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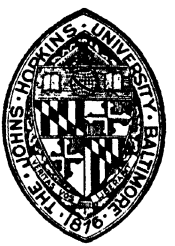
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THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC

Principles of the Constitutional Jurisprudence of the German National Republic

By

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Dedicated
To my Parents
and to the
Mother of my Children

Meinen Eltern
und der
Mutter meiner Kinder
Gewidmet

PREFACE

The work here offered is an elaboration of the main part of a course of lectures on the constitutional jurisprudence and government of the German National Republic given at The Johns Hopkins University in the winter semester 1924-25. The theory of modern German constitutional jurisprudence is based upon the juristic conception of the State. It is evident, then, that the serious student of this subject must first square himself with the theory or doctrine of the juristic conception of the State. This the author has attempted to do in the introduction to the lecture course published as *Concepts of State, Sovereignty, and International Law with Special Reference to the Juristic Conception of the State,* forming the philosophical or theoretical background for the practical demonstration of the actual construction of a modern elaborate governmental machinery on the basis of the juristic conception of the State. The two works supplement each other and the fullest understanding of one depends upon the sympathetic study of the other.

In the *Principles of the Constitutional Jurisprudence of the German National Republic* the author does not intend to present a commentary on the individual provisions of the Constitution in question. He has undertaken to present to the student the general principles upon which the framers of the Constitution have avowedly constructed the new fundamental law of the National Republic. He has conscientiously refrained from overstepping the limits which he has thus set himself, in the realization that a student genuinely interested in foreign constitutions and governments, when given the fundamental principles essential to their understanding, will prefer to do his own exploring in detail. The object of the present work is to

stimulate thinking by the presentation and unravelling of problems, not to encourage the blind acceptance of authoritative answers to the questions involved.

The unavoidable use of German terms defying translation or included in support of the translations chosen has made strict adherence to the more or less customary mode of italicizing undesirable. After serious consideration it has seemed best not to italicize German technical terms for standard concepts or institutions with which every political scientist and constitutional jurist may be expected to be acquainted. In the footnotes and bibliography, titles of books and names of journals have been given in Roman type in order to avoid a confusing preponderance of italics. Where clarity of context demanded some sort of specification parentheses have been employed to indicate the journal in which an article has appeared, and quotation marks for titles of books, monographs, etc.

The list of sources and works consulted is not offered as an exhaustive bibliography of the subject. The criterion of selection has been the author's judgment of the essential within the limitation of the obtainable.

Grateful acknowledgment is here made to those who have been helpful in the preparation of this work: To the authorities of The Johns Hopkins University for the granting of a three months' leave of absence in 1923, which furnished the opportunity for the gathering of source material abroad; to my wife, Carola Glaser Mattern, for her patient and encouraging assistance in the preparation of the lecture course from which the present work has grown; and to Miss Elizabeth S. Iddings, Librarian in Charge of the Library of the Departments of History, Economics, and Political Science, for her generous and intelligent cooperation in the technical preparation and shaping of the final text.

J. M.

CONTENTS

PART I. HISTORICAL AND THEORETICAL BACKGROUND

CHAPTER I. GERMAN CONSTITUTIONAL SYSTEMS PRIOR TO THE REVOLUTION

Organization of Earliest Political Units 3
The Frankenreich and National Unity 14
Das Deutsche Reich and the Holy Roman Empire of the German Nation 21
The Rhenish Confederation and the End of the Empire 24
The German Confederation of 1815 and the Constitution of 1849 30
Zollverein and North German Confederation 41
The German Empire of 1871 and the Reform Acts of October 1918 55

CHAPTER II. TRANSITION FROM MONARCHY TO REPUBLIC

Revolution and de facto Government 65
Labor and Soldiers' Councils 74
The National Constituent Assembly 80
The Provisional Constitution of February 10, 1919 . . 85
Preliminary Drafts of the Constitution 86

CHAPTER III. CONCEPTION OF STATE AND SOVEREIGNTY IN GERMAN CONSTITUTIONAL JURISPRUDENCE

The Juristic Conception of the State 97
Sovereignty and Staatsgewalt 102
Staatsgewalt and Souveränetät 104
Staatsgewalt and Regierungsgewalt 108
Location and Exercise of Sovereignty 112

CHAPTER IV. THE QUESTION OF THE LEGAL CONTINUITY OF EMPIRE AND REPUBLIC

The Political Opinion of the Framers of the Constitution 121
The Juristic Opinion of the Commentators of the Constitution 136
Legal Continuity and Location of Sovereignty . . . 145
Legal Continuity and Relation of Constitution to the Existence of the State 150

PART II. RELATIONS OF REICH AND LÄNDER

CHAPTER V. DIVISION OF COMPETENCIES BETWEEN REICH AND LÄNDER

Stämme, Staaten, Länder 157
National or State Sovereignty? 165
Division of Government, not of Staatsgewalt . . . 170
National Restrictions upon State Constitutions . . . 179
Determination of State Boundaries by National Law . 181
Supremacy of National over State Law 188

CHAPTER VI. NATIONAL ADMINISTRATIVE CONTROL OVER THE LÄNDER

National Control over the Administrative Activities of the Länder 201
Administrative Control with Judicial Review . . . 213
Diplomatic Intercourse between Reich and Länder . . 223
Administrative Organization of the Reich 228

CHAPTER VII. NATIONAL JUDICIAL CONTROL OVER THE LÄNDER

Judicial Control over State Legislation 249
Decisions under Article 13, Section 2 257
Controversies under Article 19 Defined 266

Controversies Concerning the Constitution Arising within a State 274
Decisions in Controversies Arising within a State . . 283
Controversies Arising between States and between Reich and States 291
Parties Competent to Request the Decision of a National Supreme Court 295

CHAPTER VIII. STATES RIGHTS AND NATIONAL UNITARY STATE

The States Rights Doctrine in the United States . . 305
Nullification under the German States Rights Doctrine 310
A Compromise between National Supremacy and States Rights 319
National Enforcement Against the States 323
Increased States Rights by Change of the National Constitution 333
Einheits- or Bundesstaat? 341

PART III. THE NATIONAL GOVERNMENT

CHAPTER IX. THE CHOICE OF A PARLIAMENTARY FORM OF GOVERNMENT

Different Types of Popular Government 361
Conflicting Interests in the Choice of Popular Government 369
The Republic with Parliamentary Dualism 385

CHAPTER X. EXECUTIVE AND LEGISLATIVE DEPARTMENTS

The President and the Cabinet 388
Reichstag and Bundesrat under the Monarchy . . . 398
Reichstag and Reichsrat under the Republic 402
Executive and Legislature 415
Organization and Procedure of the Reichstag . . . 427

Participation of Reichsregierung and President in Legislation 437
National Economic Council (Reichswirtschaftsrat) . . 442

CHAPTER XI. THE ORDINANCE POWER OF THE NATIONAL GOVERNMENT

Ordinances in General 453
The Ordinance Power from the American Viewpoint . 462
The Ordinance Power under the Constitution of 1871 . 470
The Ordinance Power under the Republican Constitution 479
Emergency Ordinances under Article 48 483
Enabling Acts and Cabinet Legislation 488
Interpretation of Article 48, Section 2 505

CHAPTER XII. DIRECT GOVERNMENT BY POPULAR ELECTION, INITIATIVE, REFERENDUM, AND RECALL

Origin, Meaning, and Use of the Term Plebiscite . . 508
Origin, Meaning, and Use of the Term Referendum . . 512
Use of the Terms in Modern Practice 517
Direct Government and Popular Sovereignty . . . 521
The Views of Brunet, Hatschek, and Others 525
Different Functions of Direct Government 537
Referendum and Initiative in Legislation 543
Direct Government in Practical Application . . . 551

CHAPTER XIII. THE NATIONAL JUDICIAL SYSTEM

Jurisdiction of Federal and State Courts 562
Judicial Review of the Formal Constitutionality of National Law 570
Judicial Review of the Legality of Ordinances . . . 581
Judicial Review of the Material Constitutionality of National Law 590
Judicial Review in Recent Decisions 596
Judicial Interpretation of Law 609

CHAPTER XIV. SPECIAL TOPICS AND CONCLUSION

The Rights of Man and Citizen 614
Police Power 626
International and Constitutional Law 635
Conclusion 647

BIBLIOGRAPHY

General Documentary Sources 649
Constitutional Systems Prior to 1918 651
Provisional Constitution of February 10, 1919 . . . 652
Official Drafts of the Constitution of 1919 652
Unofficial Drafts 652
Official Texts of the Constitution of 1919 653
Annotated Editions 653
Works on the Constitution 654
Constitutional Law and Theory 661
History, Sociology, and Economics 665

ABBREVIATIONS USED IN FOOTNOTES 667

INDEX 669

PART I

HISTORICAL AND THEORETICAL BACKGROUND

CHAPTER I

German Constitutional Systems Prior to the Revolution

Organization of Earliest Political Units. It has become customary in modern constitutional history to trace the beginning of the movement toward democratic and republican government in continental Europe to the French Revolution. This custom has its origin and its raison d'être in a rather narrow interpretation of the events concerned. No one would question the fact that the French Revolution has given a certain momentum to the general continental tendency toward constitutional reform in the direction of popular government just as it accelerated and intensified the synchronous movement of national consolidation. But admitting this to be true, the French Revolution, like that of the American Colonies resulting in the establishment of a republican form of government for the new Union, was merely one link in the long chain of events tending to prove that every existing form of government and, after its overthrow, every new system of political control, is the result of forces rooted in the ever changing needs of man and society. In other words the chief importance of the French Revolution lies in the fact that it was the first unmistakable manifestation in modern continental Europe of the purely utilitarian aspect of a particular form of government as the system of control exercised by the group over the individual.

The nature, extent, and intensity of the needs determining the choice of a particular kind of control or the over-

throw of an existing system of government in favor of another, depend upon a number of factors, the most important of which are what we term national characteristics and environment, i. e. racial temperament in its manifold reactions to the vicissitudes of the forces of nature and to the attitude and behavior of neighboring and other national groups.

We readily perceive at this distant time that under the conditions given only a government or control by a strong monarchy could be trusted to overcome the decentralizing tendencies of the feudal period. In fact we know that it was only where such a strong monarchy existed and was able to maintain itself long enough, that these tendencies were actually overcome. It was the practically uninterrupted succession of absolute sovereigns which made possible the restoration of the French national unitary State as the realization of the old tribal consciousness of political cohesion and dominance. But this national solidarity of France had been established at the price of a serious impairment of the essential needs of a large section of the membership of the body politic. It was in consequence of the successful political unification of the nation and the failure to recognize the immediacy and predominance of the newer needs of the injured masses that in the French Revolution royalty was cast off as an instrument of political control which had outlived its usefulness and only served as an impediment to the interests of the group.

The same is true, *mutatis mutandis,* of the circumstances leading to the German Revolution of 1918. To say that this event was the final echo of the French Revolution, or for that matter, the realization of the unsuccessful earlier attempts of 1848, is meaningless. In order to understand the apparent suddenness and amazing effectiveness of the overthrow of more than two dozens of princely rulers we

must go back to prime factors. As far as the mere fact of the change from monarchical to republican government is concerned the formal analogy with the results of the French Revolution may be readily admitted, but here the analogy ends. The problem of German national needs is far too complicated and the measure or method of their realization too different to permit any comparison on that score with the causes and the results of the French Revolution.

In order to prepare for a proper analysis of the German Revolution and the new system of political organization regulating the relations of the member States, the Länder, to the Reich and the largely overlapping relations of the individual citizens to the particular commonwealths and to the national body politic, we must to some extent consider the principal steps in German historical and constitutional development. These steps must be considered from the point of view of the needs of the political groups involved, resulting from their racial characteristics and environment as manifested in their social and political history. Such an attempt should not, however, be construed as an effort to give an outline of the constitutional history of the German people, but merely as a fundamental consideration of their traits and of those happenings which are essential to the comprehension of the two main aspects of the new Republican Constitution, namely: the ambiguous relations of Reich and Länder and the new system of control by the group over the individual.

These essentials can be presented despite the fact that many of the elements upon which a constitutional history of the German Nation would have to be based are still uncertain and even subject to controversy. This is so not only with regard to the pre-historic period and the time of Caesar and Tacitus, but also for the eras of the Frankish

kingdom, the Frankenreich, and the Holy Roman Empire of the German Nation.

The problem of the complicated relations of Reich and Länder in modern times, especially under the late Empire and under the new National Republic, will appear much less unreasonable in the light of the earliest organization of the various groups constituting what the Roman world recognized as a racial unit and called the Germans.

According to the long current opinion expressed in the text books of Schroeder [1] and Brunner,[2] the earliest organization of the Germanic groups was one based on a numerical division of the male freemen able to bear arms, into sections of one hundred or one hundred and twenty, the so-called *Grosshundert*. This division is conceived to have been effected on the basis of blood relationship, i. e. by reason of family and clan affinity. Some of the adherents of this numerical theory consider this division to have been a purely personal institution,[3] others hold that it was territorial in character.[4]

As in pre-historic times the nomadic hordes are described marching and fighting together in sections of hundreds, so they are supposed to have settled in their temporary resting or grazing places and finally to have become domiciled

[1] Schroeder, Lehrbuch der deutschen Rechtsgeschichte. . . . 4. Aufl. 1902, pp. 15-21.

[2] Brunner, Deutsche Rechtsgeschichte . . . 1887, pp. 114-119, and his more recent and shorter edition: Quellen und Geschichte des deutschen Rechts, 1915 (Holtzendorff's Enzyklopädie der Rechtswissenschaft, bd. I, pp. 72-73).

[3] The theory of personal division by hundred is held by such authorities as Brunner, Schroeder, *et alii* (Cited by Meister, Deutsche Verfassungsgeschichte von den Anfängen bis ins 14. Jahrhundert. 2. Aufl., 1913, p. 13, note 1).

[4] The theory of the territorial character of the division is maintained for instance by Grimm, Waitz, Rietschel, cited *ibidem*, p. 14, notes 2-4 (Meister, pp. 14-15).

in more or less permanent territories. Ten such units of a hundred (*Hundertschaften*) are said to have formed the thousand or *Tausendschaft,* and a varying number of such thousands are supposed to have formed the extreme extent of the individual socio-military group or unit called by modern German historians *Völkerschaft, Volksgemeinschaft, Volksgemeinde.* With the increase of population the respective units are held to have lost their original numerical character, the terms *Hundertschaft* and *Tausendschaft* coming to signify divisions from which a hundred or a thousand armed freemen had to heed the call to war and the summons to the assembly of the *civitas.* It was in the degree to which this formal numerical division was abandoned that the group domiciled in a fixed territory gradually cast off its socio-military character and assumed the aspect of a political unit.[5]

Differing with Schroeder and Brunner as adherents of the theory of the personal division by hundreds, the proponents of the theory of the territorial division do not insist upon the original military structure as the basic principle for the organization of the non-military life of the group. All they claim is that when the migrating units settled down, each head of a family received a certain parcel of land (*Huf*) and that a hundred of such parcels formed a territorial unit, i. e. the hundred.[6]

Simple and plausible as these theories may seem, they have been successfully challenged by more recent investigations as shown convincingly in Aloys Meister's review of these recent efforts.[7] As Meister points out, the adherents of the hundred theory, personal or territorial, as a formal basis of organization, seem to be misled by the failure to

[5] Schroeder, pp. 14-21.
[6] Meister, p. 14; see also note 4.
[7] *Opus cited* in note 3.

realize that the term hundred and its equivalent in the various Germanic dialects, are nothing but translations of the Latin *centena,* adopted from the Romans by the Franks settling in Roman Gaul. Agreeing with Schwerin that the term hundred represents no more than a "territory settled by an indefinite mass (*Haufen*)," [8] Meister states that in his opinion the number hundred played no part in the settlement. The smallest unit of a settling group, so he says, was that of one or more clans (*Sippen*). To such a settlement or to any division formed in the interest of public order and effective policing the Franks applied the Latin term *centena* and the leader of such a unit they called *centenarius.* With the westward spread of Frankish Romanized institutions the term was introduced among the Alemanni who translated it in their dialect as *hundari.* The corresponding terms *huntari* of the Swedes and hundred of the Anglo-Saxons, Meister explains as analogous word formations or adaptations appearing only in later sources.[9] According to Meister the term hundred or its dialectic equivalent is not found in the literary documents of any other Germanic group and it even failed to gain general recognition within the territory of the Frankenreich.[10]

The existence of the *Tauscndschaft,* as the unit compris-

[8] C. v. Schwerin, Die altgermanische Hundertschaft (cited by Meister, p. 14, note 7).

[9] Meister, p. 15. This explanation of the Anglo-Saxon term hundred would of course apply to the interpretation of the term as it figures in English and American constitutional history.

[10] *Ibid.* According to Hoops, Reallexikon der germanischen Altertumskunde, "the *pagi* . . ., though called '*Hunderte*', . . . had nothing in common with the number hundred, neither with a hundred homesteads (*Höfe*) nor a hundred families, nor a hundred warriors, their name merely being derived from a common Germanic word denoting multitude (*Menge*) or mass (*Haufen*)." Hoops, vol. IV, p. 210 under topic: Staatsverfassung und Staatsverwaltung. See also note 12.

ing ten *Hundertschaften* assumed by Schroeder, Brunner, and Sickel,[11] is denied by Meister on the ground of the total want of historical evidence.[12]

Eliminating then the idea of a definite number of a hundred or thousand as an essential in the development of the group life of the earliest German political units, we find that the elements of cohesion were of a purely physical and utilitarian character, i. e. blood relationship, mutual interests in the necessities of life, such as need of security, of the means of subsistence, and of protection against bodily harm. During the period of the nomadic wanderings these elements, in varying degrees and combinations, furnished the motives for the affiliation of families into clans (*Sippen*) and of clans into *Völkerschaften*. However, these affiliations, being the result of predominantly utilitarian motives, had to maintain for purely tactical reasons the old formal grouping by clans and families as the logical lines of division in their joint wanderings, fighting, and ultimate settlements.[13]

When the Germans came into contact with the Roman world this affiliation had progressed to the extent of the more or less permanent settlement of the *Völkerschaften* in definite territories and of the transition of the social group into a body politic. Proof for this is found in the application of the term *civitas* in the description of the German groups by the Roman writers of the time. The Latin term *civitas* implied the personal relationship of

[11] Sickel, Der Freistaat . . . Halle, 1879, p. 93 (Meister, p. 15).

[12] *Ibid.* The theory of the *Tausendschaft* was based chiefly upon Caesar, De Bello Gallico, IV. 1, where he writes of the Suebi as follows: ". . . Hi centum pagos habere dicuntur, ex quibus quotannis singula milia armatorum bellandi causa suis ex finibus educunt. Reliqui qui domi manserunt, se atque illos alunt. Hi rursus invicem anno post in armis sunt, illi domis remanent. . . ."

[13] Meister, p. 12.

the members of a certain group to the commonwealth conceived as a political entity, i. e. as a body politic.[14]

This term *civitas* was applied to what has been described as the *Völkerschaft* or *Volksgemeinschaft* formed by the affiliation of a varying number of clans or *Sippen*. By this application of the term the Roman writers recognized and characterized the *Volksgemeinschaft* as a political personal bond of the members of that unit as a body politic and at the same time testified to the division of the Germanic peoples into numerous bodies politic of the kind described. It is this essential fact which must never be lost sight of if we wish to understand the later and latest development of the German political units in their attitude to the successive stages of national organization or unification.

With regard to the second main aspect of the new Republican Constitution, i. e. the change from a monarchical to a republican form of control, we must start with the generally accepted theory that in the earliest or pre-historic period, when the *Volksgemeinchaften* were still in the process of formation, there existed no official that could be called king in the modern sense of the word. During this period the prevailing concepts of right and wrong, private and public, were those of the freemen as members of the family and clan. When and where the clan had superseded the family as the largest unit, a chosen freeman or *princeps* (*Fürst*) acted as the guardian of the internal peace under the guidance and supervision of the armed gathering of the freemen of the clan and in time of war as their leader, *dux* (*Herzog*), in combat.[15]

[14] "Civitas, the citizens united in a community, the body politic, the State" (Andrews, Latin Dictionary). "Civitas: Generatim ponitur pro populi vel civium comunitate, quæ reipublicæ corpus efficit. . . ." (Forcellini, Lexicon totius Latinitatis).

[15] Meister, pp. 16-18.

According to the accepted theory the affairs of the newly established *Völkerschaften* of the early historic period, formed by affiliation of clans were, at least in time of peace, originally conducted by what the Romans called the *concilium civitatis,* i. e. the assembly of the armed freemen of the new unit. Hence they were what modern German writers call *Freistaaten* (republics).[16] It was only in times of war that the *civitas* or *Völkerschaft* required the personal leadership of the *dux* or *Herzog.*[17] Thus Ariovistus, the military leader of the German invaders of Gaul in their war against Caesar, is termed *dux* in the latter's *De Bello Gallico.* However, in the eastern groups or *Völkerschaften,* where more or less constant warfare and an intense struggle for physical existence called for a more permanent personal leadership as a guarantee of closer solidarity, the office of the foremen or *principes* of the clans was duplicated in the form of a chosen permanent leader whose original Germanic name, like that of the foreman of the clan is not known.[18] The functions of this permanent leader of the *Völkerschaft* did not differ essentially from those of the foreman of the clan as the formal subdivision of the *civitas.* Both functionaries were subject to the decisions of the assembly of armed freemen of their respective units. The main difference between these two offices was this: the one was the leader of the entire *civitas,* the other

[16] Sickel, Der Freistaat (Meister, pp. 16-17); Brunner calls them "Staaten mit Prinzipatsverfassung" (Brunner, Quellen, p. 72).

[17] Anglo-Saxon: *heretoga.*

[18] The later Anglo-Saxon name for the contemporary equivalent office was *thiodan,* Gothic *thiudans.* The modern word King or *König* is derived from the old high German *kuning,* i. e., member of the leading, or later, ruling house or family (Meister, p. 16). The origin of this permanent leadership coincides with the tendency of closer political union. In the east this leadership and union was found first among the Markomannen, Quoden and Hermonduren, in the west among the Cherusker and Brukterer (Waitz, I, p. 303; Meister, p. 17).

acted in the same capacity within the smaller unit. In other words, the difference was one of territorial extent rather than of degree of authority.[19]

It was this chosen permanent leader of the *Völkerschaft* whom the Romans termed *rex*. Thus while Caesar still seems to know only *principes* and *duces,* Tacitus distinguishes between *principes, duces,* and *reges.*[20] It was the application of the term *rex* which has led modern writers to speak of the *Völkerschaften* which had adopted such permanent personal leadership as monarchies in contradistinction to the *Volks-* or *Freistaaten* (republics) governed solely by the *concilium civitatis.* As a matter of fact, the distinction implied in the terms monarchies and republics as applied to the period in question, did not exist. As stated before, both *principes* and *reges* were subject to the decisions of the assemblies of their respective groups. They were leaders not rulers. Their leadership, at least originally, had its sole foundation in their personal qualification. Persuasion and emulation, not enforcement and obedience, constituted the elements of government and control. The leader was the commander only in time of war.[21]

Since personal qualifications were the chief criterion of fitness for such leadership it was only natural that as time went on these qualifications were sought and found more and more in the families which had rendered such services effectively in the past. Practice became custom

[19] Meister, pp. 15-16.

[20] Tacitus, Germania, VII, XI. The Romans were rather liberal in the use of the term *rex.* Preferring to deal with individual leaders rather than with a multitude of *principes* they applied the title of *rex* even to the chief of any considerable number of people, although he was not formally entitled to such a position or did not actually exercise such leadership (Meister, p. 17).

[21] Schroeder, pp. 25-26.

and the right to election was thus vested in one particular family renowned for its prowess of leadership. However, this right of election to leadership in the *civitas* was not the personal privilege of one particular member, but of all the individuals of the family of leaders. Thus it was membership in this family of leaders, expressed in the old high German term *kuning,* which gave to the office its new name of *König* or king.[22]

In the *Völkerschaften* which for a time at least refrained from adopting such personal leadership in times of peace, i. e. in the so-called *Freistaaten,* governed by the *concilium civitatis,* the need for more effective leadership found final expression in the development of the assembly of the foremen or *principes* of the clans into the *concilium principum* or *Fürstenrat* for the entire *Völkerschaft,* deciding on its own authority matters of smaller import and deliberating on affairs to be submitted to the decision of the *concilium civitatis,* i. e. the assembly of the armed freemen of the whole *Völkerschaft.*[23]

In résumé it may be stated then first, that in the early stages of political organization the Germans were divided into numerous *Völkerschaften* which contemporary Roman writers called *civitates,* i. e. independent states or bodies politic; second, that there existed no monarchical rulership in the Germanic political units of the pre-historic and early historical periods. Whatever evidence of personal govern-

[22] "The word *König* (old high German *kuning*, Anglo-Saxon *cyning*, old-Nordic *konüngr*) points to and signifies member of a noble family (*Geschlecht*). But it was only during the migration period and under strong Roman influence that the Germanic king has risen to real monarchical power" (Hoops, Reallexikon der germanischen Altertumskunde . . . vol. III, 1915-16: König, p. 71). On the subject of *reges* and *principes* see *ibidem*, vol. IV: Staatsverfassung und Staatsverwaltung, p. 210 ff.; also Müllenhoff, Deutsche Altertumskunde . . . vol. IV, 1900, p. 182 ff.

[23] Meister, p. 17.

ment there was in time of peace represented a leadership by example and persuasion, not command and enforcement, and by compliance in the form of emulation rather than obedience. It is these facts which offer the key to the later struggles between the princes, kings, and emperors of the artificial national monarchical creations from the Frankenreich down to the disestablishment of the German Empire and the creation of the National Republic in 1918.

The Frankenreich and National Unity. A great change in the political status of the *Völkerschaften* and in the character of the personal leadership in these groups took place as a result of the struggle for existence caused by the increase and fluctuations of population ending in the great migrations. Failure to maintain their political independence against the conquering instincts of the more powerful groups led first to defensive alliances and finally to the merging of many of the weaker *Völkerschaften* into a smaller number of larger and stronger units, some of which, however, in consequence of their migration from German soil lost their identity and Germanic character altogether. This period is known as that of the *Stammbildung,* i. e. the formation of the *Stämme* or tribes. Of these new political units only six remained on German territory or rather retained their German character, namely: Ripuarian Franks, Alemanni, Saxons, Thuringians, Frisians, and Bavarians.[24]

As the original assembly-ruled *Völkerschaften* had proved unequal to the strain of the struggle for existence and, with the exception of the Saxons, had finally all changed to a system of personal leadership under assembly guidance and control, so now this new institution of

[24] Brunner, Quellen, p. 69.

personal leadership grew into a more powerful monarchical rule assuming many of the functions heretofore exercised by the tribal assembly or its elected functionaries.

Aside from the internal factor of the strain and stress of the migrations calling for constantly increasing personal leadership, this development was furthered greatly by western, i. e. Roman influence. Preferring to deal with individual rulers rather than a multitude of *principes,* the Romans were extremely liberal in the application of the term *rex* in their intercourse with the German groups. On the other hand, leaders like Chlovis, imbued with the spirit of conquest and unification, were not satisfied to be king in name only, but proved themselves adept disciples of their Roman preceptors in the practical art of acting the rôle of the ruler.[25]

The group in which this change took definite and extreme form was that of the Salian Franks. Beginning with the end of the third century of the Christian era this group, then situated on the lower Rhine, gradually extended its settlements and rule over the Batavian Islands, Belgium, and finally, after repeated partial invasions, and as the result of the victory over the Romans at Soissons in 486, also over the territory of the Roman province of Gaul. From this time on until the middle of the eighth century, the Frankenreich succeeded in bringing under its rule one

[25] Meister, p. 17. It is interesting to note that even at this period the chief of the Visigoths is referred to in a contemporary Latin document not as king (*rex*), but as judge, (*judex*). Auxentius, Arian bishop of Dorostorum writing in defense of the life and teaching of bishop Ulfilas (311-383), his friend and teacher, refers to the still pagan chief Athanaric (?) before whose persecution Ulfilas fled with his Christian flock across the Danube into Roman Moesia, as *irreligiosus et sacrilegus judex.* (For original text see Waitz, Über Leben und Lehre des Ulfila. . . . Hannover, 1840; Kaufman, Aus der Schule des Wulfila. . . . Strassburg, 1899; Streitberg, Die Gotische Bibel. . . . Heidelberg, 1919, 1. Teil, pp. XIII-XIX).

after another of the German groups with the exception of the Saxons whom repeated subjection failed to keep under lasting domination. Some of the groups joined the Frankenreich by the constitutional method of a popular vote in the tribal assembly. This was the case in the incorporation of the Ripuarian Franks.

The conquered tribes which in their former relations with each other had known no other bond than that of free and friendly alliance had now, at least for a time, been reduced to the formal status of integral parts of the Frankenreich. Unruly and resentful of this condition as they were, it required stern control to keep them in subjection. The old oath of feudal fealty to their self-chosen tribal leader or *Herzog* (duke) now became an oath of submission to the conquering king of the Frankenreich or his royal functionaries. The Merovingian dynasty being the central and driving power in the extension of the Frankish rule over the other German groups, represented the unifying principle of the new national State, and as such it assumed the political and legal power to govern the realm.

The former tribal units or *Stammeseinheiten* now forming part of the Frankenreich were, in true Roman style, called provinces (*provincia, ducatus, regio, regnum*).[26] They were not reduced to administrative districts in the strict technical sense, but they rather represented geographical divisions on the basis of the racio-political consciousness of the old tribal groupings. While the central government could not eliminate this consciousness, it attempted to control its effect by the resurrection of the old office of the *Herzog* (*dux, patricius*), who now as the provincial administrative head was made responsible to the Frankish king.[27] At the same time the central government

[26] Schroeder, p. 121.

[27] *Ibid.*, p. 132; Brunner, Quellen, p. 90.

hoped to checkmate the outward manifestation of the old group consciousness of the provinces by making the *Grafschaft,* which was a subordinate unit of the *Stammeseinheit,* the intermediary and chief unit for the official relations between the crown and the realm. This system of administration was effected by sending trustworthy leaders (originally military) to the different *Grafschaften* as the political administrative units, there to rule in the name of the Frankish king. Their appointment, first for a fixed period, became in the seventh century one of life tenure. The *Graf* (*grafio, comes*), as this official was called, exercised royal power in the *Grafschaft* within prescribed limits. The exercise of his functions was a duty, not a right.[28]

The Merovingian kings had, on special occasions, sent special emissaries, *Sendboten,* (*missi ad hoc, nuntii, legati*) to various parts of the empire. As the name suggests, their task was the delivery and execution of special royal orders and the investigation and supervision of the activities of the *Grafen* and *Herzöge* in the *Graftschaften* and provinces.[29] In addition to these special messengers Charlemagne established the office of regular annual *Sendboten* (*missi dominici, regules, palatini, fiscales*). These annual emissaries were assigned to special districts and they received special instructions (*capitula missorum*) for their missions. Often these royal instructions embodied the wishes of the Reichstag. Though the term of office of these new annual emissaries ran only for one year, they were subject to reappointment which naturally led, first to permanency in office, and, finally, to permanent appointment. Under Charlemagne's successor their appointment by the king was made dependent upon the approbation of

[28] Schroeder, pp. 127-128; Brunner, Quellen, p. 89.

[29] Schroeder, p. 135; Brunner, Quellen, p. 90.

the Reichstag.[30] The chief significance of the institution of the *missi dominici* is to be found in the fact that their office was conceived and established by Charlemagne as an intermediary agency between the central government and the administration of the *Graftschaften*. As such it replaced the office of the *Herzöge* who, as the king's guardians of the provinces, had grown too powerful and dangerous for the peace of the king and the unity of the realm.[31]

The high points of the constitutional system as here given represent only the ideal aspect of the situation. The formerly free tribes, now subjected to the rule of the Frankenreich, were always eager to use every pretext and every means of regaining something resembling their old liberty and, strange as it may seem, the agencies who were instrumental in the realization of these aspirations were the king's own officials. Aided by the distance of some of their districts or *Grafschaften* from the royal court, the resident *Grafen* soon succeeded in transforming their administrative office into that of a feudal lien and in gaining hereditary rights for their families. Under the Merovingians the *Herzöge* as the administrators of the provinces quickly assumed the rôle of the old *Stammesherzöge* of the preceding period. Even the *Sendboten* of Charlemagne, replacing the *Herzöge* in the provinces, could not resist the general tendency of decentralization and independence. Originally they had been appointed for one year only. But through the participation of the Reichstag in their appointment the aristocracy of the administrative or inspection districts succeeded not only in securing for themselves the

[30] See note 32.

[31] The office of the *Herzog* was retained by Charlemagne as a military agency (*dux limitis, comes marchae, marchio, marchisus*) for the protection of the *Grenzmarken*, the newly acquired territories of the realm (Schroeder, p. 132).

appointment to these missions, but also in perpetuating their appointments. As a result there developed at the end of the first quarter of the ninth century, in addition to the annually appointed emissaries, a system of permanent and resident *Sendboten* (*missi majores, missi constituti*). Finally the *Sendboten* by annual appointment disappeared altogether.[32] So it happened that the same institutions which had been created for the purpose of maintaining and strengthening the central power became the active instruments of disintegration and political division of the realm.

Another element favoring the general tendencies of disintegration or return to what had been was found in the repeated divisions of the territory of the Frankenreich under the Merovingian kings into as many parts as there were royal male heirs. To be sure after each division reunion was effected in consequence of the natural or violent death of all the royal heirs but one. But the disturbances due to the changes and the concessions which the crown had to make for the support of its own officials and of the landed aristocracy weakened the royal power beyond repair so that finally the occupants of the royal office of major domo succeeded in usurping the king's power. Thus with the sanction of the Pope in 751 the last Merovingian king was deposed and Pippin, his major domo, elected and crowned in his place.

Under Pippin's successor, Charlemagne, the complete political and administrative unity of the Frankenreich was for a time at least reestablished. The old Germanic custom of the election of a leader, now the king, was revived, though the electors continued to choose the son to succeed the father. Once more the officials were reduced to their administrative position. Conquering the still independent Saxons, Charlemagne completed his control over all Ger-

[32] Schroeder, p. 132; Brunner, Quellen, p. 190.

man groups, including the Lombards (*Langobarden*) in northern Italy.

After his death, however, the customary division of the parental dominion among the male offspring continued. In 817 an attempt was made to establish a system which was expected to satisfy the ambition of all male heirs and at the same time to preserve the unity of the realm. An agreement was effected in that year between Charlemagne's son and successor, Louis the Pious, and Louis' three sons, by which the oldest, Lothair, was associated with the father in the rule of the Empire, and whereby, under the suzerainty of the Frankenreich, Pippin was made King of Aquitania and Louis King of Bavaria, Italy at that time being under the rule of King Bernard, grandson of Charlemagne. But this system proved no more stable than any other. After Lothair's death in 840, dissatisfaction among his sons led to the Treaty of Verdun in 843, whereby the Empire was divided into "Westfranken" under Louis, "Ostfranken" under Charles (Karl), and "Lorraine" (Lothringen) under Lothair. By the agreement of Mersen of 870, Lorraine was divided between west and east and, in some way or other, has remained a football between the two ever since.

Once more reunion between west and east was brought about in 885 through the election by the west of King Charles, then ruling as Karl III in the east. Called upon by the Pope to aid him against the Saracens, Karl III had secured the Kingdom of Italy in 879 and in consequence had been crowned Emperor of Rome in 881. He thus once more combined under one rule the Empire of Charlemagne who had been crowned as Emperor of Rome by Pope Leo III on Christmas day in the year 800. But like the earlier attempts this reunion was not of lasting duration and the political and moral disintegration engendered by the con-

tinuous chain of more or less forceful amalgamations and disruptions, resulting in 851 in the dethronement of the Merovingians by Pippin, the major domo, was bound finally to dispel the magnificent illusion of a national union of all Germanic groups under one, and as it was, Frankish suzerainty. Adding to this consideration the adoption by the west of the *lingua Romana,* the inevitable eclipse of the Frankish dream came with the end of the century. Louis the Child, elected in the year 900 by the Saxons and the Franks of the east, and his successor Conrad were kings of the "Ostreich," and the separation now became a final one between the west as France and the east as Germany (Deutsches Reich).

Das Deutsche Reich and the Holy Roman Empire of the German Nation. At the time when this final separation of east and west came to pass, the *Herzöge* of the east had once more completely identified themselves with the territories over which they were supposed to rule in the name of the realm. While unanimous in their sentiment for separation from the Romanized west, they claimed practical independence in their own duchies (*Herzogtümer*) and were extremely jealous concerning the question of national leadership over the now separate German east. The attempt of the *Ostfranken* to gain for themselves the position of hegemony over the other German groups of the east was frustrated by their failure to secure the submission of the other groups and by their inability to prevent the invasions of Slavs and Hungarians. This failure on the part of the *Ostfranken* made possible in 919 the election of the Duke of Saxony as King Henry I of the *Ostreich,* i. e. Germany.

In theory the new king was of course supposed to represent the supreme power in the entire Reich; in actual

practice, however, he was not in a position to exercise any real authority beyond the confines of his own Saxon dukedom. The Duke of Bavaria consented to formal recognition of the king in 921, two years after Henry's election. Lorraine was reunited with the Reich in 925, the duke marrying the king's daughter. But while nominally professing allegiance to the Reich and homage to the king, the rulers of the various groups reserved for themselves the rights and privileges which they had possessed before Henry's ascension to the royal office. The Reich was nothing more than an alliance of the then existing five component units whose rulers claimed independence in their own name for their own territory, recognizing the king merely as *primus inter pares* and rebelling at the first royal attempt to challenge their position.

After Henry's death his son Otto was elected king by the German dukes and clerical dignitaries. Under him a new element was introduced into the political and constitutional aspect of the German Reich, which was expected to enhance the king's hopes and efforts in the direction of national unity and sovereign power. In the year 962 Otto I gained for the German kingdom the Roman *imperium,* being crowned Emperor of Rome by Pope John II.

But the aspirations to universal rulership over the Christian world, which this title implied, was soon to involve the German kings in endless military expeditions for the subjugation of the rebellious non-German parts of the Holy Roman Empire of the German Nation. Instead of proving a unifying factor the Roman *imperium* turned out to be a new source of power for the dukes and dignitaries and an additional element of weakness for the central authority in the Reich. Furthermore, in the interpretation of the Church the Roman *imperium,* bestowed by the Pope, signified more than worldly authority over the Christian

European countries. It meant universal spiritual rule as well. The worldly governance by the king and the spiritual rule by the Pope were conceived as friendly, parallel forces supplementing each other. They were destined to work in harmony for the elevation of man's state on earth and his ultimate salvation in the beyond. However, the accession of the clergy to the status of worldly dignitaries led, as a natural corollary, to the attempt by the German kings to control or influence their election and appointment. Consequently there was soon destroyed that element of harmony essential to the practical working of the system of dual control implied in the *imperium*. On the other hand, the popes, positing the spiritual as the source of the temporal power, soon asserted the superiority of the former over the latter. Boniface VIII went so far as to proclaim his temporal authority over the Christian world.

The rulers of the Church employed both the spiritual and political weapons at their disposal in the attempt to force the acceptance of their claims. The only means of defense of the German kings was that of military action and the effacement, if possible, of those who sided with the popes in the struggles which followed. So there passed centuries of foreign and internal warfare resulting in a series of progressive divisions and regroupings of the political units of the Reich, leading to the territorial parcellation of medieval and modern Germany and ending finally in the breaking up of the Empire in 1806.

As a parallel and concomitant of this contest of arms there was carried on another no less bitter and protracted struggle of the minds. To ease the consciences of the followers of the two main contestants, clergymen and jurists on both sides attempted to justify each of the two opposing views. To substantiate their arguments they

appealed to the Canon law of the Church as well as to the German and Roman law, the last of which had gradually gained for itself a place of equality with the *Volks-* and *Reichsrecht* in the judicial system of the Empire. This battle of wits has been sketched in the consideration of the different conceptions of the State and Sovereignty given in the author's *Concepts of State, Sovereignty, and International Law.*[33] As has been shown there, the extreme claims of the defenders of the Emperor's position failed to check the legalization of the sovereign position assumed by the princes of the Empire and failed to prevent the ultimate dissolution of the Reich.

The Rhenish Confederation and the End of the Empire. While these were the internal causes leading to the moral and political disintegration of the Holy Roman Empire of the German Nation, the immediate occasion for the formal declaration on the part of the last emperor of its actual termination was the creation of the Rheinbund in July, 1806. In the Peace of Pressburg of December 26, 1805, following the defeat of Austria at Austerlitz, Napoleon compelled the Emperor of Germany and Austria to sanction the assumption of the title of king by the electors of Bavaria and Württemberg.[34] By the same treaty Francis II was forced to recognize that "their Majesties, the kings of Bavaria and Württemberg, and His Highness, the Elector of Baden, will enjoy over the territories ceded to them, as well as in their old States, the plenitude of Sovereignty and all the rights thence derived and granted them by the Emperor of the French and King of Italy, as and in the same manner in which His Majesty, the Emperor of Ger-

[33] Chapter I.

[34] Martens, Recueil des principaux traités . . . de l'Europe . . . Art. VII of the treaty in question.

many and Austria, and His Majesty, the King of Prussia, enjoy the same over the German States. . . ." [35]

Article VII dealing with the recognition of the assumption of the title of king by the electors of Bavaria and Württemberg definitely stated that this elevation in rank did not in any way affect their status as member States of the Empire.[36] But less than six months later, on July 12, 1806, the same Napoleon secured the signatures of the plenipotentiaries of the new kings of Bavaria and Württemberg, of the Elector of Baden, and of thirteen other German States, to the *Rheinbundsakte* or *Traité de confédération des états du Rhin,* a compact entered into by His Majesty, the Emperor of the French, King of Italy, on the one hand and the German princes concerned, on the other, for the purpose of "assuring . . . the internal peace of Middle Germany, for which the German Constitution, as long and recent experience has proved, has failed to offer any sort of guarantee. . . ." [37] Article II provided for the nullification within the States of the Confederation of all German imperial laws heretofore affecting or binding the princes and subjects of the States concerned. According to Article III "each one of the federated kings and princes shall renounce those titles which express any kind of relations with the Germanic Empire and on August 1 shall notify the Diet (Reichstag) of their separation from the Empire."

In an official note dated August 1, 1806, the charge d'affaires of the Emperor of the French, King of Italy,

[35] *Ibid.*, Art. XIV.

[36] Les électeurs de Bavarie et de Würtemberg ayant pris le titre de roi, sans néanmoins cesser d'appartenir à la confédération germanique, S. M. l'empéreur d'Allemagne et d'Autriche les reconnaît en cette qualité."

[37] Preamble to the treaty of confederation (Martens, Recueil des principaux traités).

revealed to the German Reichstag Napoleon's attitude towards the Empire in a statement summarized as follows:

1. The princes of Middle and East Germany had formed the Confederation of the Rhine and they had ceased to be States of the Empire.

2. The Peace of Pressburg had placed the Courts allied to France, and indirectly the princes of the neighboring States, in a position incompatible with the status of States in the Empire and it was necessary for them to create a new system of mutual relations, eliminating a contradiction which had been a source of permanent agitation, disquietude, and danger.

3. France on her part, so essentially interested in maintaining the peace of Middle Germany, fearing as the inevitable consequence of contradictory or uncertain relations the reappearance of disorder and the reopening of war on the continent and feeling obliged to support her allies in the enjoyment of the advantages assured them by the Treaty of Pressburg, looked upon the new Confederation as a natural and necessary complement of this treaty.

4. The German Reichstag had ceased to have the proper authority;[38] the decisions of the highest courts could not be executed; all this showed the federal bond to be so feeble that it no longer offered any security to anybody and among the strong was nothing but a source of dissension and disorder; one electorate had been suppressed by the union of Hanover with Prussia; a king of the north had incorporated in his States one of the provinces of the Empire; the Treaty of Pressburg had attributed to their Majesties, the kings of Bavaria and Württemberg, and to His Highness, the Elector of Baden, the plenitude of Sovereignty, a prerogative which no doubt the other electors also would claim or be justified in claiming but which could not be held to be in accord with the letter and spirit of the Constitution of the Empire.[39]

[38] "La diète avait cessé d'avoir une volonté qui lui fût propre. . . ."

[39] What is here referred to as the Constitution of the Empire was a series of fundamental laws, the most important of which were: Constitutiones Frederici II, of 1220 and 1232; The Constitution of Ludwig

5. His Majesty, the Emperor and King, could no longer recognize the existence of the Germanic Constitution, but at the same time he had to recognize the complete and absolute Sovereignty of each one of the princes whose States at the time formed the German Empire and had to maintain with them the same relations which he maintained with the other independent powers of Europe.

6. His Majesty, the Emperor and King, had accepted the title of Protector of the Confederation of the Rhine; he had done so only with a view to peace and in order that his mediation constantly interposed between the feeblest and the strongest, might prevent all sorts of dissension and trouble.[40]

By a joint note of the same date the princes of the States of the Confederation, on their part, informed the Diet of their separation from the Empire. In consequence of this separation Francis II on August 6 issued a declaration in which he abdicated as German Emperor. In this

of Bavaria, of 1338; The Golden Bull of Charles IV, of 1356; Der ewige Landfrieden of 1495; The Treaty of Passau, of 1552; The Treaty of Augsburg, of 1555; The Treaty of Münster, of 1648; The Electoral Capitulations (Wahlkapitulation) of 1519; The Treaty of Teschen, of 1779; The Reichsdeputationshauptschluss, of 1803.

In the oath of investiture the princes and electors of the Empire obligated themselves "to be faithful, favorable, obedient and ready to serve the Emperor, never knowingly to take part in any council in which anything was planned or decided against His Imperial Majesty's person, honor, dignity or status, nor to consent or to yield to such undertaking in any way, but to consider and further His Imperial Majesty's and the Holy Empire's honor, advantage and welfare within all their power, and if they understand that something is afoot or is being undertaken against His Imperial Majesty's person or the Holy Empire, faithfully to anticipate such action and without fail to warn His Majesty and to do faithfully and without malice and harm everything else due His Majesty and the Reich under the law and custom from an obedient prince and a faithful vassal" (Puetter, Historische Entwicklung der heutigen Staatsverfassung des Deutschen Reichs . . . Goettingen, 1799, vol. III, pp. 219-220).

[40] Summarized from Martens' complete text.

declaration he particularly mentioned the defection of the members of the Rheinbund as the cause of his action.

> Being convinced . . . of the impossibility of fulfilling much longer the duties of our imperial functions [the declaration read in part], we must in accordance with our principles and our duty renounce a crown which could have value in our own eyes only to the extent to which we could meet the confidence of the electors, princes, and other estates of the German Empire, and to the extent to which we could satisfy the obligations with which we are charged. We declare therefore . . . that we consider as dissolved the ties which heretofore have held us to the State of the German Empire, that we consider as extinguished by the Rhenish Confederation the office of the headship of the Empire (*la charge de chef de l'empire*), and that by the same we consider ourselves acquitted of all duties towards the German Empire, thus laying down the imperial crown and the imperial government. We absolve at the same time the electors, princes, and estates and every one belonging to the Empire, especially the members of the supreme court and other magistrates of the Empire, from all obligations by which they have been bound to us as legal head of the Empire in accordance with the Constitution.[41]

By the publicists and statesmen of the Rheinbund, and even by many genuine patriots, the new Confederation was extolled as the regeneration of Germany, and its Constitution as the guarantee for a happy and great future. But there could even at the time be no doubt that the Confederation of the Rhine was but the tool of its official protector who, having openly sponsored its creation, intended to use it solely for the purpose of permanently controlling the destinies of the Germanic Empire and after its destruction, that of its component parts.

But while Napoleon had thus aided the princes in freeing

[41] Martens, Recueil des principaux traités. . . .

themselves from the formal suzerainty of the Emperor, and of Austria as the leading State of the Empire, the idea of some sort of national solidarity and of some kind of hegemony over the German States found a new sponsor and aspirant in the King of Prussia. Ever since the Peace of Basel, concluded between Prussia and the French Republic in the year 1795, the Berlin Court entertained the hope of assuming the leadership of the North German States.[42] In 1804, shortly after the assumption of the title of Emperor of the French by Napoleon, and that of Emperor of Austria by Francis II, the former suggested to the King of Prussia to do likewise.[43] But however great the hopes of the Prussian Court might have been for the realization of such dreams, the King of Prussia preferred to prepare the ground by way of negotiations and agreements with the other German States rather than to antagonize them by the assumption of a title which would have brought him into conflict with the still existing Emperor of the Holy Roman Empire of the German Nation. After the creation of the Confederation of the Rhine, Napoleon, in order to secure Prussia's recognition of the new Confederation, once more intimated to the Prussian Court that in return for such recognition France would be prepared to give Prussia a free hand in any plans she might have with regard to the North German States. It was now Prussia's chance, the French note of July 22, 1806, stated, to make use of such a favorable opportunity to enlarge and consolidate its system. Prussia would find Napoleon inclined to support her plans and designs. Prussia might unite under a new federal law the States still belonging to the German Em-

[42] Lefebure, Histoire des cabinets de l'Europe pendant le Consulat et l'Empire . . . 1845, vol. II, p. 23 (cited by Kaltenborn, Geschichte der deutschen Bundesverhältnisse und Einheitsbestrebungen . . . vol. I, p. 41).

[43] Kaltenborn, vol. I, pp. 40-41.

pire after the defection of the princes of the Rheinbund. Prussia might thus secure the imperial crown for the House of Hohenzollern, or she might, if she preferred, form a union of the North German States situated more within her sphere of influence. The Emperor would even now approve any arrangement of this sort which might appear suitable to Prussia.[44] Prussia recognized the Rheinbund on the condition of non-interference with the formation of a North German Federation which she now set about most energetically to bring into being. However, the failure of the States concerned to agree to various proposals for a North German Constitution calling for the creation of the *Norddeutscher Reichsbund* under Prussian imperial leadership and the Franco-Prussian War of 1806 put an end, at least temporarily, to Prussia's plans for a North German Confederation. After this the membership of the Rheinbund quickly advanced from the original sixteen of 1806 to thirty-six in 1811, the year of Napoleon's greatest power. Including the Kingdom of Westphalia, ruled by Napoleon's brother Jérôme, the Confederation of the Rhine comprised all German States with the exception of Austria, Prussia, Swedish Pomerania, and Holstein. With the temporary elimination of its protector from the control of European politics in 1813, the Rheinbund dissolved in the same year partly in consequence of the voluntary defection of its members, partly as the result of the loss of statehood by some of its member States.

The German Confederation of 1815 and the Constitution of 1849. Following the defeat of the French in Russia in the winter of 1812, the Emperor of Russia and the King of Prussia joined forces for the expulsion of the

[44] Lefebure, vol. II, p. 331 (cited by Kaltenborn, vol. I, p. 43); Häusser, Deutsche Geschichte vom Tode Friedrichs des Grossen bis zur Gründung des Deutschen Bundes . . . vol. II, p. 709 ff.

French from Central Europe. Ready to invade the territories of the Rheinbund States as Napoleon's allies, the two rulers publicly declared this to be their military and political aim in the terms of the treaty of alliance known as the Treaty of Kalisch of March 19, 1813. Article 1 of this treaty promised the immediate publication of a proclamation "announcing as the sole purpose of the two powers the emancipation of Germany from the influence and domination of France and inviting the princes and peoples to join in the liberation of their fatherland. . . ." [45] Article 1 concluded with the statement that "any German prince failing to respond to this appeal within a fixed time stands to lose his territory (*scs états*)."

The proclamation which followed promised the reestablishment of the German Empire dissolved in 1806.[46] But the realization of this promise was soon to be jeopardized by the necessity of bargaining for the support of the larger States of the Rheinbund. In the secret articles appended to the Preliminary Treaty of Alliance between Austria and Bavaria, signed at Ried on October 8, 1813, we read for instance as follows: "The High Contracting Parties consider as one of their principal efforts in the actual war, the dissolution of the Confederation of the Rhine and the complete and absolute independence of Bavaria, so that disengaged from, and placed beyond, all foreign influence, she shall enjoy the plenitude of Her Sovereignty." [47] The same promise of the continued recognition of their Sovereignty was given to Württemberg, Baden, and Hes-

[45] Martens, Recueil des principaux traités. . . .

[46] The text of the proclamation is not available. For statement of fact see Bornhak, p. 32, and for partial quotation, Kaltenborn, vol. I, p. 88. Kaltenborn quotes from text of Voss, Zeiten, 1813; and Meyer, Corp. Const. Germ., I. Abthlg., 2te aber unvollendete Auflage der Staatsakten, p. 146.

[47] Article I.

sen [48] in return for their defection from the Rheinbund and their active participation in the war against their former protector. It was quite to be expected then that in the negotiations carried on between the statesmen of the German States, some of the States, having secured the recognition of their Sovereignty by the treaties cited, should insist upon the preservation of their acquired rights with regard to their position in a reunited Germany. This was especially the case during the deliberations on the subject of the future status of Germany before the Congress of Vienna. In this insistence they could refer not only to the special treaty stipulations guaranteeing them their acquired Sovereignty, but later also to Article VI of the Treaty of Paris of May 30, 1814, in which the members of the Great Alliance had expressed their final decision concerning the future status of Germany. "The States of Germany," this article reads, "shall be independent and shall be united by a federal bond." Furthermore, in this insistence they could rely on the strong support of Austria which, realizing Prussia's desire for leadership and her preponderance among the northern States, opposed the Prussian plan for the reestablishment of the German Empire. Thus Bavaria and Württemberg [49] succeeded with

[48] Art. IV of Treaty of Fulda of Nov. 2, 1813, between Austria and Württemberg; Art. IV of Treaty of Frankfurt of Nov. 20, 1813, between Prussia and Baden; Art. II of Treaty of Frankfurt of Dec. 2, 1813 between Austria and Hessen.

[49] See Kaltenborn, p. 106 ff. In a note directed to the German Committee of the Vienna Congress the King of Württemberg refused to recognize any political organization of Germany prior to the territorial reorganization of the States. How, he asked, could anyone bind one's self in regard to the political system of the federation if one did not even know the States which were to form part of it. In the same note he protested that an acceptance of a political system, the particulars of which were still unknown, would be equal to a surrender of acquired rights, to which he could not agree (Martens, Nouveaux supplémens au Recueil de traités . . . vol. III, pp. 36-37).

the help of Austria in bringing about the establishment of a federation in which all the States were equally and absolutely independent and sovereign. The German Confederation of 1815 (Deutscher Bund) was not therefore the reestablishment of the Holy Roman Empire of the German Nation as promised in the Proclamation of Kalisch, but rather the realization of the program of the Treaty of Chaumont, i. e. the establishment of a league of independent States, agreed upon in the terms of that Treaty by the contracting parties on March 1, 1813,[50] and repeated in Article VI of the Treaty of Paris of May 30 of the following year. As specifically stated in the Preamble of the Articles of Confederation (*Bundesakte*) of June 8, 1815, the new Confederation was the result of an agreement between "the sovereign princes and free cities including His Majesty the Emperor of Austria. . . ." [51] The purpose of the Confederation was "the maintenance of the external and internal security of Germany and the independence and inviolability of the individual German States. . . ." [52] All the members of the Bund had equal rights and were obligated equally to abide by the *Bundesakte*.[53] The affairs of the Bund were managed by the

[50] The text of that treaty given by Martens does not contain any reference to this subject. The statement here quoted is based upon a reference in a note by Nesselrode of Nov. 1814 (German text in Pertz, IV. 150-152, French text in Klüber, Acten des Wiener Cong. I, Heft 1, p. 62). Kaltenborn assumes that the discussions and the agreement attributed by Nesselrode to the allied meetings and Treaty of Chaumont was embodied in secret unpublished articles (Kaltenborn, vol. I, p. 100).

[51] "Die souverainen Fürsten und freien Städte Deutschlands . . . vereinigen sich zu einem beständigen Bunde, welcher der Deutsche Bund heissen soll" (Corpus Juris Confederationis Germanicae, hrsg. von Guido von Meyer . . . 3. Aufl., Frankfurt, 1858, Art. I).

[52] *Ibid.*, Art. II.

[53] *Ibid.*, Art. III.

Federal Assembly (*Bundesversammlung*) in which Austria held the presidency.[54]

The promise of Kalisch for which the King of Prussia jointly with the Emperor of Russia had assumed responsibility had fired the German people to offer all for the liberation and unification of their common fatherland. The fulfillment of the great promise had been frustrated by a few dynasties who had bought advancement of princely rank and sovereign position from Napoleon for military aid against their own countrymen and bartered for the recognition of their independence in return for their help in the overthrow of their former would-be benefactor. Though betrayed in their hopes and powerless at the time to demand the fulfillment of the promise, the German people were before long to revive the issue of national consolidation under somewhat more favorable circumstances. Having been denied at least for the time being the one great compensation for their national sacrifices, they now centered what was left of their energies and enthusiasm upon the materialization of the great hopes raised in them by the French Revolution for popular government by the grant of constitutional reforms in their particular States.

On the other hand, encouraged by the recognition of their independence the new sovereign German princes had set about to assert their Sovereignty also in the relations with their subjects. Thus the new King of Württemberg had withdrawn the old Constitution on December 30, 1805. The sovereign Elector of Baden had disestablished the Representative Assembly in May, 1806. In Bavaria the *Landstände* were abolished in 1808.[55] As a formal concession to an undeniable popular opposition to these autocratic tendencies the Articles of Confederation of 1815

[54] *Ibid.*, Art. IV.

[55] Kaltenborn, pp. 68-69.

provided that "in all States of the Confederation constitutions (*landesständische Verfassungen*) should be created." However, after a considerable delay this promise was carried out only by the potentates of Bavaria, Baden, Württemberg, and Sachsen-Weimar.[56] The rest of the German rulers, especially those of Austria and Prussia, were too much under the influence of the reactionary Metternich and the Holy Alliance to consider the sacrifice of even a part of their sovereign power in favor of the participation of the people in the affairs of government.

But instinctively the similarity of the popular aspirations and disappointments led in Germany, and incidentally also in Italy, to the realization that only united action would promise success. Consequently a concerted campaign for the establishment of national unity, originating from an apparently spontaneous will of the masses under the enthusiastic leadership of the middle class intellectuals, was witnessed in the German and Italian States in the second quarter of the century.[57] In Italy the failure of the early attempts was due to foreign intervention as the result of Austrian and French apprehensions of the danger which a united Italy was expected to present. In Germany the effort was frustrated by a dynasty which was itself working with might and main towards the same end, but which disdained to accept success as a gift from the people.

The *Bundesversammlung,* the official assembly of the German Confederation, composed of the personal representatives of the sovereign princes, was, of course, hostile to these aspirations. Under the influence of an ever growing political tension, however, it issued a proclamation on

[56] Heilfron, I, p. 10.

[57] This and the following paragraphs are taken from the author's "Bavaria and the Reich . . .," p. 16 ff.

March 1, 1848, appealing to all German patriots to keep the peace and to resort to no other than legal means for the attainments of their aims. The proclamation promised to do all things possible for the protection of Germany against foreign danger and for the advancement of the national interests at home.[58] Ten days later it requested the State governments to appoint not later than by the end of the month a certain number of men enjoying general confidence, who were to advise the *Bundesversammlung* in the preparations for the proposed revision of the *Bundesakte.*[59] But under the stress of the revolutionary events which took place in Berlin and Vienna on March 13 and 18, the *Bundesversammlung* announced that it had already begun, with the advice of men of general confidence, the preparatory work for the revision of the *Bundesakte,* and it petitioned the State Governments to order in the existing electoral districts, and in such districts immediately to be organized, the election of popular representatives. These national representatives were to meet at Frankfurt, the seat of the *Bundesversammlung,* and there were to create, as a bond between the governments and the people, a new German constitution.[60]

In the meantime, independent of the intentions and recommendations of the *Bundesversammlung,* a group of fifty-one patriots had gathered in Heidelberg on March 5 for the purpose of considering plans for a national convention. They were of the opinion that: "The convention of national representatives, elected on the basis of population in all German States, must be held without delay for the elimination of the most pressing dangers from without and for the development, the strengthening, and the un-

[58] Heilfron, I, pp. 14-15.
[59] *Ibid.*
[60] *Ibid.*

folding of German national life." [61] A committee of seven was appointed to devise the ways and means for the election of the members of the proposed convention and to issue the call for the gathering of the delegates. In consequence of this appeal five hundred representatives, mostly from Prussia and the south German States, met in Frankfurt on March 30, 1848, the same day which the *Bundesversammlung* had set for the meeting of the representatives which it had asked the Governments of the German States to send.

These delegates opened what is known as the *Vorparlament,* on March 31. Failing to agree on a compromise between two widely diverging national programs, the advance convention adjourned on April 4, leaving a committee of fifty to carry on the work. The committee of fifty was instructed to remain in Frankfurt and to solicit the cooperation of the *Bundesversammlung* until the National Constituent Assembly should convene. In case of danger, the committee of fifty was to reconvene the *Vorparlament.*

On May 18, 1848, the National Constituent Convention or Assembly called for by the *Vorparlament* and recommended by the *Bundesversammlung,* met in St. Paul's Cathedral. Its relation to the Governments of the German States was not clear. Some of the members assumed a dependence upon their Governments, others proclaimed the Sovereignty of the Convention. The legality, and with this the dependence of the Convention upon the State Governments, however, were recognized by the *Bundesversammlung* in a letter of welcome addressed to the Convention, the closing paragraphs of which stated that: "The German Governments and their mutual organ, the *Bundesversammlung,* united with the German people in equal love

[61] *Ibid.*, pp. 11-12.

and in sincere homage to the new spirit of the time, hold out their hand in welcome to the representatives of the Nation. . . ." [62]

The Constitution produced by this Convention was called *Die Verfassung des Deutschen Reichs vom 28. März, 1849.* The Reich which this constitution contemplated was to be more than a mere league of independent commonwealths. It was to be not a Staatenbund, but a Bundesstaat.[63] Sections I and II, dealing with the competencies of the Reich and the *Reichsgewalt* provided as follows:

. . . The individual States retain their independence as far as this has not been limited by the National Constitution. They possess all sovereign rights (*alle staatlichen Hoheiten und Rechte*) as far as these have not been explicitly transferred to the *Reichsgewalt*. . . .[64] The *Reichsgewalt* has the exclusive international representation of Germany and of the individual German States. The *Reichsgewalt* appoints the National ambassadors and consuls. It conducts the diplomatic intercourse and concludes alliances and treaties with foreign countries, especially commercial and maritime conventions and extradition agreements. It issues all international regulations. The individual German Governments do not possess the right to receive or to maintain permanent ambassadors, nor may they have consuls of their own (*besondere Konsuln*). Foreign consuls receive their *exequatur* from the *Reichsgewalt.* The individual Governments shall not be denied the right to send plenipotentiaries to the head of the Reich (*Reichsoberhaupt*).

[62] *Ibid.*, pp. 20-21.

[63] It was on the issue of Staatenbund and Bundesstaat that the break between the Convention and the Austrian Government took place. See Note of Protest by the Austrian plenipotentiaries, rejecting the idea of a union restricting Austrian Sovereignty and the possibility of a submission by the Emperor of Austria to the exercise of the "Centralgewalt" by another German prince (Deutsche constitutionelle Nationalversammlung 1848-49 . . . vol. VI, pp. 5149-5151).

[64] Section I, Article I, Paragraph 5.

The individual German Governments are authorized to conclude treaties with other German Governments. Their right to enter into treaties with non-German Governments is restricted to subjects of private law, mutual (*nachbarlich*) traffic and police.[65] All treaties of a non-private law character . . . must be brought to the attention of the *Reichsgewalt,* and in so far as they affect the interests of the Reich must be submitted for the approval of the *Reichsgewalt.*[66] The *Reichsgewalt* has the exclusive right over war and peace.[67]

These were important limitations of the sovereign powers of the States. But the real significance of this constitution was to be found in the fact that it implied the Sovereignty of the State (*Reichsgewalt*), not that of the dynasty or the personal ruler, and that it posited as inviolable certain fundamental rights of the German citizen. Sections I and II speak of the *Reichsgewalt* exclusively as the supreme National authority in all matters over which the Reich is given competence. Section III deals with the *Reichsoberhaupt* and states that "the dignity or office (*Würde*) of the *Reichsoberhaupt* shall be delegated or offered (*übertragen*) to one of the governing princes."[68] The *Reichsoberhaupt* was to have the title of Emperor of the Germans.[69] He was to draw a civil list fixed by the Reichstag.[70] "The Emperor," so the provisions further read, "shall be inviolable." He "exercises the authority delegated to him (*übertragene Gewalt*) through responsible ministers appointed by him."[71] "All acts of government undertaken by the Emperor require for their validity

[65] Section II, Article I, Paragraphs 6-8.
[66] Section II, Article I, Paragraph 9.
[67] Section II, Article I, Paragraph 10.
[68] Section III, Article I, Paragraph 68.
[69] Section III, Article I, Paragraph 70.
[70] Section III, Article I, Paragraph 72.
[71] Section III, Article I, Paragraph 73.

the countersignature of at least one National Minister who by his signature assumes responsibility." [72] The responsibility of the National Ministers was to be regulated by National law. The debates on the subject and the draft of the provisional law regulating this ministerial responsibility show that the responsibility contemplated by the Convention was a strict accountability to the National Legislature. The text of the provisional law referred to provided for the responsibility of the National Ministers to both the Reichstag and the *Reichsverweser,* the provisional head of the proposed Empire appointed by the Convention. It also provided for the immediate dismissal of the National Minister in case of complaint and impeachment by the Reichstag and trial by a special court of the Minister thus impeached.

The fundamental rights of the German citizen to be established by this Constitution in Section VI are introduced by the following statement: "The fundamental rights enumerated below shall be guaranteed to the German people. They shall serve as a norm to the constitutions of the individual States. No constitution or legislature of an individual German State shall have the right ever to suspend or to restrict them." [73]

It is true, the Governments of the individual States had secured from the Convention the acknowledgment of their recognition of its origin and organization. Nevertheless, they found themselves powerless to prevent the inclusion in the constitution produced by the Convention, of principles incompatible with the doctrine of the Sovereignty of the personal ruler of the proposed National Union and by implication of the personal rulers of the States. It was equally clear that for these reasons, if for no other, Fred-

[72] Section III, Article I, Paragraph 74.
[73] Section IV, Paragraph 130.

erick William IV of Prussia, in agreement with the kings of Bavaria, Saxony, and Württemberg, felt compelled to reject the imperial title offered him in accordance with the terms of this constitution, and the creation of a German Bundesstaat which the acceptance of the offer entailed.

Zollverein and North German Confederation. Another important factor in the development of the idea of national union was the growing realization of the economic interdependence of the States. While the utilitarian aspect of national solidarity as an essential element towards the achievement of constitutional government had led to the popular movement resulting in the abortive Constitution of 1849, it was this same utilitarian character of economic union which prompted the Prussian dynasty to sponsor the creation of a customs agreement between the German States as a prelude to their political unification under Prussian hegemony.

The old German Empire which had ended in 1806 had developed no uniform commercial or economic policy. The main reason for this failure to utilize the element of economic solidarity in the struggle for national unity is to be found in the fact that the predominance of the individual States made an imperial or national economic policy impossible. The rulers of the individual States regulated the customs and tariffs of their respective territories as they saw fit. The States formed, economically speaking, tight fitting compartments. Even the Confederation of 1815 did not provide for a national economic policy or uniform customs regulations.

However, as an early indication of her aspirations for leadership among the independent German States, Prussia proposed in 1816 that the Confederation undertake the uniform regulation of German trade and customs. Having

failed in this suggestion, Prussia herself, by the Tariff Law of 1818, removed for her own territory the general restrictions against exports and imports and provided for liberal tariff rates. It was this step which finally led to the formation of the Prussian-German Customs Union, i. e. Preussisch-Deutscher Zollverein. In 1836 this union included over twenty German States. A rival union (*Steuerverein*) was created in consequence of the economic treaties entered into in 1834 and 1836 between Hanover, Oldenburg, Braunschweig, and Schaumburg-Lippe.

Article 33 of the ill-fated Constitution of 1849 had stipulated that the German Empire, contemplated by the framers of that constitution, should form a German customs and tariff union with a common customs barrier against foreign States.[74] Thus the idea of national economic union had found a place among the political aspirations of the advocates of the idea of national solidarity and constitutional reforms, a fact which was of considerable advantage to Prussia's desire to bring about an amalgamation of the two rival customs organizations. By the *September Vertrag* of 1851 the consolidation of the two customs unions was agreed upon to become effective in 1854.

But since Prussia's hopes for national leadership implied an open challenge to Austria as the formal presiding State of the Confederation, Prussia had to reckon with Austria in the shaping of her plans with regard to a national customs union. Austria's economic policy was essentially different from that of Prussia and the Zollverein. While Prussia favored the lowering, and finally the complete abolition of tariff rates between the States of the Zollverein, Austria insisted upon a high protective

[74] "The German Empire shall form a customs and commercial unit (*Gebiet*), surrounded by a common tariff border with elimination of all internal frontier customs."

tariff on imported manufactured goods. Nevertheless the Commercial and Customs Treaty of 1853 between Prussia and Austria provided for the eventual inclusion of Austria in the Zollverein. This treaty between Prussia and Austria was to remain in effect until December 21, 1865. But certain phases of commercial agreements entered into between Prussia and France in 1862 and between Prussia and Belgium in 1863 were the cause of considerable opposition on the part of some of the members of the Zollverein, and especially of Austria. The result of this opposition was to delay the expected inclusion of Austria in the Customs Union until finally the Austro-Prussian War of 1866 and the resulting creation of the North German Confederation with the exclusion of Austria brought about a definite solution of the conflicting political and economic policies of the two contestants for national leadership.

The tariff policy of the North German Confederation (Norddeutscher Bund) was regulated by the Federal Constitution of 1867.[75] Special treaties with the South German States still remaining outside of the Confederation were effected until, by the inclusion of these States in the Empire in 1871, these treaties were replaced by the constitutional provisions of the Empire.

In order to appraise correctly this dynastic advocacy of a common customs policy it must be realized that the establishment of economic union was, for the dynasties concerned, not an end in itself but the means towards the achievement of their political aims, i. e. the leadership over the rest of the German States. The same may, of

[75] Article 33, reading almost like Article 33 of the Constitution of 1849, provides that: "The Confederation forms a customs and commercial unit (*Gebiet*), surrounded by a common tariff border. Excluded are only those territories (*Gebietsteile*) which, on account of their position, are not suited for inclusion within the customs border." See also Article 34 ff.

course, be said, *mutatis mutandis,* of the early stages of the popular movement for national consolidation both in Italy and in Germany. Originally these popular aspirations were confined to the demand for constitutional rights within the limit of the individual States. It was the realization that such reforms could not be secured from the sovereign rulers of the petty States, which in Italy gave birth to spontaneous revolutionary movement for the abolition of the obdurate lordlings and the amalgamation of the States into a nationally united Italy. It was this same realization which in Germany culminated in the revolutionary outbreaks of the thirties and those of 1848, resulting in the irresistible demand for the control of the individual rulers by a national constitution as the fundamental law of a united national German State. The Constitution of 1849, abortive though it proved to be, unmistakably testified to the fact that, though national union had originally been the means towards an end, i. e. the establishment of political reforms, it now had assumed a place of eminence in the aspirations of the leaders of the movement for popular government by constitutional guarantees. The Germany visioned by the framers of the Constitution of 1849 was not a league of independent States ruled over by so many sovereign autocrats. It was a national State in which the powers of the Emperor and of the princes were circumscribed by a fundamental law emanating formally and materially from a spontaneous desire and will of the citizenry of the new national State in the making. The anticipation of this fact was the actual reason for the more or less successful attempt on the part of the princes to place upon the Convention the seal of their approval in the hope of controlling its actions and finally, when this hope proved futile, for the repudiation of the product of its labors. On the other hand, it was

this same realization which had prompted the rulers of the individual States to make at least a gesture of yielding to the popular demands for political rights and which at the same time warned them to prepare the way for the establishment of national union in a manner compatible with their dynastic prerogatives and their sovereign positions.

As it had been the recognition of the earnestness and determination of the revolutionists of the thirties and especially of 1848, which had forced the reluctant rulers to offer promises of constitutional reforms and, in some cases, to effect the actual elimination of the worst forms of absolute control in the States, so now it was the fear that after the rejection of the Constitution of 1849, the idea of national unity might be pushed in the same manner in which the struggle for political rights had been conducted, which forced the dynasties to secure control of this movement for themselves. It was at this stage that Bismarck came to the leadership of Prussian affairs. His keen and loyal mind did not fail to perceive the danger which a repeated refusal on the part of the King of Prussia, or for that matter on the part of any other prince or king, to heed the popular longing for a united Germany might entail for the dynastic system as an institution. Realizing, however, that antecedent to any formal reversal of policy on the part of the Prussian ruling House the question of dominance between north and south, i. e. between Prussia and Austria, had to be settled, he proceeded to solve this problem in the only way possible at that time, namely, by way of the exclusion of Austria from the German Confederation. The result of this policy was the creation of the Norddeutscher Bund in 1866 and the acceptance by the States of the Bund of the Constitution adopted by the Federal Reichstag in 1867.

Compared with the Articles of Confederation of 1815

the Constitution of 1867 was a marked step forward in the direction of practical federal or national centralization. It provided for National legislation superior to State law, it established equal political and civil rights for all Germans regardless of their State allegiance. According to this constitution National laws were to be promulgated, war was to be declared, peace to be made, and the Confederation to be represented by the President of the Confederation, i. e. the King of Prussia. But the Constitution of 1867 left undecided the theoretical question whether the new union was a Bundestaat, i. e. a union of the member States concerned under a Sovereign National Government, or a Staatenbund, i. e. a federation of sovereign States with some kind of a central governing agency.

The literary controversy produced by this question has received the attention of Professor Richard Hudson in an admirably clear and convincing critical analysis published in 1891 in the *Political Science Quarterly*.[76] Referring to the corresponding phases of the evolution which has taken place in American political theory with regard to the origin and status of the Federal Union, Hudson first gives a concise outline of the consecutive steps in the process of the formation of the North German Confederation. He follows this outline by a critical presentation of the conflicting interpretations of these steps by the leading German constitutional jurists and concludes his examination of the controversy in favor of the only verdict possible under the juristic conception of the State implied in the interpretation of Jellinek and now generally accepted by the majority of German authorities on constitutional law.

The different steps in the process of the formation of the

[76] The North German Confederation (Political Science Quarterly, vol. VI, no. 3).

North German Confederation may be briefly given as presented by Hudson:[77]

. . . On the 14th of June, 1866, the Diet [of the German Confederation of 1815] having decreed mobilization against Prussia [in the latter's controversy with Austria over Sleswig-Holstein], the Prussian envoy announced the withdrawal of that state from the confederation. Already on the 10th of June, when the crisis appeared imminent, Bismarck had addressed a circular despatch to the Prussian envoys at all the German courts, except the Austrian, in which he had inquired whether in case of the anticipated dissolution of existing relations the governments would be disposed to form a new confederation upon a different basis. The outlines of the proposed constitution which this despatch contained have been appropriately called the first draft of the constitution of the North German Confederation. A favorable issue of the negotiations which were thus inaugurated was assured by the victory won by Prussia at Sadowa on the 3d of July, followed on the 26th of the same month by the preliminaries of Nicolsburg, and on the 23d of August by the treaty of Prague. The terms agreed upon cleared the field for the work of political reorganization by the withdrawal of Austria and limiting it to the region north of the Main.

Five days before the conclusion of the treaty of Prague, what is known as the August treaty was signed in Berlin on the basis of a draft which Bismarck had as early as the 4th of August laid before all the states of North Germany, with the exception of those that were marked for incorporation in the Prussian monarchy. The sixteen states that signed this treaty on August 18th were shortly afterwards joined by the remain-

[77] The attention here given to Hudson's study will be found justified in view of the more recent question to be considered in chapter VIII, namely, whether the new National Republican Reich is a Bundesstaat or Einheitsstaat. The answer to this question depends largely upon the facts and theories so ably reviewed and analyzed by Hudson.

ing states north of the Main. . . . The treaty was to hold for one year unless earlier terminated by fulfilment. Before this period should elapse the international relation formed by the treaty was to be converted into a constitutional relation on the basis of the Prussian draft of the 10th of June. The constitution was to be formed by the governments in agreement with a Reichstag, chosen according to the electoral law of the 12th of April, 1849, [enacted by the Frankfurt Convention and intended for the election of the Reichstag of the National Union proposed by the Constitution of 1849 which was rejected by the King of Prussia in agreement with the rulers of Bavaria, Saxony, and Württemberg]. . . .[78]

The first thing to be done by the governments in carrying out the terms of the August treaty was to make provision for the election of the Reichstag. . . . Accordingly, in the several states electoral laws were enacted, differing in only unimportant respects from the law of the 12th of April, 1849. . . . An amendment made to the electoral law by the Prussian Landtag required that the constitution should be submitted for its approval; an example which was followed in most of the other states.

The necessary steps having been taken for the election of the Reichstag, the envoys of the governments convened at Berlin on the 15th of December to consider the draft of a constitution laid before it on that day by Count Bismarck. Three formal sessions, held on the 18th and the 28th of January and on the 7th of February, show how much must have been done beforehand in the way of private conference and exchange of views between the envoys and their governments. In the session of the 18th of January the crown of Prussia was authorized to represent the associated governments in their relations with the Reichstag, a function assigned to the King of Prussia in the proposed constitution. Accordingly, the work of the

[78] The text of this law is appended to the text of the Constitution printed in Heilfron's edition of "Die Deutsche Nationalversammlung im Jahre 1919-1920," I, pp. 45-47.

envoys now only awaiting the ratification of their governments, the King, by a patent of the 12th of February, 1867, the day following the general elections, summoned the Reichstag to meet in Berlin on the 24th of February, and on that day laid before it in the name of the associated governments the draft of the constitution which they had adopted.

Immediately upon the close of the deliberations of the Reichstag, which covered a period of two months, the constitution as amended was adopted by the assembly of envoys, whereupon it was submitted by the governments to the legislatures of their several states and approved by the latter in the form prescribed for constitutional amendments in each state. The constitution thus adopted should have been promulgated either by the associated governments or by the governments and the Reichstag jointly. . . . Strangely, however, neither the manner of promulgation nor the question when the new constitution should go into effect, had received any attention from what we may be justified in calling the new federal authorities. This omission was supplied by the state governments which promulgated the constitution, through the insertion of an identical provision that on the 1st of July, 1867, it should go into effect in the promulgating state. . . .[79]

"This sketch of the history of the establishment of the North German Confederation," Hudson continues, "prepares the way for an examination of the theories which in Germany the facts have been made to support." The theories examined by Hudson are those of Seydel, Binding, Laband, and Jellinek. As Hudson points out, the American student will at once recognize old acquaintances in a new garb. Seydel, as the disciple of Calhoun, appeals to the ratification of the Federal Constitution by the State legislatures and to the promulgation of that constitution by the State authorities as proof that the constitution is not a Federal law, but an identical law of the several States.

[79] Hudson, pp. 424-427.

Like Calhoun, Seydel holds that the doctrine of a division of sovereignty is in contradiction with the nature of the state. Sovereignty being indivisible and the states sovereign, it follows that the empire is not a state at all, but is only an international relation between sovereign states. These states concluded the August treaty for the joint regulation of common interests; and the constitution is hence an identical law of the several states, enacted in order to give effect on state authority to the stipulations of the treaty. The contents of the treaty and of the constitution are identical, the object of the latter being to enforce within state limits the provisions of the international agreement.[80]

The definition of the North German Confederation as a league of sovereign States is opposed by Laband, Binding, and Jellinek. All three hold that the new union is a State (Bundesstaat), but they differ with regard to the interpretation of the creation of the union and its ultimate authority. Laband, as Hudson summarizes his views, "holds in opposition to Seydel that the empire is not a league but a state, and moreover, since sovereignty is indivisible, that the empire alone is sovereign." He is of the opinion, that "as a state it cannot rest on a treaty, for a treaty creates only international rights and obligations." The parties to the August treaty, Laband states, "do not found a confederation, but pledge themselves to found a confederation; they agree not on a contitution, but on a method by which a constitution is to be established." Hence, according to Laband, the North German Confederation did not come into existence on the 18th of August 1866, when the States concluded the treaty, but on the 1st of July

[80] Hudson, pp. 427-428. Hudson fails to give any page references to Seydel's works; the opinions of Seydel here summarized are to be found in his "Commentar zur Verfassungsurkunde für das Deutsche Reich," pp. IX-XVI, 4 ff.

1867, when it was founded by the States in fulfillment of treaty stipulations.[81]

But "What is gained," Hudson pertinently asks, "by denying that the August treaty was the foundation of the confederation and then asserting that the confederation was founded by the States in fulfilment of that treaty?" In answer to this question he points out that:

> It is evident that Laband seeks to establish legal continuity between the old order and the new. While denying that the August treaty is the legal foundation of the North German Confederation, he [Laband] yet holds that it is its international foundation. In the proceedings of governments and Reichstag he sees nothing but the steps taken by the states in fulfilment of treaty to draw up a constitution. The states are preparing to found such a federal state as the constitution describes; but until they actually call it into existence and endow it with its fundamental law, the constitution has no more authority than have the resolutions of a public meeting. In harmony with this line of thought is Laband's assertion that by their ratifications the legislatures empowered the governments to proceed to the establishment of the North German Confederation with the constitution which had been drawn up. The act by which the states founded the confederation Laband characterizes as a *Rechtshandlung,* or an act founded in law, although it is difficult to see how an act performed beyond state limits can derive its qualifications as legal from state legislation.[82]

To Jellinek Professor Hudson properly ascribes the credit of having shown that all attempts to find a juristic explanation of the origin of the State are futile not only for the simple but equally for the federal State.

[81] Hudson, pp. 432-433. Hudson's summary of Laband's views is based on the latter's "Das Staatsrecht des Deutschen Reiches," vol. 1, pp. 9-33.

[82] *Ibid.*

Since the existing legal order rests on the authority of the state, it cannot be made use of to explain the existence of the state itself. But the states are part of the political order of the federal state, for they have no existence except as its members. They were in possession of the field before it, but the nation in giving itself political organization reduced them to a subordinate position. Jellinek rejects the traditional doctrine of divided sovereignty and logically holds that all the powers of government belong to the federal state, which, however, in assigning some of these powers to the organs which it has in common with every simple state, leaves the rest to the states, now become it members.[83]

Most important of all for the determination of the question of the character of the Republican Reich and especially of the legal continuity of the old Imperial and the new Republican National Union is the interpretation of Binding, or rather, the refutation of his interpretation by Hudson:

In what Laband regards as the mere fulfilment of treaty, Binding sees the emergence of a new authority. The formation of the North German Confederation must, he [Binding] declares, be *extra et supra legem*. The proceedings of the governments and the Reichstag are a creative process by which the elements that are to form the new state co-operate in ordaining new legal relations. But in ordaining the constitution the assembly of envoys and the Reichstag did not act as organs of the North German Confederation, for that was not founded until the 1st of the following July. Much less did they act as organs of the states, for a federal constitution cannot be state legislation. It was their moral weight in Germany which qualified them to create a new system of public law. In ratifying a constitution which was to modify on its own authority

[83] Hudson, pp. 433-434. See Jellinek, Staatenverbindungen . . ., especially his introductory explanations and the sections dealing with "Staatenbund and Bundesstaat."

the law of the states, the state legislatures relinquished rights which they had in the existing political order. But although the constitution was already law, it had not yet gone into effect. When the governments and people, upon the appointed day, took the positions assigned them in the new system, they gave effect to the constitution, and in so doing they created the North German Confederation.[84]

In this interpretation Binding raises the question of the relation of the constitution to the establishment of the State and he appeals to the theory of the compact as the *deus ex machina* putting into effect the constitution in accordance with which the confederation is created. Hudson's criticism of Binding's position concerning these two points deserves to be given in his own words:

For the new political order Binding finds a commanding authority, but that authority is not, as in Jellinek, the state itself. This inversion of the logical relation between a state and its constitution is not without serious consequences, for Binding finds himself compelled to make to Seydel the admission that a constitution may be a compact. Indeed, he expresses the opinion that in case of absolute monarchies, where the consent of the people would not be necessary, a federal state may be formed by treaty. But where states with constitutional governments undertake to form a federal state the consent of the nation is necessary, and a treaty between states which should require the ratification of the entire nation is unthinkable. But does not this remark suggest where the real difficulty lies? Is it conceivable that the parties cooperating in the formation of a constitution should act in different capacities, the Reichstag on behalf of the nation and the gov-

[84] Hudson, p. 435. This rendition of Binding's theory is based on the latter's "Die Gründung des Norddeutschen Bundes . . .," 1889; reprinted in his "Werden und Leben der Staaten . . .," 1920.

ernments on behalf of the states? Are they not both organs of a state which is already moving and which gives its first sign of life in ordaining its constitution?

Hudson's refutation of Binding's position follows the argument suggested in Hudson's queries. Referring to the content of his own interrogation he replies that "if this be true, then what Binding calls agreement or compact between the governments and the Reichstag is no more compact than is a vote of the German Federal Council or the concurrent vote of the Federal Council and the Reichstag. It is not an agreement between the parties that are to form the new state, but cooperation between the organs which the new state makes use of in ordaining its fundamental law." And he continues:

Agreement then must be between the organs which a nation employs and not between individuals or states; for a nation is not a numerical aggregate but the result of an organic process. In Germany national forces had been gradually gathering strength until at last they became irresistible. By breaking down state barriers for economic purposes the Customs Union had demonstrated the advantages of national unity. Dangers from abroad showed the necessity of the concentration of Germany's military resources. The increasing intercourse between the states pleaded for unification of the law and for a uniform judicial administration. Into this national movement both people and governments were drawn, the latter for the most part reluctantly and out of deference to public opinion and fear of Prussia. But whether spontaneously or under pressure, they espoused the cause of the nation, hoping to find in the position they gained on the national arena compensation for the diminution of power at home. . . . What should be more natural than that associated governments and Reichstag should alike serve as organs of the nation, now that it was undertaking the work of political reorganization? As in local

affairs the governments were the leaders, so the associated governments took the lead in national affairs; and as in the states the governments enjoyed the cooperation of legislatures, so on the national arena the associated governments summoned to their cooperation a North German Reichstag. In summoning this Reichstag and drawing up a constitution for its approval, they were no less organs of the nation than was the body which they summoned. The new authorities are already pointed out before the work begins, and they fall naturally into the positions that seem by right to belong to them. The organs which the nation uses in establishing its constitution and which, as Jellinek remarks, serve as a provisional government, usually differ in character from those which the constitution provides. Such was the case in this country, where the nation had to make use of a convention made up of delegations from the states. But in Germany the forms of provisional and of permanent organization are almost identical. Federal Council, Reichstag, and King of Prussia already take the position which they occupy today.[85]

Agreeing with Professor Hudson's fundamental position on the question of the relation of State and Constitution [86] and on the compact theory we must unqualifiedly accept the State character of the North German Confederation as a creation resulting not from the consent or agreement of contracting States but from the will of a whole people grown weary of the pretensions and dangers of sovereign particularism and desirous of political organization on a national scale.

The German Empire of 1871 and the Reform Acts of October 1918. German national unity, as far as it had thus been established was the inevitable result of an ir-

[85] Hudson, pp. 435-437.

[86] See chapter IV, section: Legal Continuity and Relation of the Constitution to the Existence of the State.

resistible popular impulse, but formally and to all outward appearances it had come through the definite actions of the dynasties who, seeing the handwriting on the wall, *nolens volens* assumed the leadership in a movement which they could no longer thwart nor ignore. Even more than for the North German Confederation was this true for the Empire of 1871 which was formally and publicly proclaimed by the ruling princes gathered for this purpose at Versailles. But from the point of view of constitutional theory and law this proclamation signifies no more than a change in the name of the President of the union and an enlargement of the commonwealths or States constituting the Reich. The legal continuity between the North German Confederation and the Empire is not subject to question. The controversy concerning the State character of the North German Confederation applies equally to the status of the Reich, as the works of Seydel, Laband, Jellinek, and Binding show. This being so, Hudson's criticism and conclusions must be accepted also for the Empire not as a Staatenbund but a Bundesstaat. Hence the Empire must be considered not as a State created by the compact of the princes gathered at Versailles or by the State Governments ratifying the imperially granted constitution, but as a State existing in legal continuity of the North German Confederation from which it is differentiated only in the modifications of its constitution and in the number of its constituent parts.

In consequence of the eleventh hour assumption of sponsorship of the idea of national consolidation by the dynasties, national union as actually established remained subject to the limitation and qualifications dictated by the interests of the individual ruling houses. It was these limitations and qualifications which gave to both the North German Confederation and the Empire of 1871 a certain artificial character apparent in the terminology of their

constitutions as well as in the actual working of their administrative machinery. However, formal unity at least having thus been established, popular attention kept alert by the phenomenal spread of the socialist doctrine centered once more upon the extension of political liberties in domestic affairs. But feeling secure in the glory of having given the nation its outward union, the dynasties once again refused to meet, in any appreciable degree, the new demands for the curtailment of their remaining princely prerogatives until, in the fall of 1918, approaching disaster once more forced their unwilling hand.

The realization that a victorious conclusion of the war was impossible brought about a sudden change in the attitude of the rulers toward the people's aspirations for democratic reforms. On September 12, 1918, Vice Chancellor von Payer promised the abolition of the Prussian three-class election system. But this promise of abolition, long demanded by all liberal elements of Prussia and the Empire, came too late to save the dynastic organization. The Emperor's Easter Program of 1917, which was at the time blocked by the Conservatives,[87] now ceased to satisfy the demands of the Liberals. As stated by Lutz in his study of the German Revolution: "The destruction of the military dictatorship of General Headquarters, and the parliamentarization of the Empire and the federal states became the program late in September [1918] of the Liberals and Catholics." "These parties," Lutz continues, "invited the Socialists to join them and to assume a share of the burden of government. The Socialists accepted, provided that Article IX of the Constitution, which forbade membership in Reichstag and Bundesrat at the same time, be abolished, and that they be given a portfolio. *Vor-*

[87] Lutz, The German Revolution, p. 21.

wärts, the official organ of the party, then published the following as their minimum demands: the recognition by the imperial government of the Reichstag resolution of July 19, 1917; the unequivocal declaration of a Belgian policy, the revision of the treaties of Brest-Litovsk and Bucharest; complete autonomy for Alsace-Lorraine; universal, direct, and secret franchise; dissolution of the Prussian Parliament; representative government by the majority of the Reichstag; abolition of Paragraph IX of the Constitution; freedom of assembly and the press; and the restriction of censorship to military affairs." [88]

As the conservative Chancellor von Hertling had on previous occasions opposed the granting of autonomy to Alsace-Lorraine and the abrogation of Article IX of the Constitution, and as he failed to make any concessions to the demands formulated by *Vorwärts,* the Socialists declined to participate in his government.[89] The sudden collapse of the Bulgarian front and the signing of the Armistice by Bulgaria forced the issue. "Under the pressure of this tremendous weight," Lutz writes, "and conscious of the mortal danger of the Empire, the majority parties of the Reichstag agreed hastily upon a common program. The committee of the majority parties met on the afternoon of September 28. It demanded of the Government: the autonomy of Alsace-Lorraine, and the abrogation of Paragraph IX of the Constitution. The Chancellor, who at first had decided to go to General Headquarters and carry through the new program, now announced that he would resign. On September 30 he was dismissed from office after recommending the cooperation

[88] Vorwärts, Sept. 24, 1918 (cited by Lutz, pp. 21-23).

[89] Statement made by deputy Mierfeld on September 23 (cited by Lutz, p. 22).

of the parties in the government and proposing Prince Max von Baden as his successor." [90]

The result of this self-assertion on the part of the majority parties of the Reichstag was the Emperor's eleventh hour offer of popular government for the Reich, embodied in the so-called Reform Acts of October, 1918. But while these reforms seemed to satisfy the moderate advocates of liberal government, they came too late to appease the more radical demands of the Socialist groups whose hands were strengthened by the German demand for an armistice and President Wilson's insistence upon a popular government, generally interpreted to imply a change from monarchy to republic.

In his proclamation of September 30, 1918, nominally addressed to Graf von Hertling, though in reality intended for the general public, the Emperor consented to pave the way for the establishment of parliamentary government in Germany. In this letter to the Chancellor who had tendered his resignation as head of the Imperial Cabinet the Emperor said:

I desire that the German people collaborate more effectively than heretofore in the determination of the fate of the fatherland. It is therefore my will that men enjoying the confidence of the people participate on a wide range in the rights and duties of the government. I beg you to complete your task by continuing the conduct of affairs and in preparing the measures willed by me until I shall find your successor. I am looking forward to your proposals.[91]

Even before the changes promised in the Emperor's proclamation were legally effected the new Chancellor, Prince

[90] Lutz, p. 22.
[91] Stier-Somlo, p. 1.

Max von Baden, in his introductory speech before the Reichstag on October 5, made the following announcement concerning these innovations:

In accordance with the imperial decree of September 30, the German Empire has undergone a basic alteration of its political leadership.

As successor to Count Georg von Hertling, . . . I have been summoned by the Emperor to lead the new government.

In accordance with the governmental method now introduced, I submit to the Reichstag, publicly and without delay, the principles upon which I propose to conduct the grave responsibilities of the office.

These principles were firmly established by the agreement of the federated governments and the leaders of the majority parties in this honorable house before I decided to assume the duties of chancellor. They contain, therefore, not only my own confession of political faith, but that of an overwhelming portion of the German people's representatives, that is of the German nation which has constituted the Reichstag on the basis of a general, equal and secret franchise, and according to their will. Only the fact that I know the conviction and the will of the majority of the people are back of me has given me strength to take upon myself [the] conduct of the empire's affairs in this hard and earnest time in which we are living. . .

My resolve to do this has been especially lightened by the fact that prominent leaders of the laboring class have found a way in the new government to the highest offices of the empire. . . .

I am convinced that the manner in which imperial leadership is now constituted with coöperation of the Reichstag is not something ephemeral, and that when peace comes a government cannot again be formed which does not find support in the Reichstag and does not draw its leaders therefrom. . . .

This development necessitates an alteration of our constitution's provisions along the lines of the imperial decree of September 30, which shall make it possible that those members of

the Reichstag who entered the government will retain their seats in the Reichstag. A bill to this end has been submitted to the federal states and will immediately be made the object of their consideration and decision.[92]

The constitutional amendment here referred to repealed Article 21, Section 2, which had stipulated that a member of the Reichstag accepting a salaried office in the Governments of Reich or States, or such an office entailing higher rank or salary, should lose seat and vote in the Reichstag. Furthermore Article 15 which stated that the Imperial Chancellor, to be appointed by the Emperor, should preside in the Bundesrat and supervise the conduct of business, was extended by three sections. These additions to Article 15 provide that:

The Chancellor shall require the confidence of the Reichstag for the conduct of business.

The Chancellor shall be responsible for all acts of political importance which the Emperor commits by virtue of his constitutional competence.

The Chancellor and his representatives shall be responsible to the Bundesrat and the Reichstag for their conduct of office.[93]

Juristic opinion in Germany and even in the enemy countries seemed to agree that these modifications of the Constitution of 1871, giving legal validity to a change which had already taken place in actual practice, meant

[92] See text in Willoughby, Prussian Political Philosophy. Appendix.

[93] By these Reform Acts the powers of Emperor and the Bundesrat were limited in the following manner. By Article 11 of the Constitution of 1871 the Emperor had the right to declare war if the Federal territory or the coast were attacked. In all other cases the consent of the Bundesrat was required. This provision of Article 11 was replaced by the following: "For the declaration of war in the name of the Reich the consent of the Bundesrat and the Reichstag is required" (Trans-

the introduction of parliamentary government in the German Empire.[94]

As already intimated, however, the Emperor's consent to this fundamental change in the system of Government of the Reich came at a time when further refusal would have meant complete self-efacement. The events which immediately followed in spite of this liberalization of government sufficiently substantiate this assertion. Furthermore, this concession had come to the advocates of popular government as a formal grant, i. e. as a gift by the grace of His Majesty. The Chancellor's assurance to the Reichstag that this concession, once it had been effected, could never be repealed, was not sufficiently convincing. There was at that time no political guarantee that the Emperor or his successor might not, at a more propitious time, attempt and even succeed in purging the Constitution of the amendments of October 18, 1918, conceded under the psychological effect of the failure of the great offensive of the summer of the same year.

With the admission of defeat implied in the demand for an armistice, the fulfilment of the more radical demands for a republican form of government was purely a question

lated from text given by Stier-Somlo, p. 6). According to Section 3 of Article 11 of the Imperial Constitution, Treaties with foreign nations, as far as they related to matters subject to Federal legislation, required for their formulation the consent of the Bundesrat, and for their validity that of the Reichstag. This article was revised as follows: "Treaties of peace and those treaties with foreign States relating to matters subject to Federal legislation, require the consent of the Bundesrat and the Reichstag" (Translated from text given by Stier-Somlo, p. 6). The power of the Emperor to appoint, advance, transfer and retire the officers of the Navy and of the Army contingents was made dependent upon the counter signature of the Chancellor or Ministers of War of the various [State] contingents (Brandis, p. 4).

[94] See for instance: Hatschek, I, pp. 45-46; Willoughby, Prussian Political Theory, pp. 155-156; Arsitch, Le fédéralisme. La Constitution allemande du 11 août 1919 . . . 1923.

of popular action. The consent or refusal of the rulers was no longer of any practical consequence. The self-styled sovereign princes had nothing more to offer. They had given the German people a certain degree of political unity, a system as good, perhaps, as so many princes with so many varying and conflicting princely interests ever could give. Their work was done.

But the very fact that their creation has withstood the storms of the Revolution and the disappointments over the crushing terms of the Peace of Versailles proved that, beneath the artificial structure of the old official machinery of the Reich, there was alive the same spirit which made the offer of national union to the King of Prussia in 1849 and, what was more important and promising for the future of the Reich, the same spirit which fought for constitutional reforms in the years preceding 1849. For, with the removal of the dynasties, and especially with the disappearance of the imperial office as the outward symbol of national solidarity it was the ideals of 1848 which served as the unifying element of 1918 and, in addition to these ideals, the realization of the people that the sole responsibility for their transformation into deeds rested on them.

There was, however, one great difference between the revolutionaries of 1830 and 1848 and those of 1918. In those early years it was the middle and upper middle classes by which the so-called ideals of 1848 were held and pushed. In 1918 it was labor, socialist labor, which took the lead in the overthrow of the old and the establishment of the new order. The middle and upper middle classes, always more or less under the spell of the apparent prosperity of the pre-war era, had come to give the sole credit for their tolerable condition to the old régime. They had accepted and supported the war as a necessity to defend and protect their prosperity. Suddenly the realization had

come to them that the war was lost, that their leaders had failed, and had apparently even deserted them. The immediate effect of this realization was a fatalistic stupor rendering them incapable of action. They could not rise to the defense of their fallen leaders for there was no ground on which to base a defense. But neither were they prepared to assume leadership or to share responsibility with those who honestly sought to save Nation and State from chaos and destruction at the hands of the advocates of proletarian tyranny. It was for these reasons that in 1918 we witnessed the assumption of power by the Socialist parties without either actual resistance or practical support on the part of the rest of the population.

CHAPTER II

Transition from Monarchy to Republic

Revolution and de facto Government. What has been said at the beginning of the preceding chapter must be repeated here with equal emphasis. The following pages are not intended to offer a history, or even an outline of the subject of the present chapter. They are not meant to constitute a sketch of the Revolution, but merely aim to present the successive actions which effected the transition from the imperial to the republican form of government of the German National State.[1]

Prince Max von Baden had accepted the chancellorship in the hope of saving Empire and Emperor by the liberalization and parliamentarization of the National Government. But the effect of President Wilson's third note of October 23 and the ever growing socialist agitation for the abdication of the Emperor as a *sine qua non* for an immediate conclusion of an acceptable peace, soon convinced the new Chancellor that, though the dynasty might be saved, Wilhelm II, as the incumbent of the imperial office, would

[1] The reader will find a well authenticated and reasonably impartial sketch of the German Revolution in Ralph Haswell Lutz's study "The German Revolution," published as vol. 1, no. 1 of the Stanford University Publications. University Series. History, Economics and Political Science . . . 1922. Very useful collections of documents on the German Revolution are found in the following German works consulted: Bremen in der deutschen Revolution von November 1918 bis zum März 1919. In einem geschichtlichen Überblick von Paul Müller und Wilhelm Breves . . . 1919; Lamp'l, Die Revolution in Gross-Hamburg . . . 1921; Bernstein, Die deutsche Revolution . . . 1921; Buchner, Revolutionsdokumente . . . 1921.

have to be sacrificed. Thus, while the Majority Socialists were agitating in the Ministry for the Emperor's abdication and while Herr Scheidemann in a memorandum to the Chancellor demanded immediate action, Prince Max sent [illegible] Drews, the Minister of the Interior, to Spa in the hope of convincing the Emperor of the necessity of a voluntary and dignified renunciation of the throne.[2] On November 1 the Emperor instructed Minister Drews to inform the Chancellor that he would not resign, adding that he believed his abdication would be the signal for the triumph of the revolutionists, or as Lutz states, the Bolshevists.[3] The Emperor acted upon the advice of his military monitors who at that time still believed in the loyalty of the armies at the front. The Emperor's refusal was followed by a Socialist party caucus resulting in an ultimatum to the Chancellor, making the party's continuance in the Government dependent upon the abdication of the Kaiser.[4] On November 7 Prince Max informed the Emperor of this ultimatum. In a personal telegram he advised abdication and the calling of a constituent assembly in order to counteract the revolutionary propoganda of the Independent Socialists and the Spartakus Bund. In reply the Emperor telegraphed: "His Majesty has completely rejected the recommendation of your Grand Ducal Highness in the throne question and considers it now, as formerly, his duty to remain at his post." [5]

[2] Letter of Prince Max von Baden (Berliner Tageblatt, August 9, 1919); Runkel, Deutsche Revolution, pp. 57-61 (cited by Lutz, p. 41).

[3] Deutsche Tageszeitung, July 27, 1919 (Lutz, p. 41).

[4] "This ultimatum," Prince Max declared, "forced me to resign. It meant the collapse of my policy which was one of conviction, not of force." He informed the Kaiser of his intention to resign, but was instructed to remain in office until His Majesty could act upon the Chancellor's resignation (Lutz, pp. 26, 47-48; Deutscher Geschichtskalender, Die deutsche Revolution, I. Heft, p. 35 ff.).

[5] Letter of Prince Max cited in note 2.

In the meantime the rebellious naval forces which had overthrown the existing governments in the seaport towns and a number of other localities on the northern coast, were extending their revolutionary successes toward Berlin. While the Kaiser refused the Chancellor's second appeal to abdicate, the monarchy was abolished in Bavaria which was proclaimed a republic. With the existence of the Empire thus threatened Prince Max held, on the night of November 8, a twenty-minute telephone conversation with the Kaiser. As related by Lutz, "he bluntly stated that abdication was necessary, that the military could not suppress the rising tide of revolution, and that he recommended as a final measure the naming of a regent and the calling of a national assembly before the Reichstag demanded it." "In addition he informed the Kaiser of a second plan recommended by the interfactional committee of the Reichstag, which called for the abdication of the Kaiser, the renunciation of the throne by the Crown Prince, and the appointment of a regency for the Emperor's grandson." [6] Still, His Majesty did not agree with the Chancellor. Even on the following day, November 9, after his army chiefs had revealed to him the utter hopelessness of retaining his throne by the support of his troops, he refused to yield to a fourth request by telephone from the Chancellor. Not until he was told by his generals that the roads to Germany as well as those to the front were held by mutinous troops did he consent to a conditional abdication as Emperor. Learning that Prince Max had without his consent announced his abdication, he exclaimed: "I am and remain King of Prussia and as such [shall stay] with my troops." [7] On the night of that same day he left Spa

[6] *Ibid.*

[7] Deutsche Tageszeitung, July 27, 1919 (Lutz, pp. 42-43).

for the Dutch frontier. He did not sign a formal renunciation of the throne until November 28.

The outbreak of the Revolution, a general labor strike in Berlin, and the defection of the garrison had forced the Chancellor to act without the consent of His Majesty. As Prince Max did all that was in his power to hasten the abdication of the Kaiser, the Majority Socialists refrained from carrying out their threatened withdrawal from the Government even after the Chancellor's tender of resignation. In fact, in order to facilitate the promised liberalization of the State election laws they extended the time limit for the Emperor's abdication to the signing of the armistice.[8] But under pressure from the more radical elements they finally withdrew from the Government in the hope of reaching an agreement with the Independents. Their withdrawal from the Government was the signal for revolutionary action in Berlin, followed by the proclamation of the general strike on November 9. On the morning of this same day Prince Max made his last energetic attempt to secure the Kaiser's abdication. By 11 o'clock he was informed from Spa that the abdication had been decided upon, but that the formula of abdication was still under consideration.[9] "At that hour," Lutz summarizes, "the strike of the workmen and the mutiny of the troops had become general throughout the capital. At any moment the masses might have proclaimed the deposition of the Emperor and established a provisional government. Prince Max therefore determined to act upon his own authority in a last desperate effort to give the crisis a constitutional solution." He announced the Emperor's abdication in the following proclamation:

[8] Deutscher Geschichtskalender, Die deutsche Revolution, I. Heft, p. 35 (Lutz, p. 48).

[9] Lutz, p. 50.

The Kaiser and King has decided to renounce the throne. The Imperial Chancellor will remain in office until the questions connected with the abdication of the Kaiser, the renunciation by the Crown Prince of the throne of the German Empire and of Prussia, and the setting up of a regency, have been settled. On behalf of the regency he intends to appoint Deputy Ebert as Imperial Chancellor and he proposes that a bill should be brought in for the establishment of a law providing for the immediate promulgation of universal suffrage and for the election of a Constituent German National Assembly which will finally settle the future form of government of the German Nation and of those peoples which may be desirous of coming into the Empire.

This statement first appeared at about 2 o'clock in the second edition of the *Berliner Zeitung am Mittag.*[10] Between 12 and 1 o'clock Herr Ebert accompanied by Herr Scheidemann had personally informed the Chancellor of the decision of the Majority Socialists to the effect that for the sake of avoiding bloodshed and for the preservation of public order the assumption of the conduct of the affairs of State by Ebert had been found necessary.[11] Asked by Vice-Chancellor von Payer whether this change was to be effected on the authority of the Constitution or by order of the Labor and Soldiers' Councils, Herr Ebert replied that it was to take place in accordance with the Constitution. After a brief consultation the Cabinet, in view of the defection of the garrison of Berlin, decided to yield and Prince Max surrendered the chancellorship to Herr Ebert on condition of subsequent legal authorization (*Genehmigung*).[12] Shortly after 2 o'clock Herr Scheide-

[10] *Ibid.*

[11] Jellinek, Revolution und Reichsverfassung, pp. 4-15. See slightly diverging presentation by Lutz, pp. 50-51.

[12] Jellinek, p. 5.

mann addressing the masses gathered before the Reichstag's building announced:

> The Monarchical system has collapsed. . . . Ebert is forming a new government to which both Social Democratic parties will adhere. Deputy Göhre, who has been assigned as adjutant to the military commander-in-chief, will attest all military orders. Nothing dare destroy the great victory which we have achieved. Let us maintain peace, order and security.[13]

In accepting the chancellorship Herr Ebert clearly considered himself the legitimate successor in office. He, as well as Prince Max, attempted to establish some sort of legal continuity between the old and new governments, for it was unquestionably in the terms of the form of Government, not of State, that both viewed the change effected by them. It was in harmony with this attempt that Herr Ebert intended to enlarge the existing Cabinet by the inclusion of members of both the Majority and Independent Socialists and to continue the conduct of affairs of State by the Ministry thus enlarged.[14] This attitude on the part of Chancellor Ebert is placed beyond doubt by his announcement of the assumption of office, in which he states:

> The former Chancellor, Prinz Max von Baden, has, with the consent of the Secretaries of all Departments of Government, turned over to me the conduct of affairs. I am about to form the new Government in agreement with the political parties and I shall shortly advise the public of the result.
>
> The new Government will be a popular government (*Volksregierung*). It shall be the aim of this Government to attain for the German people a speedy peace and to secure the liberty which has been won.

[13] Deutscher Geschichtskalender, Die deutsche Revolution, I. Heft, p. 36 (Lutz, p. 51).

[14] Jellinek, Revolution und Reichsverfassung, p. 5.

Fellow citizens, I ask for your support in the difficult task ahead of us. You know how war endangers the subsistence of the people, which is the very foundation of all political life. The political upheaval must not interfere with the victualing of the population. It is the first duty of everyone in country and city not to hinder but to further the production of articles of food and their shipment to the cities. . . .

Fellow citizens, I beg you earnestly to leave the streets and to keep peace and order.[15]

The Constitution of 1871 did not, however, provide for the appointment of a Chancellor by anybody but the Emperor. Nor did it provide for the delegation of the imperial authority to the Chancellor in case of a resignation of the Emperor. The transfer of the chancellorship from Prince Max to Representative Ebert, and the assumption of the office by the latter, were therefore unquestionably extra-legal acts which found their sole authorization in the will and demand of the revolutionary forces in actual possession of the superior physical power and in the utilitarian motives expressed in Chancellor Ebert's proclamation. The same is of course true of Chancellor Ebert's attempt to form a new, i. e. a *de facto* Government, the formation of which he announced the same day in his appeal for recognition by the German people. The admission of the extra-legal character of the new Government, though not expressly made in this announcement, is nevertheless quite patently implied in the appeal for support. In this announcement Chancellor Ebert said:

The new Government has taken over the conduct of affairs in order to save the German people from civil war and famine and to enforce its [the German people's] just demands for self-determination. This task it [the Government] can achieve

[15] *Ibid.*

only when all authorities (*Behörden*) and officials in city and country districts give helpful assistance.

I know that it will be difficult for many to work with the new men who have undertaken to guide the Reich, but I appeal to their love for our people. Failure of the [official] organization in this difficult hour would expose Germany to anarchy and to the most terrible misery.

Join me, therefore, in aiding the fatherland by fearless and untiring endeavor, each one in his own place, until the hour shall come for you to be relieved.[16]

Herr Ebert's intention of continuing the Government with the old Ministry enlarged by the inclusion of members of the two Socialist parties was frustrated by the demands of the Independents who made their collaboration contingent upon the exclusion from the Cabinet of all non-Socialist ministers. In consequence of this demand the Majority Socialists consented on November 10 to the formation of an all Socialist government. The new Government thus formed consisted of three members from each of the two Socialist wings. Claiming that all political power rested with the Labor and Soldiers' Councils, the Independents insisted upon the authorization of the new Government by the Councils. Once more the Majority Socialists yielded to the demands of the Independents and on the evening of November 10 a convention of the Labor and Soldiers' Councils of Berlin formally elected the six members as "the Provisional Government." The new Government called itself Council of Commissioners (*Rat der Volksbeauftragten*). After the creation of that body Herr Ebert ceased to employ the term Chancellor, signing as President or Chairman (*Vorsitzender*) of the Council. The State Secretaries of the old era remained in office as technical heads of the various Departments.[17]

[16] *Ibid.*, p. 6.
[17] *Ibid.*, p. 20.

The only attempt on the part of any organ of the old National régime to resist the establishment of the *de facto* Government, or, it may be, another vain effort to legalize its creation, was the movement of Herr Fehrenbach, President of the Reichstag, to convoke the National Legislature which had been adjourned since the enactment of the Reform Acts. The Reichstag had not been formerly dissolved by any definite action or pronouncement of the revolutionary Government and President Fehrenbach denied the contention of the Council of Commissioners (Council of Six) that the assumption of the national political authority by Labor and Soldiers' Councils (of Berlin) and the recognition or appointment of the *de facto* Government by the Councils implied the actual if not formal dissolution of the Reichstag. Hence on December 12 Herr Fehrenbach informed the members of the Reichstag of his intention of convoking the lower house. "The stress of the time," he wrote, "forbids further delay. It compels me to make use, without the consent of the Government, of the right granted on the 26th of October of this year, of convoking the Reichstag. I therefore hereby convoke the Reichstag, reserving the determination of time and place of meeting." [18] Warned by the Council of Commissioners to desist from his intention, Fehrenbach after an attempt to defend his position, yielded. A few days before the National Assembly convened, the *de facto* Government issued an ordinance which declared that "for the purposes of financial indemnification the Reichstag should be considered as having been dissolved on November 9." [19]

By an ordinance of November 14 the *de facto* Government had decreed that "the Bundesrat is authorized to

[18] *Ibid.*, pp. 18-19.

[19] RGBl., 1919, p. 145; Jellinek, *ibid.*, p. 19.

continue in the exercise of the administrative functions assigned to it by the laws and ordinances of the Reich." [20]

Labor and Soldiers' Councils. The actual formation of the *de facto* Government as described above was only indirectly the result of the Revolution. Revolution and *de facto* Government did not originate from the same motives or source, nor were they the result of the same objective or aim. The formation of the *de facto* Government constituted in reality nothing more nor less than a mutual attempt on the part of the old and some of the new leaders, to check and control the Revolution and to forestall the realization of the far more radical aspirations and demands of the extreme wing of the revolutionary ranks.[21]

The Revolution had its origin in acts of insubordination and in the eventual usurpation of authority by the radical and communistic elements in the Imperial Navy. Having established their revolutionary control in the service these elements extended their activities in collusion with the

[20] RGBl., 1918, p. 1311; Jellinek, *ibid.*, p. 18.

[21] An interesting illustration of this fact is seen in the attitude of the Supreme Army Command towards the revolutionary councils of the armies in the field. In the hope of gaining control over the revolutionary activities of the troops the military authorities not only tolerated, but even sponsored and directed the establishment of Soldiers' Councils at the front. It was on the basis of this fact that the Reichsgericht in several damage suits brought by civilians against members of these Councils, asserted the legal status of the Soldiers' Councils as parts of the National military forces. The Court pointed out that at first "the Soldiers' Councils elected by the individual army contingents had the task of acting as intermediaries in personal and official matters between the rank and file including the non-commissioned officers on the one hand and the higher authorities on the other. They were called to cooperate especially in all questions concerning the care of the troops, social and economic affairs, furlough and discipline. It was only later, by Government order of January 19, 1919, no. 5 (Arm. VOBl., 1919, p. 54) that their tasks were extended to a supervision of the actions of their superiors with the object of preventing the exercise of

radical civilian elements first over the coast towns and, in cooperation with the Soldiers' Councils, rapidly over the mainland. The result was the formation of the so-called Labor and Soldiers' Councils in city and township and the assumption of political authority and government by them.

The failure of the military and industrial organization of the Empire, the realization of impending military defeat, the request for the armistice, the unmistakable foreign demand for the elimination of the Hohenzollern dynasty as a prerequisite to the granting of an armistice, had so thoroughly overwhelmed and paralyzed the middle classes as to make all resistance on their part impossible.

It was the demand of the extreme radical elements for the abolition of the monarchy and the establishment of a communist republic (*Rätorepublik*), and the threat to enforce this demand by fire and blood, that prompted the moderate Socialist group to insist upon the immediate abdication of the Kaiser and to consent to the formation of an all-Socialist government. But while the moderate Socialists had thus won the race for the actual control of the National Government, they were soon to learn that they could not escape temporary domination by the Labor and Soldiers' Councils. While the Majority Socialists were striving to establish a democratic republican government under the semblance of legality, the Labor and Soldiers' Councils, drawn from the more radical and communist groups, were gaining control over the municipal

such official authority to the detriment of the *de facto* Government. The formation of Soldiers' Councils among the troops, especially also among those at the front, took place at the very beginning of the Revolution at the express order of the Supreme Military Command. The revolutionary Government of the Reich approved of their formation as is shown not only by the ordinance of Jan. 19, 1919, but also by the ordinance of the Ministry of War, issued on Feb. 20, 1919 (Arm. VOBl., 1919, p. 156). . . ." (RGZ, vol. 99, 1920, pp. 286-287).

governments of practically all important cities and rural communities throughout the Reich. When the Majority Socialists consented to the creation of the all-Socialist National Government in the form of a Council of the People's Commissioners, the Independent Socialists demanded the formal recognition of this government by the Labor and Soldiers' Council as the source of all political power of the Nation. Considering it safer to have the Independents inside than outside the new government the Majority Socialists conformed to their demand. Formal recognition of the all-Socialist National Government was given at a public meeting of the Labor and Soldiers' Councils of Berlin, who assumed authority for the Councils of the Reich. At this meeting the Labor and Soldiers' Councils of the Berlin elected an Executive Committee of twenty-four members which assumed the possession of the political power of the new Republic.

In a proclamation to the inhabitants of Berlin, this Executive Committee announced that it had entered upon its activity. "All communal, state, federal, and military authorities," the proclamation directed, "are to continue to function. All orders of these *Behörden* are issued by authority of the Executive Committee of the Labor and Soldiers' Councils. Everybody is bound to obey these orders." [22] But the Council of Six, consisting of men better known to the public, and being in actual possession of the printing press of the *Reichsgesetzblatt,* i. e. the National Official Gazette in which all laws, ordinances and orders were published, proved to be the stronger in the struggle for political control. An agreement between the two bodies was reached to the effect that the Council of Six was to recognize the Executive Council as the possessor

[22] Jellinek, Revolution und Reichsverfassung, pp. 20-21.

of the supreme political power of the Republic, but that the Executive Council was to delegate this power to the Council of Six. This agreement was embodied in the following statement issued on November 23:

> The Revolution has created a new public law. For the immediate transitional period this new legal status finds expression in the following agreement. . . .
>
> The political power is in the hands of the Labor and Soldiers' Councils of the German Socialist Republic. . . .
>
> Until a representative assembly of the Labor and Soldiers' Councils has elected an executive council of the German Republic, the Executive Council of Berlin shall exercise the functions of the Labor and Soldiers' Councils of the German Republic. . . .
>
> The endorsement of the Council of Commissioners [Council of Six] by the Labor and Soldiers' Councils of Berlin (Gross-Berlin) is equivalent to the delegation of the executive power of the Republic [to the Council of Six]. . . .
>
> As soon as possible a national convention of the Labor and Soldiers' Councils shall be convened. . . .[23]

A supplemental agreement between the Council of Six and the Executive Council of the Labor and Soldiers' Councils of Berlin, effected on December 10, spoke of the existing arrangements as a "Constitution" and attempted to define the division of power or government between the two bodies in the following terms:

> . . . Created by the Revolution, these two bodies have the same political aim, namely to guarantee to the German people the Socialist Republic. The Council of Commissioners holds unconditionally to the Constitution established by the Revolution, which cannot be altered without the consent of the

[23] *Ibid.*, pp. 21-22.

Executive Council of the Labor and Soldiers' Councils. . . . The position of the Executive Council carries with it the right of control. The Council of Commissioners is endowed with the executive power. Both are convinced that their activities can be effective only by faithful cooperation. We trust that our people, in recognition of the difficult situation at home and abroad, will give us their support. . . .[24]

In the meantime the Labor and Soldiers' Councils of Berlin had learned that their attempt to function as the representative body for all the Labor and Soldiers' Councils of the Socialist Republic had been bitterly resented. In consequence of this resentment a National Congress of Delegates from the local Councils was called, which convened in Berlin on December 16, 1918. At this Congress the following resolution was adopted on December 18, the second day of its meeting.

1. The National Congress of the Labor and Soldiers' Councils, representing the entire political power, delegates the legislative and executive power to the Council of Commissioners [Council of Six] until final regulation by the National Assembly.

2. The Congress appoints a Central Council of the Labor and Soldiers' Councils for the parliamentary supervision of the German and Prussian Cabinets. The Central Council has authority to appoint and dismiss the Commissioners of the Reich [the members of the Council of Six] and those of Prussia until the final regulation of the constitutional status.

3. Associates to the State Secretaries are appointed for the supervision of the conduct of the affairs of the Departments of the Reich. Two associates are to be appointed for each Department. They are to be chosen from the two Socialist parties. Prior to the appointment of the technical Secretaries

[24] *Ibid.*, p. 22.

and of their [political] associates the Central Council is to be consulted.[25]

Owing to a disagreement concerning the competencies of the Central Council the Independent Socialists refused to participate in the election of the twenty-seven members of the Central Council. The consequence was that all the twenty-seven members were chosen from the Majority Socialist party. This fact is important as indicative of the impending elimination of the more radical Independent element from the *de facto* Government of the Socialist Republic. As Jellinek points out, the result of the Congress was a defeat of the Independent Socialists in favor of the more conservative Majority Socialist wing of the original Socialist party. But it was also the beginning of the end of the whole system of Labor and Soldiers' Councils in Germany. For by a vote of 344 against 98 the same Congress defeated a resolution which provided that: "Under all circumstances the council system should be maintained as the foundation of the Constitution of the Socialist Republic, to the extent that the supreme legislative and executive power of the Councils be recognized." [26] As the same Congress on the same day adopted a motion setting January 19, 1919,[27] as the date for the election of the delegates to the National Constituent Assembly, the rejection of the resolution just quoted meant nothing less than the refusal of the Majority Socialists, controlling the National Congress of the Labor and Soldiers' Councils, to tie the hands of the coming National Constituent Assembly in the formulation of the basic principles of the new National Constitution.

[25] *Ibid.*, p. 25.
[26] *Ibid.*
[27] *Ibid.*, pp. 26, 29.

The final elimination of the Independent Socialists from the Council of Six was brought about in consequence of the power of appointment bestowed upon the Central Council under Section 2 of the resolution adopted by the National Congress of the Councils on December 18. On December 29 the three Independent Socialist members of the Council of Six resigned and the other three of the Majority Socialist party offered their resignation to the Central Council. Their resignation was the result of a general disagreement of the Independents with the more moderate policies of the Majority Socialists and especially with the *de facto* Government's relentless suppression of revolutionary disturbances in Berlin. While accepting the resignation of the Independents, the Central Council consisting of twenty-seven all-Majority Socialist members reaffirmed the appointment of the other three and filled the vacancies by naming three members of the Majority Socialist party, one of whom, however, declined to accept the appointment. In an appeal to the German people the new Government announced that:

> . . . The Independents have resigned from the Government. . . . The paralyzing discord has been overcome. A new and single-minded National Government has been formed. . . The presiding officers are Ebert and Scheidemann. . . .[28]

The National Constituent Assembly. The first suggestion for the election of delegates to a National Constituent Assembly which was to formulate and enact the new Constitution for "the future form of the State of the German people" came from the last Chancellor of the Empire before he surrendered the chancellorship to the revolutionary Government. This fact, however, could have no

[28] Jellinek, *ibid.*, pp. 26-27.

bearing upon the actual authority of the National Assembly. For the call for the election of the delegates and the law regulating the election came from the revolutionary or *de facto* Government of the Socialist Republic. Hence the formal source of the authority of the National Constituent Assembly was the *de facto* Government and, in the last analysis, the Revolution itself.

On November 12, three days after the fall of the old Government, the Council of Commissioners issued, as legally binding upon the citizens of the Socialist Republic, some of the provisions of the so-called Erfurt Program of the Socialist party. In this pronouncement the new *de facto* Government ordered among other things that: "All elections for public officials shall be held by the equal, secret, direct, and general vote on the basis of proportional representation of all male and female persons at least twenty years of age." The pronouncement closed with the statement that: "This election law shall apply also to the election for the National Constituent Assembly for which further regulations will be issued." [29]

The National Congress of Labor and Soldiers' Councils, convened in Berlin on December 16, 1918, set January 19, 1919, as the day on which the voting for the National Assembly was to take place, instead of February 16 the day set originally by the *de facto* Government.[30] A special election law for the elections of delegates to the National Assembly had been published by the Council of Commissioners on November 30. The elections took place as ordered and the Assembly convened at Weimar on February 6, 1919.[31]

[29] Heilfron, I, pp. 104-105.

[30] See note 27.

[31] For an outline of the provisions of this election law see Jellinek, Revolution und Reichsverfassung, p. 29 ff.

In his opening address Herr Ebert, referring to the Assembly's and his own Government's authority, said:

. . . The National Government through me extends its greeting to the Constituent Assembly of the German Nation. . . . The Provisional Government owes its mandate to the Revolution. It will place this mandate back into the hands of the National Assembly.

In the Revolution the German people rose against an antiquated and collapsing rule of force. . . . As soon as its right of self-determination has been assured, the German people will return to the way of legality. Only by parliamentary discussion and decision can the unavoidable changes in the economic and social spheres be produced, without which the Reich and its economic life must perish. It is for this reason that the National Government extends its greeting to this National Assembly as the highest and sole Sovereign in Germany. We are done forever with the old kings and princes by the grace of God. . . . With the certainty of a republican majority in this Assembly, the old ideas of a God-given dependence are eliminated. . . . The German people are free, they shall remain free and govern themselves for all time to come. . . .[32]

There are three important phrases in these few sentences. In the first place Herr Ebert calls the Convention the "verfassunggebende Versammlung des deutschen Volkes." The usual translation of this is "the Constituent Assembly of the German People." A strict translation attempting to give the finest shade of the meaning might insist on rendering the phrase as "the German Nation convened to give itself a Constitution." The correctness of this rendering is substantiated in the Preamble of the Republican Constitution of 1919, which states that: "The German People, united as a Nation . . . has given itself this Constitution."

[32] Heilfron, I, p. 1.

Commenting on Herr Ebert's use of the term "verfassunggebende" as chosen advisedly, Heilfron remarks that it is this term which distinguishes the authority of the Weimar Assembly from that of Frankfurt in 1848. In the Frankfurt Assembly a difference of opinion arose over the question of the authority or competency of the Assembly to formulate or to enact a constitution. The prevailing opinion, however, was that the Assembly of 1848 had no power to enact, but had authority only to deliberate on and to formulate, a Constitution, or as the German terms give it, that it was "eine verfassungberatende" and not "eine verfassunggebende Versammlung." The failure to have the Constitution of 1849 accepted by the German princes seems to prove that this interpretation was correct. The Weimar Assembly, on the other hand, was, as the National *de facto* Government through Herr Ebert asserted, "eine verfassunggebende Versammlung." In other words, the *de facto* Government admitted the competency of the Assembly to enact a fundamental law in accordance with which a new permanent governmental system was to be established as a government not of fact, but of law.

This brings us to the second important point in Herr Ebert's opening address, namely the promise that the existing *de facto* or provisional Government would place its revolutionary mandate into the hands of the National Assembly, a promise which was redeemed a few days later when the Assembly enacted the Provisional Constitution of February 10 and when, in accordance with the terms of the Provisional Constitution, the *de facto* Government of the Socialist Republic was replaced by the *de jure* Government of the Republican Reich.

The third important phrase in Herr Ebert's address is that in which he definitely admits or asserts the sovereign character of the National Assembly, referring to it as the

highest and sole Sovereign in Germany. This same attitude toward the Assembly was shown by the Central Council of the Labor and Soldiers' Councils, exercising supervisory power over the National and Prussian Cabinets. "In the expectation that the National Assembly will realize its full Sovereignty," so the Council declared at the opening of the Assembly, "the Central Council places in the hands of the Assembly the power received from the National Congress of the Labor and Soldiers' Councils." [33]

The National Assembly was thus recognized and considered by the *de facto* Government as the body holding and exercising the sovereign power of the German Nation. But as the context in the statements of the Government and numerous similar references by other speakers of the Assembly shows, the Assembly was held to be sovereign and to exercise Sovereignty only as the representative of the German people or Nation which alone was considered the Sovereign of the new Germany. Speaking before the National Assembly on the day of its first meeting, the seniority President, for instance, said: "The National Assembly is the expression of the will of the German Nation; it alone has from now on the right to decide, it alone has the responsibility for Germany's future. . . . It depends upon the National Assembly whether the German people will in the future govern itself in liberty or not." [34] What Herr Ebert, his fellow speakers, and the Central Council meant to stress was that the National Assembly and not Emperor and princes, or Labor and Sol-

[33] Jellinek, *ibid.*, p. 27. It is true that the Labor and Soldiers' Councils objected to this resignation of their assumed sovereign power. But the Central Council denied the charge of treason against the Councils and defended the formal right of its action.

[34] Heilfron, I, p. 10.

diers' Councils, was the sole body entitled to speak and act for the sovereign German people or Nation. In the language of constitutional law they meant to say: The German people or Nation viewed as a body politic is sovereign. The National Assembly representing the German Nation on the basis of a national and popular election is thus alone authorized to exercise the Sovereignty of the Nation and is thus alone authorized to decide the future mode or rules in accordance with which the German Nation is to be governed.

The Provisional Constitution of February 10, 1919. The National Assembly immediately set to work to formulate a provisional constitution as the mandate for a transitional government. The provisional law of February 10, known as the Provisional Constitution of February 10, called for: a National President; a States Committee (*Staatenausschuss*) consisting of representatives of the States as an upper house, the National Assembly itself acting as the lower house; and a National Cabinet to be appointed by the President and responsible to the National Assembly. When the Provisional Constitution was adopted in the third reading, Herr Scheidemann formally surrendered to the Assembly the political authority of the Council of Commissioners (Council of Six, then consisting only of five members). The Assembly requested the Council to continue in office for the time being. On the following day, i. e. February 11, the Assembly elected Herr Ebert the first President of the National Republic. Two days after his election President Ebert informed the Assembly of the formation of a National Cabinet in accordance with the Provisional Constitution of February 10.[35]

[35] Jellinek, *ibid.*, p. 35. For text of the Provisional Constitution of Feb. 10, 1919, see Jellinek, *ibid.*, pp. 31-32.

A supplementary law of March 4, 1919, settled the question of the validity of those laws of the Empire which contained references to the former Emperor, the Bundesrat, the Chancellor, etc. This so-called Transition Law of March 4 stipulated that all laws of the Empire and all laws and ordinances issued by the Council of Six (or Five), were to remain in force in so far as they were not superseded by the provisions of the Transition Law itself. Accordingly the National Assembly was to succeed to the powers of the old Reichstag, the States Committee to those of the Bundesrat, the President to those of the Emperor, and the National Cabinet to those of the Chancellor. Under the provisions of the Transition Law, as Jellinek points out, even the Imperial Constitution, as National law, remained in force in so far as it was compatible with the Provisional Constitution of February 10 and with the Transition Law of March 4. As a matter of fact, the Constitution of 1871 was, together with the Provisional Constitution of February 10, 1919, declared to be repealed by Article 178 of the final Constitution of August 11, 1919.[36]

Preliminary Drafts of the Constitution. On November 15, 1918, the Council of Commissioners (Council of Six) had appointed Professor Preuss as Secretary of the Interior of the National Socialist Republic. The Council authorized Preuss to prepare a draft for the new National Constitution.[37] Before the Revolution Professor Preuss had been a member of the Progressive People's party (*Fortschrittliche Volkspartei*). After the Revolution he joined the German Democratic party (Deutsche Demokratische Partei). According to newspaper reports he

[36] For text of the Supplementary Law of March 4, 1919, see Jellinek, *ibid.*, pp. 37-38.

[37] Jellinek, *ibid.*, p. 46.

intended to seek the cooperation of Professors Gerhard Anschütz and Max Weber in the preparation of the drafts for the new fundamental law for the Republican Reich. Anschütz was, like Preuss, Professor of Constitutional Law (*Staatsrechtslehre*); Max Weber was Professor of Political Economy (*Volkswirtschaftslehre*). All three were of the same political complexion. Professor Anschütz was unable to accept the invitation. From December 9 to 12, Preuss and Weber are reported to have conferred together on the project with the result that Preuss finished his first draft not later than January 3, 1919.[38]

The essentials of this draft have been summarized by Jellinek as follows:

It introduced a limited number of fundamental rights of the German citizen.[39] The right of the States to the bicameral system was guaranteed.[40] The Reichstag was to be elected for a period of five years.[41] The dissolution of the Reichstag was not subject to any conditions.[42] The National President could, by his veto, suspend National legislation.[43] Prussia was to be divided into parts approximating the size of the other States and the Reich to be regrouped to consist of the following Länder: Prussia (consisting of the provinces of Ostpreussen, Westpreussen, and of Posen to be called Bromberg); Silesia; Brandenburg; Berlin; Lower Saxony; the three free cities of Hamburg, Lübeck, and Bremen; Upper Saxony; Thuringia; Westfalia; Hessen; the Rhineland; Bavaria; Württemberg; Baden; German-Austria; and Vienna.[44]

[38] *Ibid.*

[39] Articles 18-23.

[40] Art. 26, Sect. 2.

[41] Art. 31.

[42] Art. 34.

[43] Art. 55, Sect. 2.

[44] Art. 29. See Jellinek, *ibid.*, pp. 46-47. The proposed division of Prussia was justified at length in a memorial (*Denkschrift*) accompanying the text of the draft and submitted and printed later with his second draft.

This draft is known as the first or unpublished Preuss draft.[45] But though it was not published at the time, it did not long remain secret and some of its provisions were considered as a practical basis for the discussions which followed.

On the day after the opening of the National Assembly Preuss laid before that body another draft known as the second or published Preuss draft.[46] Like the first unpublished draft it was only fragmentary. It lacked the provisions for National defense, communication and traffic, commerce and customs, finance and justice. Its chief aim was the unitary character of the Reich. For the achievement of this purpose it favored the equalization of the States by way of division of the larger and amalgamation of the smaller States.[47] It prescribed in considerable detail the form of the States' constitutions.[48] The officials of the States charged with the execution of National Law were to be subject to prosecution under the National disciplinary regulations.[49] The States were to have only a limited share in the formation of the National will, for the members to the upper house (*Staatenhaus*) were to be elected by the State legislatures and they were not to be bound by instructions.[50]

[45] For text of the first Preuss draft see Triepel, Quellensammlung zum Deutschen Reichsstaatsrecht . . . pp. 7-9.

[46] Published in the Reichsanzeiger of January 20, 1919. See also Deutscher Geschichtskalender, 52. Lieferung, 1919; Heilfron, II, pp. 513-521; Triepel, Quellensammlung, pp. 10-16.

[47] Art. 11.

[48] Art. 12.

[49] Art. 8, Sect. 3.

[50] Articles 12, 30, 32, 39. National legislation, before its introduction in the Reichstag, and administrative ordinances issued for the execution of National laws, were to be approved by representatives of the States, attached, as need might be (*nach Bedarf*), as National Councillors (*Reichsräte*) to the National Ministries (Art. 15).

As Jellinek points out,[51] the author of this second draft had drawn largely upon the principles of the proposed Constitution of 1849, and upon the fundamental laws of England, the United States, Switzerland, and France. From the Constitution of 1849 he had taken Section II dealing with the fundamental rights of the German citizen and the division of the Reichstag into *Volkshaus* and *Staatenhaus;*[52] from English constitutional practice the possibility of a single appeal to the people;[53] from the Constitution of Switzerland the obligatory referendum on constitutional amendments;[54] from the constitutional law of the United States the election of the National President by popular vote;[55] and from France the provision that the President be elected for a term of seven years and that his powers be circumscribed by a National Cabinet dependent upon the confidence of the *Volkshaus.*[56]

This second draft was submitted for consideration to a conference of over one hundred representatives of the States (*Staatenkonferenz*), which convened on January 25 at the behest of the National Government. Under the influence of the Socialist predilection for a strong unitary government for the National Republic, the Council of Six had from the beginning shown little consideration for the particularist aspirations of the States. Thus the Proclamation of November 12, 1918,[57] had declared a National amnesty without the consent of the States. It had estab-

[51] Jellinek, *ibid.*, pp. 47-48.

[52] Art. 30.

[53] Art. 40.

[54] Art. 51. Sect. 2. ". . . Nach Ablauf von fünf Jahren nach dem Inkrafttreten dieser Verfassung bedarf jede Verfassungsänderung der Bestätigung durch eine Volksabstimmung."

[55] Art. 58.

[56] Articles, 65, 70.

[57] See chapter I, p.

lished a uniform National election law to apply also to the election of the State legislatures. Furthermore, the Labor and Soldiers' Councils of Berlin, insisting upon their formal approval and election of the members of the Council of Six, and upon the appointment of the Executive Council,[58] had assumed political authority and control for the whole Nation without the consent or consultation of the Labor and Soldiers' Councils of the rest of Prussia and the other States. On the other hand, the States, resenting the action of the National Government and of the Labor and Soldiers' Councils of Berlin, had, on their part, been guilty of infringements upon the competencies of the National Government. Thus Saxony, for instance, had, by ordinance of November 30, arbitrarily and radically changed the National provisions for the regulation of the procedure of military justice.[59] In order to meet the danger which this state of affairs entailed for the existence of the Reich, the National Government invited the States to send delegates to Berlin for the purpose of agreeing upon a *modus vivendi* until the future relations of Reich and States could be regulated by a new National Constitution. In response to this invitation about seventy

[58] *Ibid., p.*

[59] Jellinek, *ibid.*, p. 28. In his book "Von der Monarchie zum Volksstaat," Wilhelm Blos, Minister- and later Staatspresident of Württemberg, quotes a letter from the National Government to the Governments of the States. The letter is dated November 18, 1918, and signed: "Ebert. Haase." It reads: "In several cases the newly established Governments of the Bundesstaaten have interfered with the competencies of the Reich. This creates confusion and makes the reorganization of the Reich difficult. The National Government asks the Governments of the States to conform in all manifestations and actions strictly to the prevailing delimitations of the competencies of Reich and States. Changes cannot be effected except by the consent of the National Government and require the approval of the . . . National Assembly (*der gesamtdeutschen verfassunggebenden Nationalversammlung*) . . . ." (vol. 1, p. 78). Commenting on this communication Blos writes: "At

representatives of the States convened in Berlin on November 25 under the chairmanship of Herr Ebert. The convention ended in the adoption of the following resolutions:

1. The maintenance of the unity of Germany is a pressing demand. All German groups (*Stämme*) adhere to the German Republic. They obligate themselves to work with determination for the unity of the Reich and to combat separatist tendencies. 2. The calling of a National Assembly is generally agreed to. . . . 3. Until the National Assembly meets, the Labor and Soldiers' Councils shall act as the representatives of the popular will. . . ." [60]

Although these resolutions constituted a victory of the National Government over the governments of the States, the Council of Commissioners was henceforth more solicitous of avoiding an open conflict with the States. Hence its failure to publish the first Preuss draft which intended to make short work of the existing State system, and its calling of a second States conference for the consideration of the second draft which, though considerably modifying the former drastic demands for the regrouping of the Reich, still showed a strong unitary spirit and an implied danger to State particularism.

the time, it was only ten days after the Revolution, we were still in a state of turmoil. Besides, the Labor and Soldiers' Councils had a decisive influence upon the [State] Governments, a state of affairs which could not be met by constitutional regulations of the old régime. But we [Blos is speaking as Minister-President of Württemberg] were not conscious of any guilt and I would not attribute this peculiar communication to the initiative of the conciliatory Ebert, but to that of the astute Independent Haase. . . ." (*Ibid.*, pp. 78-79).

[60] A conference of representatives of the four South German States took place on Dec. 27-28 of the same year, at Stuttgart, the capital of Württemberg. This conference ended in the adoption of resolutions similar to those accepted by the *Staatenkonferenz* held in Berlin in November (Blos, vol. I, pp. 80-81; see also Jellinek, *op. cit.*, p. 28).

It was this second conference of representatives of the Länder, known as the *Staatenkonferenz,* which met in the National Capital on January 25, 1919, for the purpose of examining the second Preuss draft for a National Constitution.[61] The *Staatenkonferenz* appointed a commission to which the draft was referred for further deliberations. A still smaller committee chosen from the commission finally completed the examination and revision of the second Preuss draft in Weimar. The result of the labors of the *Staatenkonferenz* and its two committees was embodied by the Government in a third draft, known as the first Government draft, which, like the first Preuss draft, was not published.

The first Government draft consisted of eight sections: 1. Reich and its member States. 2. Fundamental rights of the German people. 3. Reichstag. 4. National President and National Government. 5. Commerce and finance. 6. Communication and traffic (*Verkehrswesen*). 7. Justice. 8. Final provisions.[62] The important difference between this and the second Preuss draft, however, is to be found in the elimination of the provisions for a strong unitary National government in favor of principles supporting the particularist tendencies of the States.[63] In this respect the first Government draft resembles more the final draft actually submitted to the National Assembly, which, as the second Government draft, will be considered in more detail below.

The first Government draft was submitted to the *Staa-*

[61] The *Staatenkonferenz* included a number of representatives of the National Government (Triepel, Die Entwürfe zur neuen Reichsverfassung, p. 59).

[62] Jellinek, *ibid.*, p. 49.

[63] For details concerning the provisions of the first Government draft see Jellinek, *ibid.*, p. 49; Triepel (cited in note 61) p. 60 ff; and for full text Triepel, Quellensammlung, pp. 18-28 (Entwurf III).

tenausschuss,[64] the temporary upper house of the German Republic, created by the Provisional Constitution of February 10, 1919. As a result of the labors of the *Staatenkonferenz* and its two committees there had been eliminated from the second Preuss draft the efforts of Preuss for the curtailment of States rights in favor of the unitary National State. But there were not yet present in the first Government draft those strong particularist features which the second Government draft, produced by the Government as a result of the criticism of the *Staatenausschuss,* was to exhibit.

The fourth draft, known as the second Government draft,[65] was the one resulting from the revision by the *Staatenausschuss.* It was the one finally submitted to the National Assembly. As the product of the criticism of two, or rather four, different bodies consisting of the representatives of the States, it is not surprising that it was as extreme in favor of States rights as the draft or drafts of Preuss had been in favor of the unitary State. In submitting this draft to the National Assembly, Preuss stated that though the *Staatenausschuss* had approved the text as submitted, it had failed to agree with the National Government concerning the contents of Articles 15, 19, and 40 and had appended its own views on those subjects in the form of footnotes. Article 15 dealt with the union of the member States (*Gliedstaaten*); Article 19 with the distribution of votes in the Reichsrat; Article 40 with non-German-speaking populations of the Reich.[66] According

[64] It was thus submitted in accordance with Art. 2 of the Provisional Constitution which stated that the National Cabinet must have the consent of a *Staatenhaus* for the submission of bills to the National Assembly.

[65] For text see Heilfron II, pp. 522-541; also Triepel, Quellensammlung, pp. 28-33 (Entwurf IV).

[66] Jellinek, *ibid.*, p. 49.

to the Government's phraseology of Article 15 the parcellation of the States had been made rather difficult, while the amended form of the *Staatenausschuss* made their division impossible.

The second Government draft prescribed for the States: a republican form of government; the franchise for men and women on the basis of the general, equal, immediate, and secret vote and in accordance with the proportional ballot; and parliamentary government.[67] It provided only for an indirect supervision of the States by the National Government.[68] The Reichsrat, replacing the *Staatenhaus* of Preuss, was to enable the States to participate in the formation and expression of the National will. The Reichstag was to be a unicameral house of legislation.[69] The draft contained a number of specific reserved States rights, elimination of which should be possible only by way of treaty.[70] Article 19 implied a recognition of Prussian supremacy in so far as it fixed the minimum of eighteen votes for Prussia in the Reichsrat.[71]

After the first reading of the second Government draft the National Assembly appointed a committee of 28 members (*Verfassungsausschuss*) for the consideration of the second Government draft, i. e. the draft in the form accepted and amended by the *Staatenausschuss*. This Committee on the Constitution consisted of members of all political parties represented in the Assembly. After two readings on March 3 to June 2 and June 3 to 18, it returned the text in a considerably modified form to the

[67] Art. 16.

[68] Art. 14.

[69] Art. 18 ff.

[70] Art. 5, Sect. 4: Army; Art. 80, Sect. 4: Free ports; Art. 87: Postal and telegraph service; Articles 90, 102, 103: Railroads and waterways; Articles 116-117: Beer and liquor tax; Art. 118: Bavarian fire insurance of immovable property.

[71] Jellinek, *ibid.*, pp. 49-50.

Assembly. The modified text returned by the Committee on the Constitution on June 18 was accompanied by the request that the National Assembly approve the enclosed draft in the form returned and "by this decision table the petitions submitted" for the alteration of the text under consideration in plenary meeting.[72]

The chief importance of the modification of the second Government draft by the Committee on the Constitution consisted in the almost complete elimination of the particularist tendencies introduced by the *Staatenkonferenz* and the *Staatenausschuss*. The reserved rights of the States disappeared with the exception of one, the transfer to the Reich of the railroads and waterways and the postal and telegraph systems of Bavaria and Württemberg by way of agreement (*Verständigung*). But even this exception was limited to October 1, 1920, after which date the Reich should be free to settle these matters by National law.[73] The possibility of control of the Reichsrat by Prussia was checked by the ingenious device of assigning half of the Prussian votes to the provincial administrations of that State.[74] To the largely increased use of the referendum was added that of the initiative in legislation.[75] The legislative competency of the Reich was considerably extended and systematized.[76] The thirteen articles dealing with the fundamental rights of the German people were expanded into a special chapter (*Hauptteil*) of fifty-six articles. Important provisions concerning religion, religious societies,[77] education and schools,[78] and economic life[79] were

[72] Verf. Ber. und Prot., p. 1.
[73] Articles 167-168.
[74] Articles 62, 64.
[75] Art. 74.
[76] Art. 8 ff.
[77] Art. 132 ff.
[78] Art. 139 ff.
[79] Art. 148 ff.

added. Finally, in Article 162 the attempt was made to legalize the revolutionary system of the Councils.[80]

It was on the basis of this draft as amended by the Committee on the Constitution, the fifth version in the list, that the National Assembly on July 3, began its second reading in plenary session with the result that on July 22 it produced a sixth draft, referred to as the first draft of the National Assembly.[81] With the modifications effected during the third reading in plenary meeting from July 29 to 31, this draft of the National Assembly became the final text of the Constitution as it was signed by President Ebert and the Cabinet on August 11 and promulgated on August 14, 1919. The closing vote at the end of the third reading stood 262 for and 75 against its acceptance, with one abstaining vote. Those voting against its acceptance were the German Nationalists, the German People's party, the Independent Socialists, the Bavarian Agrarian Association (*Bauernbund*), and one member of the Bavarian People's party.[82]

[80] Jellinek, *ibid.*, pp. 50-51. For text see Verf. Ber. und Prot., pp. 2-15; also Triepel, Quellensammlung, pp. 39-45 (Entwurf V).

[81] Der erste Entwurf "nach den Beschlüssen der Nationalversammlung in 2. Beratung." Drucksachen der Nationalversammlung. Nr. 656 (Jellinek, *ibid.*, p. 51).

[82] Jellinek, *ibid.*, p. 52; Heilfron, *ibid.*, V, p. 450.

CHAPTER III

Conceptions of State and Sovereignty in German Constitutional Jurisprudence

The Juristic Conception of the State. The first question presenting itself in the study of the German Republican Constitution is that of the legal continuity of the Republic, i. e. the question whether the National Republic is, from the juristic point of view, identical with the Empire of 1871, or whether the National Republic is a new State creation and as such is only the legal successor of the Empire. But the answer to this question depends upon the meaning in the constitutional jurisprudence of the Monarchy and the Republic, of the terms State, Sovereignty, Government, and their equivalents in the German vernacular, i. e. Staat, Staatsgewalt, Regierungsgewalt, and their synonyms.

German theories of the State have been reviewed by Professor Anschütz in a study on German constitutional law, published in volume IV of *Holtzendorff's Enzyklopädie der Rechtswissenschaft,* which appeared in 1913-15.[1] In this exposition Anschütz comes to the conclusion that of all the theories advanced to define the essence and character of the

[1] An English survey of the evolution of German constitutional theory is found in a translation of a study by Léon Duguit, published under the title: "The Law and the State; French and German Doctrines" in the November 1917 number of the Harvard Law Review. Duguit rejects the juristic conception of the State as autocratic and vicious. In this connection see the author's "Concepts of State, Sovereignty, and International Law," chapter IX, dealing with Duguit's criticism of the juristic conception of the State.

State, it is only the juristic conception, positing the State's personality in a legal sense, which meets with the requirements considered essential for the comprehension and explanation of the modern State. Referring to the theory of the legal personality of the State as a source of deepest knowledge in the sphere of political science, Anschütz adds that this doctrine, "already current in antiquity, but almost completely obscured in the Middle Ages, was revived in the seventeenth and eighteenth centuries by the adherents of the theory of natural law: Althusius, Grotius, Pufendorf, Kant." [2] According to Anschütz, the doctrine was brought to its full flower by the German jurists of the nineteenth century: Albrecht, v. Gerber, Gierke, Jellinek, Laband, Georg Meyer.[3]

Summarizing the progressive clarification of the doctrine, Anschütz comes to the conclusion that "the State in the juristic sense is a corporation, a collective personality on a territorial basis (*Gesamtpersönlichkeit auf territorialer Grundlage*)," [4] or as given in a more elaborate form: "The State is the union (*Vereinigung*) of all human beings of a definite territory as a collective personality (*Gesamtpersönlichkeit*) endowed with supreme power (*Gewalt*) over land and people." [5] Accepting this definition of the State as his own, he contends that "of all the theories of the

[2] In his work "Zum ewigen Frieden" (Werke, hrsg. von Hartenstein, 6, 409), Kant writes: "The State is not, like the territory upon which it exists, a possession, but a society of human beings over whom it [the State] alone has the right to command (*über die niemand anders als er selbst zu gebieten und disponieren hat*)." In the interpretation of Anschütz this means that according to Kant the State is "a society capable of disposition (*eine dispositionsfähige Gesellschaft*), in other words, a juristic person" (Anschütz, Deutsches Staatsrecht, p. 11, note 1).

[3] Anschütz, *ibid.*, p. 11.

[4] *Ibid.*

[5] *Ibid.*

State it is the theory of the personality of the State which today has found the widest acceptance." This general acceptance, he holds, "corresponds to its intrinsic worth, for it is the theory of the personality of the State which alone on a purely juristic basis offers a non-contradictory explanation of the concept of the State in agreement with modern political thinking." [6]

Analyzing the criteria of the non-contradictory character of the juristic conception of the State as a legal personality, Anschütz enumerates certain requirements demanded by modern political thinking of any satisfactory definition of the State and met by no other doctrine than that of the legal personality of the State. These requirements are:

1. A unity of the State transcending the changing relations of the governors and governed.
2. The quality of the State as a unity endowed with power and will, and capable of action, the subject of rights and duties.
3. The character of the State as a social unit consisting of human beings or, in other words, the nature of the State as a commonwealth, the nature of the State's will as a common will (*Gemeinwille*), the nature of Sovereignty (Staatsgewalt) as corporate competence or power.

4. The inclusion in the State corporation of the rulers, one or many, i. e. the inclusion of those exercising the corporate power, in the State corporation in such a way that the ruler is not placed outside or above the corporation, but is included as its principal servant (*Erster Diener*), in other words, in such a way that the king in ruling does not maintain his own, but some one else's, namely the State's, law.[7]

The juristic conception of the State is presented as the generally valid theory of the present time also in Georg

[6] *Ibid.*
[7] *Ibid.*

Meyer's *Lehrbuch des deutschen Staatsrechts,* of which the seventh edition, prepared by Anschütz, appeared in the early part of 1919.[8] As stated by Anschütz this edition, though published in 1919, is based on the constitutional jurisprudence of the Monarchy. According to Meyer-Anschütz, the State, from the juristic point of view, is called a person, i. e. a *Rechtssubject* of public law. The right to rule its subjects belongs to the State as a commonwealth, not to the rulers, for the ruler is merely an organ of the State. Attention is called, however, to the fact that in the older version of the doctrine the right to rule was vested not in the State, but in the ruler as his personal *Herrschergewalt* and that this version had its supporters even at the end of the nineteenth century, as for instance in Professor Jellinek.

Of the theory of the legal personality of the State it is said that "in modern constitutional jurisprudence it may be considered as generally valid for the juristic conception of the State."[9] The list of the German constitutional authorities accepting the doctrine given by Anschütz is considerably enlarged in Meyer-Anschütz. As here enumerated the theory of the legal personality of the State has been accepted by Gierke, Albrecht, v. Gerber, Jellinek, Bernatzik, v. Treitschke, Laband, Haenel, Huebler, Schmidt, Seidler, Rehm.[10]

In his treatise on German and Prussian constitutional

[8] To be referred to hereafter as Meyer-Anschütz.

[9] Meyer-Anschütz, p. 15.

[10] For specific references to the works of these authors see Meyer-Anschütz, p. 15. Of the German writers who oppose the juristic conception of the State, mention should here be made of O. Mayer who rejects the theory of the legal personality of the State on the ground that the concept of the juristic person befits only beings subject to the will of the State. He likens the State to Samson whom the adherents of the doctrine "attempt to tie by the rope of the juristic personality,"

law [11] Professor Hatschek accepts the juristic conception of the State as a legal personality endowed with a legal will also for the constitutional jurisprudence of the Republic. The State, Hatschek admits, may be considered from a double aspect, i. e. from the point of view of social science, and from that of jurisprudence. Rejecting the doctrine of the legal personality as dangerous from the sociological aspect, he asserts the necessity of its acceptance from the point of view of jurisprudence. Considered from the sociological aspect, so he argues, the State is not a reality (*keine reale Substanz*), but merely a function of Society (*bloss Funktion der Gesellschaft*). Viewed socially the State is nothing but a passing or rotation (*Ablauf*) of human actions. These actions are, to be sure, of a particular kind: they are directed towards the realization of specific aims, called the aims of the State, such as security of law, welfare, power. But we must realize that these aims do not exist as realities outside of ourselves. For we, and only we ourselves, create these aims in order to conceive this rotation of human action as having sense or meaning. To ignore this warning would, in Hatschek's opinion, "render us only too apt to consider the State as a unity of will, a collective personality (*Willenseinheit, Gesamtpersönlichkeit*)" and this, in turn, "would lead to a dangerous apotheosis of the State." But however unnecessary and erroneous the concept of the unity of will of the State is from the social point of view, it is "equally necessary as an auxiliary concept introduced by us for the understanding of a regulative content of legal propositions

such as societies and foundations upon which the character of juristic persons is bestowed by the legal order of the State (Mayer, Die juristische Person und ihre Vertwertbarkeit im öffentlichen Recht. In Festgabe für Laband, p. 4 ff.). See Meyer-Anschütz, p. 15.

[11] Hatschek, Deutsches und preussisches Staatsrecht . . . 1922.

(*um den normativen Inhalt von Rechtssätzen zu verstehen*)." From the juristic point of view the concept of the unity of will of the State, i. e. the concept of the legal personality of the State, is not, according to Hatschek, likely to serve as a basis for the glorification of the State, for this concept, "introduced by us as an auxiliary construction, is our own creature, i. e. a fiction which we must accept for the better understanding of our legal order." [12]

Sovereignty and Staatsgewalt. Considered as a juristic person the State has a legal will like any other physical or legal person. This legal will the State possesses and exercises, for instance, in its fiscal activities. But in addition to this legal will which the State has in common with other legal persons, it has, as Anschütz points out, another will (*Willensmacht*) peculiar to itself, which is called Staatsgewalt, with the synonyms *Staatshoheit* and *Imperium*. As the terms *Staatshoheit* and *Imperium* suggest, the Staatsgewalt, peculiar to the State, is the sovereign will or the Sovereignty of the State.

Staatsgewalt Anschütz defines as "the competence (*Gewalt*), exclusively belonging to the State, of ruling land and people," which means that "the State's competence (*Gewalt*) is supreme in its sphere, that its command has precedence over the commands of all other subordinate powers of the land, that its will breaks all resistance." [13]

According to German constitutional jurisprudence the Staatsgewalt is indivisible and irresistible. We cannot consider a personality in its component parts without destroying its unity. A division of the Staatsgewalt would result in the division of the State into as many new States,

[12] Hatschek, I, pp. 3-4.

[13] Anschütz, Deutches Staatsrecht, pp. 17-18.

each with its own Staatsgewalt.[14] The irresistibility of the Staatsgewalt as an essential characteristic is, so Anschütz correctly states, included in the definition of the term as the supreme competence or power of social coercion.[15]

In his discussion of the juristic conception of the State and Sovereignty in German republican jurisprudence Hatschek, defining the State, writes: "The State is a territorial corporation (*Gebietskörperschaft*) endowed with supreme *Herrschermacht* (Souveränetät)."[16] Of the *Herrschermacht,* or Sovereignty, called by Anschütz Staatsgewalt, Hatschek says: "Souveränetät is merely a logical concept of relation, such as above, below, right or left. It has no definite material content . . . such as the 'eight marks' [qualities] assumed by Bodin. It only means that the State within the sphere of its legal order does not recognize a superior lawgiver above itself."[17] Giving as the essential characteristics of the State viewed as a juristic person those of territory and population, Hatschek concludes that "to this must be added Souveränetät in the sense described above, which includes the right of self-organization."[18]

From the preceding definitions it would appear that the German term Staatsgewalt, or *Herrschermacht* as used by Hatschek, implies something more than Sovereignty as legal supremacy, or the will of the State expressed as law.

[14] His definition of the Staatsgewalt in the relation between National and component units in the Federal State will be considered later.

[15] "Staatsgewalt is the exclusive competence of the State of ruling land and people. This means that the Staatsgewalt is supreme competence in its sphere. Its command has precedence over the commands of other subordinate powers of the land, its will breaks all resistance. It means further that commanding and enforcing is the exclusive activity of the State. The Staatsgewalt has within its sphere of rule the monopoly of social coercion" (Anschütz, *ibid.*, p. 18).

[16] Hatschek, I, p. 4.

[17] *Ibid.*

[18] *Ibid.*

There seems to be implied in it a connotation of political power or force which the term Sovereignty as legal supremacy in the sense used heretofore does not so readily suggest. This difference, however, is only apparent. The fact is that the German term Staatsgewalt expresses the material aspect of the supremacy of the State, while the term Sovereignty as legal superiority expresses the formal aspect of this supremacy. But on the formal side, the political power or force implied in the term Staatsgewalt connotes an attribute of the State as a subject of law exercising the Staatsgewalt exclusively in the form of legal action. On the other hand, the term Sovereignty as legal supremacy implies on the material side the political power or force necessary to make the legal superiority of the State a reality. Thus the term Staatsgewalt may, with this explanation, be accepted as the equivalent of the term Sovereignty, denoting the legal will or supremacy of the State conceived as a juristic person.

Staatsgewalt and Souveränetät. Anschütz considers the question whether independence (*Unabhängigkeit*) is an essential quality of the Staatsgewalt. Independence he defines as a quality of the State or Staatsgewalt as regarded from the point of view of international relations. The State is independent when it is not permanently subject to the command or restriction of another State. Thus the question, whether independence is an essential characteristic of the Staatsgewalt, is, according to Anschütz, "identical with the other question, whether Sovereignty (Souveränetät) belongs to the characteristics without which a State no longer remains a State." In answer to this question Anschütz states that under Laband's influence German constitutional doctrine has come to hold that Souveränetät is not an essential attribute of the Staats-

gewalt.[19] Accordingly the term Staatsgewalt is applied in German jurisprudence to denote the supremacy of the State in the sphere of constitutional law, covering the activities of the State within the confines and the reach of its own territory. The term Sovereignty (Souveränetät) is used to describe the independence (*Unabhängigkeit*) of the State in its relation to other States, i. e. in international relations.[20]

The practice in German jurisprudence of distinguishing between the use of the terms Staatsgewalt and Souveränetät as here described has its basis in the historical development of the German States. It was the result of two conflicting tendencies within the Holy Roman Empire of the German Nation. These conflicting tendencies may be described as the effort on the part of the Empire or Emperor to subordinate under the imperial dominion the political units of the realm, and on the part of the political units of the Empire, to escape from the dominion of the Empire or the overlordship of the Emperor. Not being able to reduce the princes of the Empire to permanent submission, the Emperor never succeeded in establishing the Sovereignty of the Crown or of the Empire within the boundaries of the imperial realm. On the contrary, the princes succeeded in securing international recognition for their territories as States of international standing in the Treaty of Muenster of 1648 and finally in bringing about the dissolution of the shadowy Empire itself in 1806. The princes of the political units of the Empire thus succeeded in establishing their Sovereignty in international law, i. e. their independence in their relation to the Emperor

[19] Anschütz, *ibid.*, p. 24. The significance of this doctrine will appear in the discussion of the relations of the German States or Länder to the Reich.

[20] *Ibid.*, pp. 21-22.

and to their fellow rulers of the other German States. The fact that in consequence of the successful termination of their primary and major struggle against the Sovereignty of the Emperor or Empire they found themselves also in the possession of the supreme ruling power (*Herrschergewalt*) in the relation with their subjects, was incidental rather than fundamental. To the German rulers the important aspect of Sovereignty was that of independence in the relation to the Emperor and to their fellow rulers and it was this meaning of the term which has remained uppermost in its use. "Sovereignty (Souveränetät) is therefore independence of the State from powers which are above or outside of it." [21]

The supremacy of the ruler over his own subjects, i. e. Sovereignty in the constitutional sense, came to be known as *Herrschergewalt,* competency to rule, or ruling power. With the gradual encroachment of the supremacy of the State or Nation over that of the personal ruler, it was replaced by the term Staatsgewalt in the meaning of Sovereignty of the State in the sphere of constitutional law. In the German juristic conception of the State it has come to mean legal supremacy of the State as a power of social coercion in the form of legal action over the citizen as a member of the State.

The use of the term Staatsgewalt, or *Herrschermacht* in the sense of Sovereignty in constitutional law, and that of Souveränetät as independence in international law, is, however, by no means the universal practice of German writers. The absence of uniformity in the employment of

[21] *Ibid.*, p. 23. In this sense the term Souveränetät is used also in Heilborn's "Völkerrecht" (Holtz. Enzykl., V). In the terminology of Willoughby's "Juristic Conception of the State" Sovereignty denotes the legal will of the State from the constitutional aspect, while the term independence is suggested to denote the State's supremacy in relation with other States (*Ibid.*, especially pp. 207-208).

technical terms and the variety of such terms for the same concept is the source of serious difficulties in the study of German political philosophy and jurisprudence. In the seventh edition of Meyer's *Lehrbuch des deutschen Staatsrechts,* prepared by Anschütz, heretofore referred to as Meyer-Anschütz, the distinction made between Souveränetät and Staatsgewalt is less clear than in Anschütz's study on German constitutional law published in *Holtzendorff's Enzyklopädie der Rechtswissenschaft.* Both terms, Souveränetät and Staatsgewalt, are used in Meyer's *Lehrbuch* to denote Sovereignty in constitutional law. Concerning the term Souveränetät we read: "Souveränetät signifies the quality of the State as a supreme ruling commonwealth. In this sense Souveränetät manifests itself in a two-fold direction: (a) as independence of the State from the dominance of other commonwealths, (b) as supremacy of the State over all persons and corporations within its territory."

The term Souveränetät is here used in the same sense in which Anschütz in his *Deutsches Staatsrecht* uses Staatsgewalt as Sovereignty in constitutional jurisprudence, and Souveränetät as independence in international law. Nevertheless, in the chapters dealing with the possession, extent, and exercise of Sovereignty in constitutional law, Meyer-Anschütz's *Lehrbuch* consistently uses the term Staatsgewalt. In the section concerning the organs of the State and the bearer of the Staatsgewalt it states: ". . . The supreme ruling power in the State is called Staatsgewalt (in the subjective sense). It finds expression in those organs which are supreme (*übergeordnet*) over all others and exercise the supreme right of ruling (*Herrschaftsrechte*) in the State." [22]

[22] Meyer-Anschütz, p. 18; see also section on legitimacy of the Staatsgewalt, pp. 25-26.

The necessity of giving serious consideration to the difference of meaning of the terms Souveränetät and Staatsgewalt as used by Anschütz will appear from the fact that the German Republican Constitution avoids the use of the term Souveränetät as Sovereignty in the constitutional sense and employs the term Staatsgewalt in its stead.

There is to be considered also the use of synonyms, such as *Staatshoheit* and *Herrschermacht* for Staatsgewalt. The use of the term *Staatshoheit* for Staatsgewalt is quite general. The older term *Herrschermacht* is used by Hatschek in the same sense in which Anschütz uses the term Staatsgewalt as Sovereignty in constitutional law. But while Anschütz distinguishes between Staatsgewalt and Souveränetät in the way described, Hatschek uses both *Herrschermacht* and Souveränetät as Sovereignty in constitutional law, without reference to independence in international relations.

Staatsgewalt and Regierungsgewalt. The term Regierungsgewalt, sometimes erroneously used in place of Staatsgewalt, is not a synonym of the latter, but correctly employed, denotes a somewhat different, i. e. limited aspect of the term Staatsgewalt. Defining the term Regierungsgewalt in the constitutional law of the Empire, Anschütz writes: "By Regierungsgewalt is understood the entire Staatsgewalt from the functional aspect. . . . In German constitutional law the doctrine prevails that the Monarch is the bearer of the Regierungsgewalt, but that he must exercise it in accordance with the Constitution. . . ." [23] In other words, the term Regierungsgewalt is the equivalent of what we have, in contradistinction to the terms State and Sovereignty, been calling Government.

[23] Anschütz, *ibid.*, p. 125.

As a last consideration attention must be directed here to the fact that the term Staatsgewalt is sometimes used in authoritative quarters, not to denote the formal supreme will of the State, but the functional enforcement of this will, i. e. to denote, not the Sovereignty of the body politic, but the exercise of that Sovereignty, or rather the organization exercising that Sovereignty, i. e. the Government. A conspicuous instance of this kind is found in the argument of the Reichsgericht in connection with its decision of July 8, 1920, in which it attempts to establish the legal status of the Soldiers' Councils as organs of the National *de facto* Government. In this argument the court said:

The Revolution which began in Germany on November 7, 1918, aimed at the establishment of a German Republic. In the individual localities Labor and Soldiers' Councils were formed which assumed local political and military power (*Gewalt*). On November 10 a new National Government (Reichsregierung) appeared in the form of a central organ composed of six members belonging to the Majority and Independent Socialists. This organ, called Council of Commissioners (*Rat der Volksbeauftragten*), was acknowledged on the same day by the Labor and Soldiers' Councils of Berlin. On November 12 this new National Government issued an appeal setting forth its policy. Under the same date appeared the proclamation of the Executive Council of the Labor and Soldiers' Councils of Berlin, in which all existing authorities (*Behörden*) were instructed to continue their activities by authority of the Executive Council and by which everybody was held to obedience. On November 23 an agreement was reached between the Council of Commissioners and the Executive Council to the effect that the political power rested with the Labor and Soldiers' Councils of the Socialist German Republic, that until a German [i. e. National] Executive Council was elected, its functions were exercised by the Berlin Executive Council, and that the executive power lay with the

Council of Commissioners. On November 29 the National Committee of the Executive Council was established. On December 16 the National Congress of the Labor and Soldiers' Councils convened, which decided upon the creation of the Central Executive Committee and which delegated the executive power to the Council of Commissioners. On the basis of the election law of November 30 the National Assembly was elected on January 19, the first session of which opened on February 6. This National Assembly gave to the Reich its present Constitution. . . .

Thus it is clear that not later than November 10 a new National Government (Reichsregierung) was established, founded upon the local structure of the Labor and Soldiers' Councils and culminating in the Council of Commissioners. Its establishment took place by way of force, but it found no resistance in the former *Reichsgewalt*. Emperor, Bundesrat, and Reichstag, though inwardly resentful (*widerstrebend*) yielded to the force of events, as did the authorities (*Behörden*) continuing their activities by authority of the new Government, and the part of the population not favorable to the Revolution (*Umwälzung*). Also in the old National Army the new Government (*neue Regierung*) found no serious opposition. In a proclamation of November 11, the Supreme Command declared that in conjunction with the new Government it would protect peace and order. Thus the new Government has established itself (*durchgesetzt*) without a serious struggle and has maintained itself in its position of power without contention until it voluntarily surrendered its authority (*Befugnisse*) to the National Assembly.

In this summary of the political facts enumerated to prove the establishment of a new National Government on November 10, the Court, referring to the new Government, consistently employed the term Regierung. However, in the deduction drawn from these facts for the consideration of the constitutional legal status of the new Government,

the Court, unquestionably alluding to the same organism, chose the term Staatsgewalt. Thus the Court continued:

The new Staatsgewalt created by the Revolution cannot be denied constitutional legal recognition. The illegal manner (*Rechtswidrigkeit*) of its creation is no bar [to such recognition] because legality of creation is not an essential characteristic of the Staatsgewalt. The State cannot exist without Staatsgewalt. With the abolition of the old *Gewalt,* the new one which is enforcing itself takes its place. The course of the Revolution as described above shows that the new *Gewalt,* having destroyed the old, has established itself in a ruling fashion and that it has maintained itself in consistent organic evolution. The same opinion is shared in numerous decisions of the Criminal Senates of the Reichsgericht (RGSt, vol. 53, pp. 39, 52, 65; vol. 54, pp. 4, 87, 149, 152).

The new *Gewalt* is a *Reichsgewalt* extending to the whole of Germany. . . .

The new Staatsgewalt was already in existence on November 12, the same day on which the plaintiff suffered damages for which he seeks indemnification. The Council of Commissioners, established two days previously, immediately assumed the *Reichsgewalt* which it maintained up to the time of the opening of the National Assembly. . . .

Concluding its argument in favor of the legal status of the Soldiers' Councils as National officials, the Court used as identical the terms "Reichsregierung" and "Reichsgewalt," meaning by "Reichsgewalt" the Government of the Reich in contradistinction to the Government of Prussia, to which the city of Frankfurt, figuring in the case, belonged. "The guards charged with inflicting the damage done to the houses of the plaintiff," so the Court ruled, "were part of the organs of the new Reichsregierung. As members of the former garrison of Frankfurt they were ordered by the Soldiers' Council of Frankfurt, as the local

subordinate organ of the *Reichsgewalt,* to act as guards at the railway station of Frankfurt for the protection of order and security." [24]

The preceding considerations illustrating the inconsistency in the employment of the terms Staatsgewalt, Souveränetät, or the synonymous use of the terms Staatsgewalt (*Reichsgewalt*) and Regierungsgewalt (Regierung) proves the necessity of establishing in each instance the specific meaning which each particular author attaches to the terms in question. But wherever they are found to be used in the same source or by the same author, each with a different thought content, it is safe to accept the differentiation of Anschütz as given above.

Location and Exercise of Sovereignty. Whatever difference there may exist in the German use of the terms denoting what in Anglo-American jurisprudence is known as Sovereignty (in the constitutional sense), there is no room for ambiguity with regard to location and exercise of Sovereignty in modern German constitutional law.

In Meyer's *Lehrbuch des deutschen Staatsrechts* the theory of the location and exercise of Sovereignty is treated as follows: [25]

1. The State is an abstraction (*begriffliche Abstraktion*). It has need of physical persons for the exercise of its own rights. . . . The persons or groups of persons charged with the exercise of these rights . . . are called the organs of the State. The will and the actions of these organs constitute an expression of the will and actions of the State. . . .

Every State has numerous organs existing in a relation of superiors and subordinates. The supreme ruling competence in the State is called Staatsgewalt (in the subjective sense).

[24] RGZ, vol. 100, pp. 26-27.
[25] Meyer-Anschütz, pp. 17-21

It finds expression in those organs which are superior to all others and which exercise the supreme ruling authority (*die obersten Herrschaftsrechte*) in the State. But the existence of the Staatsgewalt is not dependent upon the existence of the particular organs in which it is personified. The individual physical person representing the Staatsgewalt may disappear and be replaced by another. The entire organization may be altered, a republican constitution may supplant a monarchical one and a monarchical constitution may replace a republican one, but a supreme ruling competence in the State always remains in existence.

The exercise of the supreme ruling authority in the State may be delegated to a single organ, as for instance in the monarchy to the monarch, and in pure democracies to the totality of their citizens united in the popular assembly, or to several organs cooperating in accordance with the constitution, as especially in constitutional monarchies and representative democracies.

2. In addition to the concept of the organ of the State there looms up another concept, that of the bearer (*Träger*) of the Staatsgewalt. As the *Träger* of the Staatsgewalt we designate the person or group of persons entitled to [the exercise of] the Staatsgewalt in their own right.[26] The *Träger* of the Staatsgewalt may exercise his *Herrscherrechte* in person or they may be exercised in his name by some one else.

The amendment of the preceding definition of the concept "Träger der Staatsgewalt," by the words "the exercise of," not found in Meyer's original text, is justified and necessitated by the corrective note appended by Anschütz, the editor of the *Lehrbuch*. "As 'a right in one's own name'," Anschütz comments, "the Staatsgewalt can be-

[26] "2. Neben dem Begriff des Organs tritt noch ein weiterer Begriff, der des Trägers der Staatsgewalt auf. Als Träger der Staatsgewalt wird diejenige Person oder Personenmehrheit bezeichnet, welcher die Staatsgewalt als eigenes Recht zusteht . . ." (*Ibid.*, p. 19).

long only to the State as such. The Staatsgewalt is a will, the subject of which is the State. Hence the sentence of the text confuses subject and bearer (*Träger*) of the Staatsgewalt. Jellinek too . . . holds that the '*Träger* of the Staatsgewalt is the State and no one else.' Accordingly '*Träger*' and 'subject' of the Staatsgewalt would be identical. But the two concepts must be well distinguished. Subject of the Staatsgewalt is the State itself, *Träger* of the Staatsgewalt is the highest organ of the State, as for instance, in the monarchy the monarch. Even the *Träger* of the Staatsgewalt is an organ of the State, even the position of the *Träger* of the Staatsgewalt is not one of rulership over the State, but one partaking of the character of an organ of the State (*Organschaft im Staate*)." [27] With this correction we may return to the text of the *Lehrbuch* where Meyer continues:

The concept of "Träger der Staatsgewalt" is not a postulate of the so-called unity or indivisibility of the Staatsgewalt. For the unity of the Staatsgewalt does not preclude the exercise of the latter by a multitude of organs. . . . We are, nevertheless, compelled to posit the special concept of the *Träger* of the Staatsgewalt for the reason that under the provisions of a number of constitutions the legal possessors of the *Hoheitsrechte,* and the persons charged with the exercise of these rights, are not identical. In modern representative democracies, for instance, very often the assumption prevails that the people are the *Träger* of the Staatsgewalt, the President . . . and Parliament being considered as organs of the State. This conception is most clearly manifested in the United States. In constitutional monarchies, on the other hand, the monarch is frequently held to be the *Träger* of the Staatsgewalt, as for instance, in accordance with the French

[27] Meyer-Anschütz, p. 19, note 6a. In the rest of the note Anschütz gives a list of authorities supporting his views on this subject.

Constitution of 1814 and in the German constitutions. . . . The practical consequence of this conception is that the monarch assumes the possession of all prerogatives of which he has not been actually deprived and that the representative assembly is held to be possessed of only those rights with which it has been expressly endowed. The fundamental law of other constitutional monarchies is based upon the principle of popular Sovereignty, which considers the people as the source and origin of all authority and which contends that even the rights of the monarch are derived from the people. In this case the monarch appears to be an organ of the State, but not the *Träger* of the Staatsgewalt. . . .[28]

Meyer's concept of the *Träger* of the Staatsgewalt as an institution apart from or additional to that of the organs of the State, has been abandoned by Anschütz in his *Deutsches Staatsrecht* published in *Holtzendorff's Enzyklopädie der Rechtswissenschaft,* where he writes as follows:

The subject, i. e. the possessor of the Staatsgewalt, is in every sense the State itself. In the normal sovereign State, only the State as such, i. e. as a collective personality, is the *Souverän,* not the prince, not the people (which cannot be conceived as a juristic or personal unit separate and apart from its State . . .) nor a section of the people, such as the ruling class in aristocracies. The principle of the Sovereignty of the State . . . is valid everywhere and for every State, regardless of its constitutional structure (*Verfassungsform*). It applies equally to the absolute monarchy and to democracy, it is true for Russia as well as for Switzerland. For everywhere, the modern State, no matter how it is organized, is the commonwealth of the entire people and the Staatsgewalt is the will of this commonwealth.

[28] Meyer-Anschütz, pp. 20-21.

Of course Anschütz admits that there still are those who object to this doctrine on the ground that it ignores the differences of constitutional structure manifested in the absolute monarchy and the democratic State,—those who persist in speaking of the principle of monarchical or princely Sovereignty as prevailing in the absolute constitutional monarchy, and that of popular Sovereignty as manifesting itself in democracies and the so-called democratic constitutional monarchies of Belgium, Norway and others. To this Anschütz replies:

> But this objection, supported as it is by the phraseology of many constitutions, loses its force when we consider that the customary expressions of princely and popular Sovereignty are based upon a confusion of the concepts "supreme competence of the State," and "supreme competence in the State.". . . The phrases princely and popular Sovereignty do not contain a statement concerning the subject (possessor) of the Staatsgewalt, but in regard to the question of the supreme organ (*Organschaft*) in the State, i. e. in regard to the question, which person or group of persons is to be considered the bearer (*Träger*) of the Staatsgewalt. In this sense we speak of popular Sovereignty even when not the totality of all citizens directly, but a college elected by them, such as a parliament or representative assembly, exercises the Staatsgewalt as the deciding political factor of last instance.

Like every juristic person, every institution and corporation, the State as a legal personality must have physical persons who, individually or collectively, formulate, declare, and exercise its will, or as Anschütz expresses it, "who will and act in the name of the State." These physical or natural persons are called the magistracy or the organs of the State.

The term "bearer (*Träger*)" in contradistinction to "subject or possessor" of the Staatsgewalt, is defined by

Anschütz as "the person or number of persons who, completely representing the State, is or are therefore authorized and called upon to exercise in person the Staatsgewalt as a whole and in all its implied forms of manifestation, and who, in case of doubt, is or are entitled to the assumption of the sole authority to exercise the Staatsgewalt. The differentiation of the forms of State or the forms of the constitution, especially the juxtaposition of monarchy and democracy is based . . . on specific differences in the structure or construction of the *Träger* of the Staatsgewalt." [29]

It is clear then that according to Anschütz the bearer of the Staatsgewalt is nothing but an organ of the State, though an organ in an eminent sense. "Whoever in a particular State is to be considered as the *Träger* of the Staatsgewalt: monarch, parliament, or the totality of citizens entitled to vote," Anschütz concludes, "it is certain that between the *Träger* of the Staatsgewalt and the other organs of the State everywhere only a quantitative difference exists. Even the '*Träger*' of the Staatsgewalt is an organ of the State; the institution is not one of rulership over the State from without or above, but one partaking of the character of an organ within the State (*Organschaft im Staate*). . . ." [30]

The distinction implied in Meyer's definition of the bearer of the Staatsgewalt as a concept apart from that of the organs of the State, and that of Anschütz differentiating the organs of the State as "bearer of the Staatsgewalt" and "other organs of the State," must appear as a considerable advance over the older theory of Jellinek and others to the effect that the monarch is the sole bearer of the Staatsgewalt and that as

[29] Anschütz, Deutsches Staatsrecht, pp. 25-26.
[30] *Ibid.*, p. 25.

such he enjoys this position on the assumption of a prerogative possessed in his own right or by the "grace of God." It is also a marked improvement over the attempts on the part of Austin,[31] Dicey,[32] and Brown[33] to explain the unique position of the British Parliament, or rather, of the King in Parliament, by the ingenious device of "political Sovereignty" conceived as a counterpart or as a particular manifestation of "legal Sovereignty" i. e. Sovereignty as defined in the juristic conception of the State.

But however great an improvement this distinction may be over the earlier attempts to find a middle course between princely and popular Sovereignty on the one hand, and Sovereignty of the State as the supremacy of law in the juristic conception on the other, it has been completely surpassed by the much simpler and more logical definition of the concept of the organs of the State as offered by Hatschek in his work on the constitutional law of the German National Republic. Under the heading, "Concept of the organs of the State," Hatschek defines organs of the State in the wider sense as "all persons called upon to express the will of the State in a juristically important capacity or act (*welche einen rechtlich bedeutenden Willen des Staates abzugeben haben*). . . ."[34] Organs of the State in the general sense he divides into two groups, namely: immediate organs of the State, and those which are not imme-

[31] See the author's "Concepts of State, Sovereignty, and International Law . . .," chapter V.

[32] *Ibid.*

[33] *Ibid.*

[34] Hatschek, I, pp. 6-7. "Since the expression of this will is of binding consequence for the State, it appears as if the position of the organ of the State is identical with the institution of the representative in private law. . . . But the two differ greatly. Representation in private law assumes two persons, the one represented and the one representing,

diate organs, i. e. functionaries of the State (*Beamte*). These two groups he shows to differ in three respects. In the first place, the source and limitation of the authority of the immediate organs of the State is the Constitution itself, while the functionaries of the State derive their authority from ordinary legislation and official instructions by way of administrative ordinances, the latter not necessarily being *Rechtsnormen,* i. e. ordinances of a legislative character.[35] In the second place, the relation of the immediate organs among themselves is one of coordination, that of the State's functionaries is of necessity one of superiors and subordinates. According to Hatschek not every organ designated by the Constitution as a *Träger* of the Staatsgewalt is therefore *per ipsum factum* an immediate organ. "The National Chancellor, for instance," Hatschek holds, "is ordinarily a functionary, inasmuch as he is responsible for his actions to the Reichstag. Even in his determination of the *Direktion der Politik* he does not act as an immediate organ of the State. Only when he represents the National President during the latter's tem-

while the position of the organ of the State assumes only the one juristic person of the State which acts through its organs and which without these organs would be a legal *nil.* Representation in private law is a legal relation, but between the State and its organs no legal relations whatsoever exist, for . . . 'the commonwealth possesses in each organ a part of itself' (Gierke, Genossenschaftstheorie, p. 625). In the relation of the State and its organs there exists only one juristic unit, the legal personality of the State, willing and acting through its organs" (Section omitted from quotation given in text).

[35] It is upon this first difference that Hatschek bases the denial of the right on the part of the immediate organs of the State to delegate their authority except by virtue of legislation enacted by the vote required for constitutional amendments, and the assumption of this right by the functionaries of the State, without such legislation. See chapter XI, dealing with the ordinance power of the Reich, especially section treating of emergency or Cabinet legislation.

porary disablement, does the Chancellor appear as an immediate organ of the State."

In the third place it follows from the preceding differentiation of the two groups that the immediate organs of State exercise their authority in accordance with their own judgment, free from the control of any other instance except that of the law, while the discretionary act of the functionary, free though it may be from review by the ordinary and administrative courts, is still subject to the administrative control of the superior authority.

"Immediate organs of the State," Hatschek concludes, "are: The *Reichsvolk* acting in the popular election, the initiative, and referendum, the Reichstag, the National President, and the Reichsrat. . . ." [36]

[36] Hatschek, I, p. 7.

CHAPTER IV

The Question of the Legal Continuity of Empire and Republic

The Political Opinion of the Framers of the Constitution. It is on the basis of the juristic conception of the State that the final answer to the question of the legal continuity of the Republican Reich must be found. Nevertheless, the issue is, even for the political philosopher or the jurist, not without its political aspect. The object of jurisprudence is, after all, no more and no less than the abstraction by the method of formal logic, of the empirical data implied in the legally binding norms of the State. On the other hand, these data, representing the formal expression of the will of the body politic, are conceived by us as reflecting the prevailing opinions and the determining activities of the various factors constituting a politically organized society. A judgment in jurisprudence, therefore, in order to be correct, must be based, not upon so-called *a priori* propositions, but upon premises in harmony with political realities which, in turn, are determined by standards of political expedience sanctioned at a particular time or in a particular society, as for instance by way of the prevailing opinion of the simple majority in the so-called parliamentary system of political organization.

Applied to the issue before us, this means that the answer to the question of legal continuity of the Republican Reich must be the result not only of sound logical deduction, but that the premises upon which it rests must

be in accord with the facts involved in the actual change from the old to the new state of affairs. But these facts may be secured only by an open-minded consideration of the purposes and accomplishments of the *dramatis personae* and among them, above all, the framers of the new National Constitution. In the discussion before the Committee on the Constitution (*Verfassungsausschuss*) appointed by the National Assembly for the examination of the second Government draft, and in the debates before the National Assembly itself, the question of legal continuity centered around that of the official name to be chosen for the Republican Reich and that of the relation of the member States to the National Union. This fact alone suggests the political aspect of the debates in the two bodies concerned, for the question of the new name for the Reich and that of the relations of Reich and States was primarily a political one. On the one hand, it dealt with the political expediency of the choice of name considered in regard to its bearing upon the internal political situation and from the point of view of international relations; and on the other hand, with the establishment of relations between Reich and States, in harmony with the aspirations of the speakers either as States righters or as adherents to the idea of the National unitary State.

Nevertheless, some of the speakers, especially those who were jurists by calling or avocation, not infrequently injected the juristic element into the political discussion. A typical example of this mixture of the juristic and political is found in the remarks of Dr. Kahl, member of the German People's party and Professor of Ecclesiastical and Constitutional Law. Reporting to the first plenary session of the Committee on the Constitution on the phrase "Das Reich und seine Gliedstaaten," i. e. the Reich and its member States,[1] as the proposed heading for Section 1 dealing with

[1] Later replaced by the term "Reich und Länder."

the structure and tasks of the Reich, Professor Kahl spoke in part as follows:

. . . Concerning the question of the name "Deutsches Reich," or "German Republic," I should prefer the term "Deutsches Reich" rather than express in advance in the name the form of State (*Staatsform*). For, though the form of State is of infinite importance, it is not the main thing in the State. Hence the heading reads: "Das Reich und seine Gliedstaaten." This heading does not open up a new problem, but implies the settlement of a problem which in my estimation requires no further discussion. The heading excludes the unitary character of the Reich. For the unitary State knows no member States, it knows only one territory (*Staatsgebiet*) with one Sovereignty (Staatsgewalt). Within its territory and Sovereignty it has administrative districts (*Verwaltungsbezirke*) which may bear the most varied names or designations.

As a political ideal, as an historical aim, the unitary State will continue. As a problem of the present—and that is what we are dealing with—it is out of the question. Of course I have no doubt that in the course of a continued evolutionary development of our constitutional situation in Germany the German Reich will some day become a unitary State. For the time being, however, this aim cannot be achieved in practice. The Reich remains what it has been: a federation of States (*Staatenverbindung*). The heading referred to determines also the kind of federation, namely a Bundesstaat, not a Staatenbund.

Whether the new Reich (*das neu zuschaffende* Reich) is to be considered as the legal successor (*Rechtsnachfolger*) of the former German Reich, is a separate question which, however, on account of subsequent practical consequences cannot be passed over. There are undoubtedly strong connecting links of a juristic nature between the former and the newly created Reich or the Reich to be created anew. . . . Aside from the Constitution a wealth of legal material is transferred to and taken over by the new Reich, so that it may well be said that

strong an emphasis of the particularism of the States. In regard to legal continuity he said: "The question whether the new State is the legal successor (*Rechtsnachfolger*) of the former German Reich should in reality not even be raised. It (the Reich) is, beyond question, the same *Rechtssubjekt* with an altered constitution; the Reich as such continues to exist. . . ." [5]

Herr v. Preger criticized Kahl's rejection of legal continuity not so much because he (v. Preger) accepted such continuity as an end in itself, but rather as a means towards the furthering of the particularist aspirations of the States, and especially for the preservation of the reserved rights of Bavaria. In recapitulation of Kahl's statement he said:

> Professor Kahl draws a sharp line between the Reich, as it existed before the Revolution, and the Reich after the Revolution. He goes so far as to deny the legal continuity between the new and the old Reich, or at least to question their legal continuity. He furthermore says that the decision of the National Assembly is an act of sovereign legislation and that, when the sovereign Legislature has reached a decision, no later legislative enactment by the States would be required to let the new State [new Constitution] [6] come to life, but that this act of the National Assembly must be recognized by the individual States.

Herr v. Preger considered this theory as extremely questionable (*bedenklich*), and questionable it would appear to any one who, like v. Preger, persists not only in holding

[5] *Ibid.*, p. 24. The term *Rechtsnachfolge* is used in the present discussion in the meaning of legal continuity. Concerning the difference of legal succession and legal continuity in connection with the translation of *Rechtsnachfolge*, see notes 48-49 and corresponding text.

[6] v. Preger here misquotes Kahl who in this connection had used the term Constitution instead of State. See note 2 and corresponding text.

to the doctrine of the compactual origin of the old Empire, but who insists upon the preservation of the compactual relations of the States under the National Republic of 1918. Thus v. Preger continued:

Assuming that the Revolution had completely annihilated the constitution, it would follow that the treaties upon which the old National Constitution rested had once more ceased to be in force (*zu Recht zu bestehen*), and that the Reich and the individual States had disintegrated into their component parts. But this conclusion no one will accept. To the contrary, we must . . . maintain that the Revolution has not altered the Reich in its composition (*Bestand*), nor the relation between Reich and member States, but that this relation is still regulated by the provisions of the [old] Reichsverfassung until a new act of the National Assembly shall provide otherwise. In fact, the National Assembly has given expression to this opinion by way of the Transition Law [of March 4, 1919], in which it has stipulated that all those provisions of the [old] National Constitution, which do not conflict with the Provisional Constitution [of February 10, 1919], shall remain in force. So far there has been therefore no intention of effecting in principle a change in the relations of Reich and member States. This applies also to those provisions of the Reichsverfassung, which, in accordance with Article 78, Section 2, cannot be altered without the consent of the member States.[7] Of course the calling of a new National Constituent Assembly has established the fact that this new National Assembly is sovereign and that by virtue of its Sovereignty it is competent (*das Recht hat*) to give the German people a constitution according to its [the Assembly's] own discretion. But in addition to the National Assembly there are the assem-

[7] Article 78, Section 2, reads: "The provisions of the Constitution of the Reich, by which certain rights are secured to particular States of the Union in their relation to the whole, may be amended only with the consent of the States affected" (Constitution of 1871).

blies of the individual States. Having received their mandates from the people of the States, they are called upon to establish the State constitutions. Unless both parties hold to the relations between Reich and States as they have been established by the former Reichsverfassung, conflicts may result in this connection which . . . cannot be solved by a one-sided decision of the National Assembly. The limits of the competencies (*Rechte*) of the Nation are determined by the limitations of its power. The Bavarian Government therefore has been extremely grateful to the National Government and especially to the National President for the clear vision and the good will manifested in the proposed draft of the Constitution by their attempt to solve the question of the relations of the Reich and the individual States, and particularly that of the reserved rights of the South German States, not by way of coercion but through an amicable understanding. . . .[8]

As already suggested, and as demonstrated in the preceding quotation, v. Preger's position regarding the question of legal continuity is determined by reasons other than the primary desire to preserve the theoretical and practical unity of the Reich. But whether or not we accept his motivation as pertinent to the question at issue, the affirmation by the extreme States righter of the legal continuity between the Empire and the Republic is of vital importance from the point of view of political realities.

The following remarks of Dr. v. Delbrück, member of the German Nationalist party, are significant in this connection because of what they omit rather than what he said. Avoiding the confusing justaposition of the terms "old and new Reich," and "old and new State," indulged in by most of the other speakers, v. Delbrück explained the reasons which prompted his party to cooperate in the examination of a new constitution which in principle ap-

[8] Verf. Ber. und Prot., p. 24.

peared questionable. "My political friends and I myself," he remarked, "have put to ourselves the question whether or not the present draft offered a suitable basis for discussion. . . . We have considered whether it would not be possible to build up the new constitution on the basis of the old one. We have also thought of the advisability of submitting another draft . . . as for instance the Bredt draft.[9] But we concluded that such undertakings would only hinder the discussion." Dr. v. Delbrück's acceptance of legal continuity is implied in the following statement concerning the choice of name for the Republican Reich:

With regard to the question whether the German State shall in future bear the name "Deutsches Reich," I have this to say: The old traditional name "Reich" should under no circumstances be touched. There is current today a conception that everything which the old German Reich has brought us is miserly and wretched in comparison with the future. This view will disappear. The time will soon come when you will with pride remember the past, and when the world which even to-day is in a way worried about the power of the old Reich, will recognize its achievements. Let us take over into the future all that has been of value in the past, not as the firm of a bankrupt State, but as the firm of a State organization (*Staatswesens*) which perished in the course of an heroic struggle. I do not share the fear that the term "Reich," translated as "Empire," could harm us in our relations with other States. . . . The realization by the outside world that for this reason we changed our good old firm, would elicite only a feeling of extreme contempt. . . .[10]

[9] Entwurf einer Reichsverfassung. Hrsg. von Dr. J. V. Bredt. Berlin, 1919 (One of the private drafts of the Constitution. For a list of private drafts see Jellinek, p. 48; Triepel, Die Entwürfe zur neuen Reichsverfassung; and Bibliography).

[10] Verf. Ber. und Prot., p. 25. v. Delbrück's statement on this subject (Article 1) before the National Assembly is less clear and consistent.

The attitude of Dr. Beyerle, member of the Center party, and later of the Bavarian People's party, is revealed in one short sentence, to wit: "We are continuing the Reich; the problem here is that of a needed internal elaboration (*Aufbau*); I am therefore in favor of the retention of the old name." [11]

The discussion of the question was closed by a plea on the part of Herr Groeber, Centrist, to let realities prevail over the theoretical. "The relation of the Reich to the individual States," Groeber warned, "must not be treated here in too juristic a fashion, but should be conceived or handled (*erfasst*) politically. The welfare of the whole is implied also in the welfare of the individual States. It is not so much a case for theorists. Continuity of development is necessary in practice, but it need not be determined theoretically. With regard to the rest we run the risk of losing time without agreeing in substance." [12]

From the preceding quotations it must appear without doubt that according to the majority opinion of the Committee on the Constitution, determined by the expressions of the speakers cited, and by the subsequent vote of the Committee, the Revolution had not disestablished the legal continuity of the Reich as a State, but had merely altered the form, i. e. the type or mode of the organization and control of the body politic. To express this opinion in the terms of the definition of the State accepted in the author's *Concepts of State, Sovereignty, and International Law*, the majority of the members of the Committee held that neither

But while it suggests the fear on his part that the Republic as contemplated by the proposed Constitution would signify a break not only with the Constitution but also with the Reich of Bismarck, it justifies the interpretation that he favors continuity and such modification of the proposed Constitution as will maintain such continuity (See Heilfron, III, p. 367 ff.).

[11] Verf. Ber. und Prot., p. 25.

[12] *Ibid.*, p. 26.

the consciousness of the German people of the mutual desire for national union, nor the existence of a legally binding system of political control to ensure the realization of this desire, had disappeared. What had occurred was nothing more nor less than a change in the system of political control and, in harmony with this change, the installation of a different rule of conduct for the magistracy in the administration of the affairs of the Nation. It was the formulation in the terms of positive law and the *post factum* legalization of this change in the system of political control which the National Assembly was to effect, not the establishment or legalization of a new State.

The same may be said of the prevailing opinion of the National Assembly itself. During the discussion on the Preliminary Constitution of February 10, Preuss opened the debate by recalling the statement with which Heinrich von Gagern greeted the National Convention in St. Paul's Cathedral at Frankfurt in 1848. On that occasion v. Gagern said: "We want to create a constitution for Germany, for the whole Reich. The authority (*Beruf*) and competence for its creation is derived from the Sovereignty of the Nation. Germany wants to be united in one Reich, governed by the will of the people in cooperation with all its groups. . . . There may be doubt concerning many things, but concerning unity there is none. It is the demand of the whole Nation. . . ." [13] Preuss pointed out how the authority and competency thus claimed for the Convention of 1848, and consequently the Sovereignty of the Nation, had been denied by the dynasties who refused to accept the constitution created by the Frankfurt Convention. This resistance of the dynasties, he added, had now been removed by the fact of the Revolution. There

[13] Heilfron, I, p. 27.

could therefore be no doubt now about the authority of the National Assembly of 1919, built upon a democratic foundation and representing the sovereign will of the German people.[14]

As we see from the opening statement of Heinrich von Gagern to the Convention of 1848, the object at that time was a twofold one: first, the creation of a democratic constitution; and second, through this democratic constitution the establishment of national union. But as Preuss very fittingly remarked before the Assembly of 1919: "At that time the Reich was only a dream, the ideal picture of national unity. To-day we have the Reich. We have had it for decades. It has not been dissolved nor eliminated by recent events. Only its constitutional legal organization has collapsed and needs to be renewed. What the Revolution has created must be given legal order and basis by this high Assembly. The Reich as such, the totality of the German Nation . . ., is the firm possession which we take over into the new status."

In other words, Preuss held that it was not the German Nation constituting the Reich, i. e. the State itself, which had changed. The Revolution had not broken up the Reich into separate States, nor had it thrown the Nation into anarchy and chaos. As Preuss stated: "In spite of the inevitable disturbances and incidents of the troubles of recent days, the orderly conduct of business has on the whole been upheld. For this I believe we should on this occasion express our gratitude and appreciation to the forces of the Civil Service and the Army, who, without consideration of political opinion, placed themselves at the service of the fatherland."[15] Preuss here referred to the well known fact that the entire German Civil Service, without inter-

[14] *Ibid.*, pp. 27-28.
[15] *Ibid.*

ruption and without actual opposition, continued to conduct the business of the Government of the Socialist Republic and accepted in the interest of the Nation the new National Government of November 9 as its actual, if not legitimate, superior. That this was an entirely natural thing to expect and to do will appear from the consideration that the Emperor as the executive head of the National Government, following his enforced resignation, had actually withdrawn from the territory of the Reich and that the Emperor's last Chancellor had surrendered his office and authority to Herr Ebert and the Council of Commissioners as the new executive authorities of the Reich. As a matter of fact in his formal renunciation of the throne, signed by him on November 28, 1918, the Emperor had actually released all civil and military functionaries from their personal oath and requested them to cooperate with the new *de facto* Government in the interest of the Nation.[16]

From these facts the conclusion is inevitable that the Revolution did not bring upon the German Nation or the Reich political disorganization. It did not reduce the commonwealth from a body politic to a mere social group without legally binding norms of conduct for the individuals of the unit. The Revolution did not affect the actual existence or continuity of control, but the personnel of the rulers, i. e. the magistracy, and the method or manner in which actual control was exercised by the latter.

Referring to the armed resistance to the National Government of Majority Socialist complexion, offered at the time by the Labor and Soldiers' Councils and the "Spartakus Bund" in the industrial districts of the Ruhr and the lower Rhine, Herr Scheidemann, Majority Socialist and President of the National Ministry, warned the National Assembly on February 13, 1919, of the danger which

[16] Jellinek, Revolution und Reichsverfassung, p. 19.

this rebellion implied not only for the Republic but also for the Nation. "I shall tell you quite frankly," he stated, "that the young Republic is facing the gravest disturbance, if not its collapse. The Reich, the people, its victualization, its opportunity for work, all are most severely endangered, not by inexorable enemies [from without], but by compatriots, by Germans who, after the cessation of the war, accomplish what fate has fortunately spared our poor land, namely the destruction of our most valuable and important province, the Rhenish-Westphalian industrial district. The ground upon which we stand is shaking and may collapse in a very short time. Let us admit it frankly: it may collapse in a very short time unless we succeed in putting an end to the insanity and crime in the Ruhr district. . . ." [17] In this statement Herr Scheidemann clearly assumed the continuity of the Reich, which he now saw threatened by a civil strife that had nothing to do with the original change from Monarchy to Republic.

The question of legal continuity received considerable attention also in the debates in the National Assembly. Thus the first speaker on the subject, the Majority Socialist delegate Fischer, said: "We wish to build a new Germany upon the broad foundation of liberty, right, and justice, a new Reich which has hardly more than the name in common with the old (*expressions of doubt from the right*). The old Reich was built upon blood and iron, with the enforced exclusion of millions of the best Germans, and because it was built upon blood and force, it has collapsed in blood and force after an existence of hardly fifty years . . . (*expressions of opposition from the right, of approval from the left*). We Socialists, the strongest party of the new Reich have still another task. We must fill this new Germany with the social and socialist spirit, so that it may

[17] Heilfron, II, p. 11.

become what the socialist laborers have desired for decades . . . and for which they began the Revolution on November 9, namely the German Socialist Republic." [18]

Delegate Fischer here avowedly expressed the wishes of many of his political colleagues. But he realized that the draft of the Constitution subject to discussion in the Assembly was not the kind to hold out any hopes that the extreme socialist wishes would be fulfilled. As he himself said, "of this social spirit—it must be stated with regret—the new Constitution is not to receive as much as we and the German laboring man had rightly expected." [19] He objected to the term "Reich" as the name for the new Germany to be created. The term "Deutsches Reich," he said, "has not a good name among the other nations." Therefore "we Socialists shall request the use of the phrase 'Constitution of the German Republic' instead of 'Constitution of the German Reich'." [20]

The same request for the use of the term German Republic instead of German Reich was made by the Independent Socialist delegate Cohn. He called attention to the fact that the attempt made by Preuss to prove the continuity between the Reich of 1871 and that of 1919, and, as he (Cohn) asserted, between the Constitutions of 1871 and 1919, had been made also in the Committee on the Constitution and in the professional literature. He argued that the Revolution had ended the preceding condition of State existence and he objected to the statement attributed to Preuss and others, that the problem of the National Assembly was merely that of changing the Constitution (*Verfassungsänderung*).[21] The Assembly, so he held, was

[18] *Ibid.*, p. 123.

[19] *Ibid.*

[20] *Ibid.*

[21] In reply to Dr. Cohn, Preuss, repeating his former argument, said: "I must maintain the position taken by me in the *Verfassungsausschuss*

bound to terminate the connection with the old constitutional structure (*Verfassungswerk*). He concurred in Dr. Naumann's warning before the Committee on the Constitution against the continuation of the term "Reich" as the equivalent of the French and English "Empire," connoting imperialistic tendencies.[22]

But the Socialists' request was not heeded and the term Reich was adopted for the Republic in accordance with the majority opinion of the Assembly that it was not the Reich that had been changed, but the system or form of Government. It was this opinion to which Dr. David, Majority Socialist and National Minister, for instance, gave expression when he said: "The Constitution records a tremendous progress over the past. In it is laid down the greatest result of the Revolution, the republican form of State. . . ." [23]

The Juristic Opinion of the Commentators of the Constitution. A number of the German commentators on the Constitution of 1919 make the unqualified statement that the majority opinion of the legal authorities is in favor of the legal continuity of the Monarchical Empire and the Republican Reich.[24]

Continuity is accepted without argument or as a fact requiring no proof or defense, by such authorities as An-

and for which I have been criticized by Dr. Cohn, namely that we are concerned here with a change of the Constitution (*Verfassungsänderung*). Though this change is rather fundamental, it is after all no more than a change of the Constitution. I can positively not conceive of any other change, unless we assume that the German people as a Nation (*Staatsvolk*) has disappeared or completely perished and that a new people (*Staatsvolk*) is here created. Aside from such a disappearance and the coming into being of a new *Staatsvolk*, there can be . . . only changes of the Constitution. . ." (Heilfron, III, pp. 556-557).

[22] Heilfron, III, pp. 550-551.

[23] *Ibid.*, II, p. 221.

[24] Hatschek, I, p. 11; Arndt, p. 47.

schütz,[25] Arndt,[26] and Meissner.[27] Poetzsch bases his affirmation of continuity on the following reasoning: "It is not," he writes, "a question of a new creation of the Reich. The Reich is given only a different constitution. This presupposes that the Reich had already outgrown the league of monarchs (*Monarchenbund*) founded for eternity, but removed by revolution, and that it had by its own development secured an independent existence." [28]

Jellinek does not express himself very definitely on the subject, but he must apparently be included among those favoring continuity. Referring to the Preliminary Constitution of February 10, 1919, he says: "With the law concerning the preliminary authority of the Reich, the German Reich, after three months of 'dictatorship by the Proletariat,' after three months of the 'Räterepublik,' has once more become a constitutional State. The 10th of February, 1919, is the birthday of the democratic republic in the German Reich." [29] He points to Article 1 of the Transition Law of March 4, 1919, which stated that: "All previous laws and ordinances of the Reich remain for the time being in force, as far as they do not contravene this law or the Law Concerning the Preliminary Authority of the Reich [i. e. the Provisional Constitution] of February 10, 1919 . . . and all ordinances passed and promulgated by the Council of Commissioners [Council of Six] or the National Government. . . ." [30] Jellinek's statement that this Article covers also the Constitution of 1871 seems to be borne out by Article 178 of the Constitution of August 11, 1919, which specifically provides that: "The Constitution

[25] Anschütz, p. 26.
[26] Arndt, pp. 46-47.
[27] Meissner, p. 23.
[28] Poetzsch, p. 28.
[29] Jellinek, Revolution und Reichsverfassung, p. 37.
[30] *Ibid.*, pp. 37-38.

abrogating particular acts of legislation or particular ordinances of the Empire, but never did they abrogate *in toto* the body of law of the Monarchy. Under pressure from the Executive Council, chosen by the Labor and Soldiers' Councils of Berlin, the Council of Commissioners issued, on November 23, 1918, what purported to be an agreement between the two Councils for the provisional conduct of the affairs of the State and what Jellinek calls the first Constitution of the German Republic. This agreement starts out with the statement: "The Revolution has created a new *Staatsrecht*. For the period of transition the new legal status shall find expression in the following agreement between the Executive Council of the Labor and Soldiers' Councils of Berlin and the Council of Commissioners [Council of Six]." [36] The agreement provided for a division of power between the two Councils for the conduct of the official business of the Republic until a final regulation of the constitutional status of the Reich could be effected.

It seems safe then to assume that the term *Recht* as used by Giese must mean constitutional law. Admitting that in the unitary State the creation of a new "form of the State" does still permit "the identity of the personality of the State before and after the overthrow," Giese holds that this is not so in the case of federated States (Bundesstaaten), and especially not in the case of the German Reich. Insisting that the essence of the former German Bundesstaat was not merely the existence of its own State authority, but rather the identity of this authority with the total authority of the member States, Giese writes: "The formation of the National Government by the totality of the 'federated Governments' was an essential characteristic of the German Empire. Hence the disappearance of the

[36] Jellinek, *ibid.*, p. 21. For full text of agreement see chapter II, section: Labor and Soldiers' Councils.

Reichsregierung signifies the end of the former German Reich. . . ." [37]

Giese's argument is based upon two main premises. In the first place he deduces as a matter of principle the disappearance of the old State from the overthrow of the Constitution or from a change in the form of the State. The fact that this position is untenable will be demonstrated later on. In the second place he identifies the end of the Reich of 1871 as a State with the disappearance of the Constitution of 1871, because this constitution was supposed to have been created by agreement or treaty between the rulers of the States of the Empire. As Hatschek has pointed out, the popular idea that the Reich of 1871 was the result of a treaty between the princes of the member States had been discarded in the jurisprudence of Germany long before the days of the Revolution.[38] Furthermore, to take Giese literally, the creation of the Constitution of 1871 was, in the modern conception of public law, not the act of establishing the Empire, but merely the formulation of the fundamental law in accordance with which the Empire was to be governed. For the Empire was not a new State, but a body politic existing in legal continuity with the North German Confederation of 1866.[39]

The same two elements of confusion are found in the

[37] Giese, pp. 9-11.

[38] "The creation of a Bundesstaat is, like that of every State, a purely matter-of-fact process, incapable of juristic explanation, while the establishment of a Staatenbund is effected by treaty, i. e. by an act conceivable in the juristic sense. The purely matter-of-fact character of the creation of the Bundesstaat applies to the Reich of Bismarck as well as to the new [Republican] Reich. In this respect we should not permit our judgment to be influenced by the popular opinion that the German Reich originated from an alliance (Bund) of princes. . . ." (Hatschek, I, p. 54 ff.).

[39] See chapter I, section: The German Empire of 1871 and the Reform Acts of October, 1918.

argument advanced by Stier-Somlo in his attempt to disprove the continuity of the Republican Reich. Quoting from the Preamble of the Constitution of 1871, he finds that the monarchs of the various States concerned created "an eternal alliance called Deutsches Reich," [40] and that the existence of the Empire of 1871 depended upon the existence of the monarchs. With their disappearance the member States ceased to exist as monarchical States and the former twenty-two monarchical States cannot now as republics represent the old Reich. Hence the form of the State is dissolved (*Die Staatsform ist daher aufgelöst*). Stier-Somlo refers to the Reich as it existed from the days of the Revolution to the promulgation of the Constitution of August 11, 1919, as "a State coming into being, and of the Republican Reich since August 11, 1919, as the new State." This new State, he says, was created by the National Assembly representing the sovereign German people, "simultaneously with the creation of the Constitution." [41] The criticism of Giese's argument applies equally to the

[40] Stier-Somlo refers to Laband's theory that the formation on August 18, 1866, of the Protective and Defensive Alliance between Prussia and the other North-German States was not the creation of the North German Confederation, but only a promise of its creation. This alliance, so it was claimed by Laband, had existence only in international, not in constitutional law. It contained the promise of the establishment of the Confederation as a State in the provisions for the creation of a constitution in cooperation with a general parliament to be called for this purpose. A draft of the Constitution was laid before the Reichstag of the North German Confederation on February 24, 1871. It was accepted by the Reichstag with some modifications on April 16 of the same year. Ignoring the cooperation of the federal Reichstag in the formulation of the Constitution Laband and his school held the Confederation to be the result of a treaty in international law between the Governments of the States concerned. But, as Stier-Somlo admits, the majority of the German jurists recognized the State character of the North German Confederation, and the Constitution as a law binding upon the States (See Stier-Somlo, pp. 79-81; also Hatschek, I, p. 54 ff.).

[41] Stier-Somlo, pp. 17-18, 80-82.

reasoning of Stier-Somlo.[42] The latter's error of identifying the creation of the supposedly new State with the formulation of the new Constitution is to all practical purposes identical with Giese's claim that with the abolition of the Constitution of 1871 the State of 1871 is supposed to have disappeared.[43]

The most elaborate argument against continuity is offered by Wittmayer.[44] In addition to the reasons advanced by Giese, Stier-Somlo, and Kahl,[45] Wittmayer tries to prove that the failure to abrogate the whole legal system of the Monarchy is no proof of the continuity of this system. The new Republic, he argues, has simply accepted as its own that part of the old legal institutions and provisions which it did not specifically reject and abrogate. This, Wittmayer contends, applies also to the taking over by the new State of the old State's servants,[46] i. e. the hierarchy of functionaries and civil employees. But he excludes from this acceptance the old Constitution—even that part which was compatible with the new republican Provisional Constitution of February 10, and with the Transition Law of March 4. A constitution, he holds, must be rejected or accepted in its entirety, for only in its entirety is it truly representative of the principal characteristics of the State. Thus the monarchical Constitution, embodying the monarchical idea, implied a union created by the compact of the princes. The new Constitution signifies a republican State built upon the Sovereignty of the

[43] Kahl, who also denies continuity and who speaks of the Republic as the "third Reich" (Wittmayer, pp. 4, 6), seems to follow the argument of Giese and Stier-Somlo (See Wittmayer, pp. 1-19; Hatschek, I, p. 11).

[44] This phase will be considered at the end of the chapter.

[45] Wittmayer, pp. 1-19.

[46] See note 42.

[47] Wittmayer, pp. 8-9.

people. Hence the disappearance of the monarchical Constitution is more than a mere change of the form of Government, it is a change of the State itself.[47]

In the preceding discussion of the question of the legal continuity of the Republican Reich the German term "Rechtsnachfolge" has advisedly been rendered in English as "legal continuity," though a purely literal translation would demand as its English equivalent the term "legal succession." In the technical language of the jurist "Rechtsnachfolge" may mean either legal succession, or legal continuity, or both, its specific meaning in a particular case being established by the intent of the author as indicated from the context. In the statements of the legal authorities cited above, the German term *Rechtsnachfolge* (or *Rechtsnachfolger*) has, without a possibility of doubt, been used in the wider sense of legal continuity, without even so much as an attempt to call attention to the alternative. This failure to differentiate between continuity and succession is criticized by Wittmayer,[48] who distinguishes between "Fortsetzung" and "Identität des Reiches." Denying legal continuity, i. e. *Identität,* he admits the possibility of succession, i. e. *Fortsetzung,* but apparently even this only in a political sense. Speaking of discontinuity of the legal order assumed by him as the result of the Revolution, he writes:

> The political and juristic necessity of bridging the void of discontinuity results in an expression which, from the juristic point of view, is inaccurate or even subject to misunderstanding, if we inject the interpretation that the German Republic is solely (*lediglich*) the continuation (*Fortsetzung*) of the old German Reich. This interpretation is true probably in the

[47] *Ibid.*, p. 16.
[48] *Ibid.*, pp. 1-19.

world of political realities which centers around the national existence of the German people in the most general aspects of the State (*staatlichen Umrissen*), provided that under "Reichsfortsetzung" we mean legal succession (*Rechtsnachfolge*), but by no means the fatal continuity of the Reich itself (*die fatale Identität des Reiches selbst*). . . .[49]

Wittmayer's distinction between *Fortsetzung* and *Identität* has, however, no practical effect upon the issue here discussed inasmuch as the legal succession of the Republic has not been put in question.

Legal Continuity and Location of Sovereignty. From the analysis of the opinions here considered it appears that the answer to the question of the legal continuity of the Republic depends on two conditions or factors. In the first place, it depends upon the location of Sovereignty in the Monarchy of 1871 and in the Republic of 1918. This follows from the argument that the origin of the North German Confederation and of the Empire of 1871 is to be found in a compact of the princes, while the establishment of the Republic of 1918 is held to be the result of a creative act on the part of the sovereign German people. In the second place, legal continuity is viewed as depending upon the relation of the written constitution to the existence or creation of the State. This follows from the argument that the disappearance of the old and the establishment of a new constitution is or is not identical with the disappearance of the old and the establishment of the new State.

Considering first the relation of legal continuity to the location of Sovereignty in the State, we have seen that in the juristic conception of the State, Sovereignty is ascribed to the State itself, not to any one of its governing organs.

[49] *Ibid.*, pp. 14-15.

This is true whether we are concerned with Republic or Monarchy. Speaking of the location of Sovereignty, or rather Staatsgewalt, in the German Monarchy of 1871, Anschütz writes:

The subject, i. e. possessor of the Staatsgewalt, is in every sense the State itself. Considering the normal case of the sovereign State, the "sovereign" is only the State, as a collective personality, not the prince, nor the people, nor a part of the people as perhaps in the ruling class in aristocracies, for it is not possible to consider the people separate from its State as a legal and personal unit. This doctrine of State Sovereignty . . . is valid everywhere and for every State, regardless of its form of constitution [i. e. Government]. It is as irreproachable for the absolute monarchy as for democracy. . . . For everywhere . . . the modern State is the commonwealth of the entire people and the Staatsgewalt the will of this commonwealth. Against this conception concerning the subject of Sovereignty (more correctly, of the Staatsgewalt) the objection is raised that the generalization . . . of the difference of government is not permissible, that in the absolute monarchy and in most constitutional monarchies the principle of the Sovereignty of the monarch or prince prevails, and in democracies and democratic constitutional monarchies, such as Belgium, and Norway, the principle of the Sovereignty of the people. This objection, supported by the phraseology of many written constitutions loses its validity if we consider that the usual expressions princely or popular Sovereignty are the result of a confusion of the concept "supreme power of the State" and "supreme power in the State." The terms Sovereignty of the prince or people do not signify expressions concerning the subject of the Staatsgewalt, but concerning the question of the supreme organ of the State, i. e. concerning the question, which person or body of persons must be considered "als Träger der Staatsgewalt," i. e. as exercising Sovereignty. In this meaning one usually speaks of popular Sovereignty not when the totality of all State citizens directly, but when a col-

lege elected by them, i. e. a parliament, (*eine Volksvertretung*), exercises the Staatsgewalt and constitutes the decisive political factor of the last instance.[50]

The same view concerning the location of Sovereignty is applicable also in the constitutional jurisprudence of the Republic. Thus it is stated in Meyer-Anschütz, *Lehrbuch*:

Sovereignty signifies the quality of the State as a supreme ruling commonwealth (*Gemeinwesen*). . . . It manifests itself [in the constitutional sense] by the superiority of the State over all persons or personal unions within its territory. . . .[51] The supreme ruling authority in the State is called Staatsgewalt (in the subjective sense). It finds expression in those organs which rank above all others—(*welche allen andern übergeordnet sind*) and thus exercise supreme ruling rights in the State. But the existence of the Staatsgewalt does not depend on the existence of the specific organs in which it is incorporated. The individual physical person representing the Staatsgewalt may disappear and be replaced by another. The entire organization may suffer a complete change. A republican constitution may be replaced by a monarchical one and a republican constitution may supplant one of a monarchical character. But the supreme ruling authority in the State always remains.[52]

We must accept, then, as correct the theory that according to German constitutional jurisprudence Sovereignty or Staatsgewalt is vested neither in the monarch nor in the people as a mere total of unorganized individuals, but in the State itself, i. e. the people as a politically organized unit. This being so, the assumed creation of the North

[50] Anschütz, Deutsches Staatsrecht, p. 25.

[51] Meyer-Anschütz, p. 24.

[52] *Ibid.*, p. 18. Concerning Hatschek's view on this subject see note 55 and corresponding text.

German Confederation and of the Empire by a compact of the sovereign princes is to be discarded as a legal theory and cannot therefore be adduced in the argument against the legal continuity of the National Republic. Hence the conclusion is inevitable that there has been no change in the location of Sovereignty in the transition from the German monarchical to the republican form of State. . . . The legal continuity of the Republic can therefore not be questioned from the point of view of a change from Monarchy to Republic.

It is true, however, that the Republican Constitution does formally ascribe Sovereignty, or rather Staatsgewalt, to the people. In its Preamble, for instance, it is stated that: "The German People, united as a Nation,[53] and inspired by the determination to renew and strengthen its commonwealth (Reich) in liberty and justice . . ., has created for itself the following Constitution." In Article 1 we read that: "The German Reich is a Republic," and that "the Staatsgewalt emanates from the people."

But be that as it may, the assertion of popular Sovereignty in the Preamble, and its elaboration in Article 1, to the effect that the Reich is a Republic in which the Staatsgewalt emanates from the people, are not as such statements of the republican legal conceptions of State and Sovereignty. They are rather expressions of the fundamental character and actual organization of the Government of the republican State. They are the public declaration that in the Republican Reich the Staatsgewalt will be exercised not only in accordance with a constitution adopted by popular will and consent, but also by popularly appointed functionaries rather than by hereditary princes.[54]

[53] Concerning the translation of the term "Stämme" as groups or otherwise see chapter V, note 10 and corresponding text.

[54] The Preamble to the Constitution contains another equally vital idea, namely that of the unity of the Reich expressed in the phrase,

Referring to the erroneous theory of the creation of the Reich of Bismarck by compact, Hatschek, for instance, declares that "equally erroneous is the conception that the people, by way of a *pouvoir constituant,* i. e. by a juristic authority, has given itself the present National Constitution." And this "despite the fact that the Constitution in its Preamble tries to make us believe so." Of the phrases princely compact and popular Sovereignty he says that "these are only juristic embellishments of the fact that the new Reich, like the old, is founded by the force of realities (*Tatsachen*). . . ." Of those "who see in these juristic phrases more than juristic glitter," he says that they "may find themselves confronted by the embarrassing necessity of considering the juristic founding act of 1919 a different one from that of 1866, and the new Reich a different one from the old Reich of Bismarck." He concludes that "having demonstrated the error of such views we need not consider as correct the premises upon which they rest. . . ." [55]

Hence the term "German people," as used in the Preamble and in Article 1, does not signify the mere total of individual Germans in a numerical sense, but the German people, conscious of their membership in the German Nation, and united in the determination to enforce its will upon the individual members of the body politic. The Republican Constitution, created by them as the expression

"The German people united as a Nation . . . has created for itself this Constitution." This, too, is not a juristic formulation of the status of the Reich in relation to its groups, but rather an assertion of a political principle, namely that the Constitution here created is the singular expression of the will of the united German people and not the combined expression of the particular wills of the component States. These two ideas represent the leading aspect of the change from the old to the new system and the rest of the Constitution may be viewed as the attempt to give to these political axioms legal sanction and form.

[55] Hatschek, I, pp. 56-57.

of this will, is not identical with the creation of their union, but rather the manifestation of the political will of the Nation expressed in the form of law. This brings us to the consideration of the question of the dependence of the legal continuity of the Republic upon the relation of the written constitution to the existence of the State.

Legal Continuity and Relation of Constitution to the Existence of the State. The simplest and most fitting definition of the State is that of a society of human beings politically organized. Society becomes politically organized when it establishes a system of political and legal control, however primitive or complicated this may be, for the realization and enforcement of the general interests which form the basis for their political union. The essential and universal elements in the State then are the presence of certain common interests in the group, and the existence of a system of legal control by the group over the individual for the attainment of these interests. The content of these general interests, and the methods of control, vary in different political societies. But variety of interests and of the method of control constitute only the individual and formal aspect of the State. From these consideration it would seem to follow that the State comes into existence with the actual establishment of some sort of legally binding control over the individual for the effectuation of the general interests of the group. It is the establishment, in however primitive a form, of this legally binding system of control which is identical with the actual, as differentiated from the written constitution, and which effects the transformation of the purely social unit into a body politic or State.[56]

[56] Distinguishing between the first or actual, and a later or formal (written), Constitution of the State, Malberg writes: "De tout ce qui précède, il ressort finalement que l'État doit avant tout son existence au fait qu'il possède une Constitution. Si en effet l'organisation de la communauté nationale est le fait primordial en vertu duquel elle se

Speaking of the constitution as a formal or written instrument regulating the method of such control, Willoughby says: "To the historian it may be convenient to date the origin of a new State from the adoption of a constitution, as for example, to date the birth of the United States from 1789; but, to the jurist, the Constitution must be viewed as a Law,—as the product of the legislative will of a State already in existence, and as providing an outline for its governmental machinery. . . ." [57] Applying this statement to the question of the legal continuity of the German Republic we must say that the change from the monarchical to a republican constitution does not necessitate the assumption of the birth of a new German State on August 11, 1919. The usurpation of the National Government by Herr Ebert and the Council of Commissioners, the assumption of the Staatsgewalt by the Labor and Soldiers' Councils of Berlin, the calling of a National Constituent Assembly, the establishment of a Provisional Constitution of February 10, 1919, and the enactment of the Transitional Law of March 4, constitute only an accidental number of progressive moves or steps in the direction of the final formulation of the constitutional system. It is in

trouve érigée en un État il faut en déduire que la naissance de l'État coincide avec l'établissement de sa première Constitution, écrite ou non, c'est-à-dire avec l'apparition du statut qui pour la première fois a donné à la collectivité des organes assurant l'unité de sa volonté et faisant d'elle une personne étatique. Assurément cette Constitution génératrice de l'État pourra au cours des temps grandement varier, sans que la personnalité de la communauté étatisée s'en trouve aucunement modifiée. Sous ce rapport, l'État est indépendant des formes successives de gouvernement qui lui donnent ses Constitutions . . .: la détermination constitutionnelle des organes variables qui auront le pouvoir de vouloir pour la communauté unifiée, n'a point d'influence sur la continuité et l'identité de la personne État. . . . (Malberg, vol. I, p. 65).

[57] Fundamental Concepts of Public Law, p. 172. See also Hatschek, I, pp. 29-31; Anschütz, Deutsches Staatsrecht, p. 26.

the light of this realization that we will be able to do justice to the fine distinction implied in Jellinek's assertion that "with the promulgation of the Provisional Constitution of February 10, Germany, after three months of dictatorship by the proletarian Councils, has once more become a constitutional State and that therefore, the 10th of February 1919 is the birthday of the democratic Republic within the German Reich." [58]

But there still remains the question as to whether the method by which a constitution is changed or replaced by another, affects the existence and continuity of the State. Where the change has taken place by legal methods, i. e. in accordance with the provisions of the old constitution, the continuity of the State cannot, of course, be questioned. Doubt as to the continuity of the State is due to arise where the old constitution did not contain any provisions for a change or amendment and where consequently the change in the government can be effected only by extra-legal means. Doubt may arise particularly where the old constitution contained specific provisions for amendment, but where a change has taken place in violation of these provisions, i. e. by illegal methods.

As far as the surrender of the Chancellorship and the monarchical Government by Max von Baden, and the assumption of this office and the formation of the revolutionary Government by Herr Ebert are concerned it has been shown that both parties intended to effect this change by constitutional methods. Nevertheless, the change in question actually was accomplished not by legal but by revolutionary means. Whether, juristically speaking, we shall call these methods extra-legal or illegal, depends entirely upon the point of view from which the political situation is judged. The old monarchical Constitution provided

[58] Jellinek, Revolution und Reichsverfassung, p. 37.

for its own amendment by way of ordinary legislation. It had on several occasions been amended and changes in the system of government had thus been effected in a legal manner. The last occasion of this kind was that of the introduction of parliamentary government by the Reform Acts of October 1918. If we take the position that, because the Constitution of 1871 did contain a provision for amendation this method should under all circumstances have been followed, then the manner in which the change from monarchical to socialist government was brought about must be called illegal. If, however, we hold that the manner of amendment of the Constitution prescribed was totally inadequate and impossible of application in consideration of the emergency demands of the hour, then we may be justified in speaking of the change not as illegal but extra-legal.

From the point of view of the juristic conception of the State, it is, of course, consistent to demand that all State action, i. e. all action of the State's governing organs or agents, be strictly within the legal norms of the constitution. However, the occasion may arise when the insistence upon the literal observance of the legal provisions may have the practical effect of frustrating a strong popular demand for an essential change in the machinery, method, or personnel of the government. Assuming that in such a case the popular demand for a change is realized in an extra-legal or even illegal manner, we certainly must admit that the change is not aimed at the existence of a system of control, i. e. the existence of a government as such, but rather at the manner in which the government is at the time conducted, or at the individuals forming the governing bodies. In other words, the change is not aimed at, and cannot be said to affect the existence of the State as the Nation, conscious of its political union and desirous of the continuation of this union.

A technically illegal removal of these governing agents, and a formally illegal change of the government by way of revolution, must in such a case be considered as logical from the point of view of practical realities and must, even under the juristic conception of State be judged compatible with the State's continued existence. To claim that every illegal change of the constitution, effecting a corresponding change in government, terminates the existing State would, as Willoughby states, mean that: "With the demise of the older Sovereignty, all existing legal rights and duties, public and private, would have to be regarded as destroyed, because the legal basis upon which they had rested would have been removed, and they would then have to be conceived as impliedly recreated by the new Sovereignty. It seems simpler and sufficiently logical to regard the original State as maintaining a continued existence and as having merely given to itself, by an original and direct constitutive act, a new governmental organization." [59]

As applied to the case of Germany's change of government by revolution and to the creation of a new constitution by the National Assembly, it seems logical to state that under the circumstances the only way of removing the princely rulers of the German States and of deposing the Emperor as the ruler of the Reich, was that of revolution. To have effected such a removal by the legal method of constitutional amendment by National legislation was eminently impossible at the time. Hence the replacement of the monarchical form of government by that of the Republic was not intended as, and not accompanied by the cessation of the old and the birth of a new State. We must therefore accept and insist upon the legal continuity of the Empire of 1871 and the Republican Reich of 1918.

[59] Willoughby, Fundamental Concepts, p. 182.

PART II

RELATIONS OF REICH AND LÄNDER

CHAPTER V

Division of Competencies between Reich and Länder

Stämme, Staaten, Länder. The Preamble to the Republican National Constitution speaks of the German People "einig in seinen Stämmen." Literally speaking the term "Stämme" should of course be translated in English as "tribes," as it has actually been rendered in the English text of the Constitution, attached to Oppenheimer's *The Constitution of the German Republic.*[1] But the English term tribes connotes a primitive condition or status foreign to the German expression and is therefore unacceptable. Equally impossible is the translation of the phrase of the Preamble offered in Gollomb's English rendering of Brunet's work on the German Constitution,[2] namely: "The German People united in all their branches." The term branches, especially when fortified by the word "all," which is absent in the German original, implies the totality of the racial divisions constituting what is known as the German people, including those remaining outside of the German body politic, i. e. the German Reich. The phrase "united in every respect," adopted by MacBain and Rogers,[3] is too indefinite and colorless.

The difficulty involved can be eliminated only by the establishment of the correct meaning of the phrase of the Preamble as it has been manifested in the interpretation given by the framers of the Constitution. Generally speaking the term Stämme is in its effect identical with the term

[1] Oppenheimer, The Constitution of the German Republic, 1923.

[2] Brunet, The New German Constitution . . . tr. . . . by Joseph Gollomb, 1922.

[3] McBain and Rogers, The New Constitutions of Europe, 1922.

Länder. There is, however, this difference: while the term Länder denotes actual division of the German Reich into a number of component commonwealths, the term Stämme connotes the historical or racial justification for the existence of this division. It was apparently on the basis of this differentiation that the phrase, "geeint in seinen Stämmen," was introduced into the Constitution upon the motion offered in the *Staatenausschuss* by Dr. v. Preger, ambassador and representative of Bavaria.[4] On the other hand, when later before the *Verfassungsausschuss* (Committee on the Constitution) the suggestion was made to drop the phrase altogether, it was patently on the basis of the practical identity of the terms that v. Preger, ever mindful of the particularist aspirations of the Länder, said: "Do you not wish to state in the Preamble 'Das deutsche Volk geeint in seinen Ländern'? I make this suggestion in order to give expression in the Preamble to the federative character of the Reich, recognized by you in the Constitution and clearly defined by you in the following provisions. The expression 'Land' is clear. The term 'Stamm' does not appear anywhere in the entire Constitution." [5] However, the Preamble as adopted by the *Verfassungsausschuss* retained the phrase, "Das deutsche Volk, einig in seinen Stämmen." The most interesting fact in this connection was the admission on the part of both the advocates and the opponents of the phrase that the "particular formulation was unimportant;[6] the only thing which

[4] See statement by Preuss on the occasion of the second reading of the constitutional draft in the *Verfassungsausschuss* (Verf. Ber. und Prot., p. 492).

[5] *Ibid.*

[6] ". . . I am of the opinion that we should retain the general introduction—the phraseology is unimportant—so that the purpose of the Constitution, which is in itself non-juristic, shall find expression" (Representative Katzenstein, Verf. Ber. und Prot., p. 492).

mattered was the fact that the entire German people be inspired by the will to perform these tasks [the tasks mentioned in the Preamble]." [7]

The non-juristic or political purpose of this phrase was made clear beyond doubt in the debates on the Preamble in the National Assembly and especially in the statement of Preuss. In the motivation of the draft of the Constitution submitted, Preuss, referring to the Preamble, said: "One may not attach great importance to formulas . . . and one may thus hastily pass by the formula which introduces the draft of the Constitution, i. e. the so-called Preamble. . . . But this Preamble gains its importance in contrast to the Preamble of the former National Constitution.[8] It is not in an alliance of princes, nor a compact between the member States, that the new Constitution originates, but in the self-organization of the German people in its entirety. . ." [9]

In other words, what the phrase, "Das deutsche Volk, einig in seinen Stämmen . . ., hat sich diese Verfassung gegeben," means to convey is that the National Republican Constitution is not the product of the consent of the States constituting the Reich, but the creation of the German people conceived as a national political unit. In the constitutional provisions dealing with the relations of the States and the Reich, the framers of the Constitution had, of

[7] "The words, 'geeint in seinen Stämmen' may be dropped. What matters is the expression of the fact that the entire German people, 'also in allen seinen Stämmen,' be inspired by the will to perform these tasks" (Spahn, *ibid.*, p. 494).

[8] The Preamble to the Constitution of 1871 reads: "His Majesty the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria . . ., [and the other German princes] conclude an eternal alliance for the protection of the territory of the Confederation and the rights of the same as well as for the promotion of the welfare of the German people. This Confederation shall bear the name German Empire, and shall have the following Constitution:"

[9] Heilfron, II, pp. 35-36.

course, to acknowledge the division of the Reich into a number of commonwealths, but in the Preamble to that Constitution these same men and women announced that the terms of the relations of States and Reich were to be those of the whole German people visioned as a body politic, i. e. as a single State. The nearest and simplest English version of the German phrase "Das deutsche Volk, einig in seinen Stämmen . . ., hat sich diese Verfassung gegeben," would therefore be this: "The German people, united as a Nation . . ., has given itself this Constitution." It is this version which will be adopted for the purposes of the present study.[10] But while the Preamble to the Republican Constitution speaks of "the German people, einig in seinen Stämmen . . .," Article 2 of the Constitution states that "the territory of the Reich consists of the territories of the German Länder. . . ." The corresponding article of the Imperial Constitution of 1871 said that "the federal territory consists of the States (Staaten) Prussia . . ., Bavaria, Saxony . . ., [etc.]."[11] It is only logical to assume that the difference in the use of the terms "Länder" in the Republican, and "Staaten" in the Imperial Constitution is supposed to signify a difference in the status of the component parts of the Reich under the constitutions of the Monarchy and the Republic.

In its program for the elections to the National Assembly the *Spartakus Bund* had demanded for the Republican Reich the status of a unitary State and the reduction of the

[10] In French translations the phrase has been rendered as "le peuple allemand, uni dans [or en] ses races. . . ." (H. N. de Prailauné, L'Unitarisme et le fédéralisme dans la constitution allemande, 1922; Brunet, La Constitution allemande du 11 août 1919).

[11] "Das Bundesgebiet besteht aus den Staaten Preussen . . ., Bayern, Sachsen, Württemberg, Baden, [etc.]" (Art. 1).

Länder to the position of mere administrative units.[12] The two drafts for the proposed new constitution, prepared at the request of the Socialist Government by Preuss, went a long way towards the realization of such extreme demands. On the other hand, the two Government drafts prepared successively as a result of the criticism of the *Staatenkonferenz* and its two committees and the revision by the *Staatenausschuss* were not only free from the unitary tendencies of the earlier Preuss drafts, but actually introduced provisions favoring the extreme particularist aspirations of the advocates of States rights.[13] It was with these strongly particularist provisions that the second Government draft was submitted to the National Assembly and by the latter for revision to the *Verfassungsausschuss* appointed from the membership of the Assembly.

The choice of the term States (Staaten) or Länder for the commonwealths of the Reich was intimately connected with the selection of the name for the National Republic. Reference has already been made to the debates on this subject in connection with the question of the legal continuity of the Republic.[14] On that occasion it was pointed out that the heading, "Das Reich und seine Gliedstaaten," was interpreted to preclude the unitary character of the Reich inasmuch as a unitary State could not be said to consist of *Gliedstaaten,* i. e. member States.[15] In this negative interpretation, the term *Gliedstaaten* was accepted as a compromise even by Preuss, the father of the two constitutional drafts attempting to realize the idea of the unitary State. Speaking before the *Verfassungsausschuss* in con-

[12] Section 1 of the political and social part of the program demanded "the abolition of all member States (*Einzelstaaten*) and the establishment of the unitary Socialist . . . Republic" (Heilfron I, 148).

[13] See chapter II, section: Preliminary drafts of the Constitution.

[14] Chapter IV.

[15] Statement made by Kahl (Verf. Ber. und Prot., p. 23).

nection with the first reading on the article in question, Preuss said: ". . . The expression *Gliedstaaten* corresponds . . . exactly to the organic relation between the whole and its members. The Reich is the *Gesamtstaat* and the individual States are the *Gliedstaaten*." [16] But the very reason adduced by Preuss for his acceptance of the term *Gliedstaaten* proved to be the cause for the rejection of the compromise term by other members of the *Verfassungsausschuss*. Representative Koch, for instance, opposed the term *Gliedstaaten* because "it signifies only a quality of the States, i. e. their position in regard to the Reich, and because the term is not a natural but an artificial expression." He suggested the term Länder because "it appears in the constitutional literature in such combinations as *Landeshoheit, Landesgesetzgebung, Landesverfassung, Landtag,* and others." [17] Without much further debate the motion of Representative Koch was accepted and the term, "Das Reich und seine Länder," was adopted in the first reading.

On the occasion of the second reading the States righters made a serious attempt to reverse the former decision of the Committee. Referring to the heading as adopted, Dr. Kahl stated: ". . . We must say, 'Das Reich und seine Staaten.' The difference . . . is not of merely literary but of great practical importance. The term Länder could be defended from the constitutional point of view only if the Reich were a unitary State, for in that case the Länder would about correspond to provinces. But we have rejected the unitary State. The Constitution concedes to

[16] Verf. Ber. und Prot., p. 24. "I am opposed to the use of the term Länder instead of *Gliedstaaten*. The term *Gliedstaaten* expresses in a fortunate manner the organic connection of the parts of the State organization" (Mausbach, *ibid.*, p. 26).

[17] *Ibid.*, p. 25.

the individual States, which rightly claim the character of States, their territorial Sovereignty (*Gebietshoheit*). This status is not only beclouded but even denied by the expression 'Länder.' A 'Land' never was an independent State. It is true that this popular term 'Land' has been introduced in such combinations as *Landesherr, Landesgrenze.* But that is due to the historical fact that in the earliest times the princes were not sovereign (independent), but held their 'Länder' as liens, and that the term 'Staaten' was applied to these territories only very late. We must take heed that in the Constitution the concepts are clearly defined. This does not exclude the use of the term Land in such composits as 'Landtag' and others, but in that case the term does not signify the constitutional character of the body in question." [18] Dr. Kahl's argument was controverted by Representatives Quark and Koch. Both held that the term Länder did in no way becloud the situation. "The term 'Land'," Herr Koch stated, "is not unclear, it simply affirms a new constitutional conception. . . . The newly proposed expression 'Staat' is dubious. We should create an unclear situation if we should speak of the Reich, which is a State, as consisting of States." [19] The Committee's decision in its second reading was once more in favor of the phrase, "Das Reich und seine Länder," an expression which, it was agreed, precluded the unitary character of the Reich, but beyond this admission, failed to give general satisfaction with regard to the constitutional status of the commonwealths constituting the Reich.

The draft subject to the first reading in the National Assembly was identical with the one discussed by the *Ver-*

[18] *Ibid.*, p. 401. The same view was expressed by the Prussian Undersecretary Dr. Freund who protested against the meaningless term 'Land' in "the name of all the States, not 'Länder'" (*Ibid.*).

[19] *Ibid.*

fassungsausschuss. It contained the phrase, "Das Reich und seine Gliedstaaten." Heilfron's edition of the debates of the first reading does not reveal any discussion on the question whether or not the term *Gliedstaaten* should be replaced by that of Länder. In the consideration of the division of competencies between Reich and member States the speakers refer to the member units as "Gliedstaaten" or "Bundesstaaten." [20] After the first reading the draft was, by a motion of March 4, referred to a committee of twenty-eight, i. e. the Committee on the Constitution (*Verfassungsausschuss*),[21] which, as we have seen, voted a change from the term "Gliedstaaten" to "Länder."

On July 2, Dr. Kahl, reporting to the National Assembly on the Labors of the Committee on the Constitution, justified the Committee's substitution of the term "Länder" for "Gliedstaaten" as follows:

> Gentlemen, . . . the heading of the first section on which I have to report, reads "Reich und Länder." The Government draft had chosen the heading, "Das Reich und seine Gliedstaaten," an expression much used in constitutional science to signify the organic connection of the parts and the whole. But the majority of the Committee placed less weight upon the juristic formulation and, in preference to the more abstract term "Staat," selected the expression "Land" which for some time has been connected with constitutional organizations and which has found entrance into German popular and poetic language. The heading, "Reich und Länder," using the latter term in the meaning of *Einzelstaaten,* contains therefore from the point of view of constitutional law the assertion that the State organism to be created by this Constitution does not represent a unitary State, but as heretofore, a combination of States (*Staatenverbindung*). . . . The creation of the German

[20] Heilfron, II, pp. 42, 129, 141, 187, 201, 206; III, p. 123.
[21] *Ibid.*, II, p. 230.

unitary State has from various sources and on various occasions been designated as the ultimate political aim. But there was no difference of opinion concerning the fact that at present, i. e. under the existing condition of political realities, the structure of the *Staatenverbindung* must be retained. To define the character of the legal nature of this State combination was, however, not considered to be the business of the legislator. There can therefore be no question that the new Reich is a Bundesstaat. . . .[22]

The draft subject to the second reading in the National Assembly was that amended by the *Verfassungsausschuss,* offering the phrase in question in the form, "Reich und Länder." Apparently without any discussion of the issue involved, the consideration of the relations of the States and the National Commonwealth was carried on in the terms, "Bundes-" and "Einzelstaaten," [23] or in the terms, "Länder" and "Einzelstaaten," used interchangeably.[24] As finally accepted by the National Assembly, the heading reads "Reich und Länder."

National or State Sovereignty? In the Preamble to the Constitution of 1871 the Reich is described as "an eternal alliance for the protection of the territory of the Confederation," concluded by the princes of the member States and the Free Cities. Aside from this the Constitution of 1871 does not contain any general statement concerning the source and the exercise of the Staatsgewalt of the kind found in Articles 1 and 5 of the Constitution of 1919. The relations between the Reich and the States in the Empire were regulated in particulars, as for instance by defining and enumerating the subjects coming under the

[22] *Ibid.*, III, p. 539.
[23] Heilfron, V, p. 23 ff., pp. 244, 350, 504, 517; VI, p. 90.
[24] *Ibid.*, III, p. 534 ff.; VI, p. 440 ff.

exclusive or concurrent right of legislation of Reich or States respectively. It was left to the jurist or political philosopher to interpret these relations in the general terms of Staatenbund or Bundesstaat, i. e. of Staatsgewalt of the Reich and Staatsgewalt of the Länder. Those attempting such a definition had the choice of doing so on the basis of these specific provisions for the division of power between Reich and States, or on the basis of the supposed origin of the Reich in the alleged compact of the princely rulers of the member States, or on the basis of both.

Reference has been made above to the fact that Anschütz does not accept independence (*Unabhängigkeit*), i. e. Sovereignty in the meaning of international law, as an essential characteristic of the State and as a prerequisite of the Staatsgewalt.[25] Attention was called in this connection to the significance of Anschütz's position for the States rights issue in the juristic and political controversies arising over this subject from the interpretation of the Republican Constitution. In substantiation of this doctrine Anschütz refers to what he calls the existence of the States in the Empire, and from this existence he attempts to prove the State character and the possession of Staatsgewalt by the Länder under the Republican Constitution. Anschütz does not, of course, claim that the States under the Empire of 1871 were as independent as they had been from 1806-1866; nor does he deny that under the Constitution of 1871, or even under that of 1867, their right of self-determination in their relation to other States found its limitation in the superior Sovereignty of the North German Confederation and the Empire. But according to Anschütz this limitation of their self-determination in international relations was no derogation of their State

[25] Chapter III, section: Staatsgewalt and Souveränetät.

character, for in his opinion, independence (*Unabhängigkeit*) is not an essential quality of the Staatsgewalt nor of the State itself, i. e. of the State conceived as sovereign in constitutional law. "What lifts the State above the community," Anschütz writes, "is not Souveränetät (independence from the outside and from above), but the originality, the spontaneity of its ruling power or competence (*Herrschaftsgewalt*)." [26] While the States of the North German Confederation and of the Empire did not possess independence they did possess Staatsgewalt, i. e., the power and capacity of ruling, and of enforcing their commands. And, as Anschütz insists, "they possessed this power in their own right, they did not bear it, figuratively speaking, as a lien from the Reich or from any one else." [27]

The logical deduction from these premises would be that in the Empire the Staatsgewalt was in the possession of the individual States and that the Staatsgewalt of the Empire was nothing more or less than the sum total of the Staatsgewalten of its component parts. From this it would follow that the Empire did not possess a Staatsgewalt separate from, and superior to, the combined Staatsgewalten of the States, but that it shared with the States the exercise of their individual Staatsgewalt and at their own individual tolerance and discretion. In other words, the Empire was sovereign over the States only from the point of view of international law, the States individually being sovereign from the aspect of constitutional law. Their share in the exercise of their own Staatsgewalt was limited, however, by the specific provisions of the Constitution of 1871 which assigned to the Empire the exercise of a

[26] Anschütz, p. 29.

[27] Anschütz, Deutsches Staatsrecht, pp. 21-25.

part of the Staatsgewalt possessed individually by the States.

This is exactly the position which Anschütz takes. In his study on German constitutional law, published in *Holtzendorff's Enzyklopädie,* he definitely denies the existence of a German, i. e. National or Federal collective Staatsgewalt. Having claimed the unity and indivisibility of the Staatsgewalt as essential attributes of Sovereignty in the constitutional sense, he writes:

> The principle of the indivisibility of the Staatsgewalt is not disproved by the appearance of the Bundesstaat. . . . The subject matter which by Article 4 of the Imperial Constitution is in part assigned to the [legislative] competence of the Reich, and in part reserved to the individual Staatsgewalten of the separate States (*Einzelstaatsgewalten*), is not the substance of a German collective Staatsgewalt—for such does not exist. It is rather the essence of all competencies and tasks which would belong to the German Reich . . . if it were a unitary State. This distribution of competencies in Germany and in every other Bundesstaat is no proof that one and the same Staatsgewalt can be divided and by such division be possessed by twenty-six owners. This distribution means that the National Constitution has effected a special assignment of particular subjects and of a specific sphere of activity to twenty-six different sovereign powers (Staatsgewalten). . . . Hence it is not the Staatsgewalt which is divided between Reich and States, but the totality of the tasks of the State. . . .[28]

When Anschütz proceeds to state the corresponding status of the Staatsgewalt for Reich and Länder under the Republican Constitution he becomes entangled in a serious contradiction. Consistent with the premises involved in his theory of the Staatsgewalt of the States under the Em-

[28] *Ibid.*, p. 20.

pire, he asserts that under the Republican Reich the States, though subordinate to the Reich, do not receive their Staatsgewalt from the Reich, but now, as before, possess it in their own right. Hence according to the new as well as the old law the States, though called Länder, have not by their adhesion to the Republican Reich lost their character as States.[29] But though Anschütz definitely denied for the Empire a National Staatsgewalt, additional and superior to the Staatsgewalt which the States were supposed to possess by their own right, and though he asserts for the Republican Reich the possession by the States of the Staatsgewalt equally in their own right, he nevertheless admits the existence of a National Staatsgewalt under the Republican Constitution. According to Anschütz, the statement of Article 1, Section 2, "The Staatsgewalt emanates from the people," represents more than the democratic principle of popular Sovereignty. Referring to the elimination of the words "entire" and "German" from the original version, "the entire Staatsgewalt emanates from the German people," he holds that the Committee on the Constitution in sanctioning the change meant to say that not the entire Staatsgewalt, but only the Staatsgewalt exercised by the Reich, emanates from the entire German people. In the opinion of Anschütz the Committee further meant to say that the Staatsgewalt of the Länder (*Landesstaatsgewalt*) emanates from the particular people of the Länder (*Landesvolk*), such as the people of Prussia, Bavaria, etc. From this Anschütz deduces "that the *Landesstaatsgewalt* was not delegated by or derived from the Reich, but that it was recognized by the latter." It was by virtue of this recognition, he claims, that "the historical and individual Staatsgewalt of the Länder has been preserved." In conclusion he asserts that "the National As-

[29] Anschütz, p. 29.

sembly in the Committee on the Constitution and in plenary session accepted this conception," and that "Article 1, Section 2, must therefore be interpreted in this fashion." [30]

The same dualism of the Staatsgewalt is posited by Anschütz in his interpretation of Article 5. Referring for the meaning of this article to what he has said about Article 1, Section 2, he continues: "The Staatsgewalt exercised by the Reich in National affairs (National Staatsgewalt), is not identical with the Staatsgewalt exercised by the States in the affairs of the States (*Landeshoheit*). . . . The Staatsgewalt of the States, though subordinate to the National competence (*Reichsgewalt*), does not emanate from the latter. The Staatsgewalt of the Länder is, like that of the Reich, an original competence, requiring no further legal derivation." [31]

Division of Government, not of Staatsgewalt. After all, however, the legal status of the States is not fixed by the term officially assigned to them, nor by juristic theories based on premises incompatible with political realities. It is determined by the constitutional provisions for the division of power or competency between the Reich and the States. Unfortunately, an apparent ambiguity seems to have been created by the Constitution's first attempt to define these relations. Article 5 of the Republican Constitution reads: "The Staatsgewalt is exercised in National affairs by the organs of the Reich according to the National

[30] *Ibid.*, pp. 28-29. In substantiation of his assertion as to the acceptance by the Committee on the Constitution and the National Assembly of his interpretation of Article 1, Section 2, he refers to the statements of Kahl, Beyerle, Haussmann, v. Preger, Schäffer, Koch, v. Delbrück. An examination of their views, following below, will force a different conclusion concerning the interpretation of the phrase in question.

[31] *Ibid.*, p. 35.

Constitution, in the affairs of the Länder by the organs of the Länder in accordance with the State constitutions."

In the opinion of some of the German commentators this means that Article 5 posits a dual Sovereignty, i. e., a Staatsgewalt for the Reich, to be exercised by the National organs of government, and a Staatsgewalt for the Länder, to be exercised by their own governmental agencies. This, for instance, is the interpretation of Stier-Somlo and, as shown in the preceding pages, of Anschütz. Both defend the State character of the Länder largely upon the basis of Article 5.[32] In fact, however, Article 5 does not attempt to posit Sovereignty or to establish the location of Sovereignty. This is done in Article 1, Section 2, which states that "the Staatsgewalt emanates from the people." Article 5 merely establishes a logical division of the exercise of the Staatsgewalt. In other words, Article 5 does not establish a dual Staatsgewalt, but a dual system of government.

In order to substantiate this statement we must in some detail consider the history of Article 1, Section 2, and of Article 5, for the correct meaning of these articles is fundamental to the proper interpretation of the constitutional relations of Reich and Länder. Article 1, Section 2, and Article 5, of the final text of the Constitution, forming Article 2, Sections 1 and 2, of the so-called second Preuss draft, read as follows: "The entire Staatsgewalt emanates from the German people [Section 1]. It is exercised in National affairs by the organs existing by virtue of the National Constitution, and in the affairs of the States by the German *Freistaaten* in accordance with their State constitutions [Section 2]."[33] The phrase, "the entire

[32] Stier-Somlo, pp. 82-83; Anschütz, pp. 28-30. The latter's opinion will be considered below.

[33] "Alle Staatsgewalt liegt beim deutschen Volke. Sie wird in den Reichsangelegenheiten durch die auf Grund der Reichsverfassung

Staatsgewalt emanates from the German people," was held to embody two main and different ideas. In the first place, it was taken to express the democratic principle of popular Sovereignty as opposed to the theory still prevailing in some quarters, that the Sovereignty of the Empire was possessed by the individual compacting States. In the second place, this phraseology was held to imply the unitary aspect of the Reich as opposed to the particularism of the States.[34] Hence the interpretation that if the entire Staatsgewalt of the Reich had its source in the German people, i. e. the German Nation, the Staatsgewalt of the Länder, as far as it might be claimed or conceded, must originate from the same source. It was in opposition to this second idea that the *Staatenausschuss,* objecting to the adjectives "entire" and "German," suggested the form, "the Staatsgewalt emanates from the people," as expressing only the democratic idea of popular Sovereignty.[35] It was realized, however, that this formulation did not settle the question at issue. Nevertheless, a motion to change the section to read, "The Staatsgewalt in the Reich and in the member States emanates from the people," was rejected.[36]

The discussion of this question in the *Verfassungsausschuss* shows the complete domination of the individual opinion of the framers of the Constitution by the larger issue of "unitary State and States rights." Referring to the change effected by the *Staatenausschuss,* Preuss remarked: "The formulation of my draft was changed by the decision of the *Staatenausschuss.* . . . The latter was of

bestehenden Organe ausgeübt, in den Landesangelegenheiten durch die deutschen Freistaaten nach Massgabe ihrer Landesverfassungen."

[34] Delbrück (Verf. Ber. und Prot., p. 30).

[35] Poetzsch., p. 41.

[36] *Ibid.*

the opinion that the entire Staatsgewalt does not rest with the German people. Believing that the political existence of the Länder was threatened by the formulation of the . . . draft [in question], the *Staatenausschuss* accepted the present weaker form. . . ." [37] The Bavarian ambassador and representative v. Preger, explaining the alteration of the phrase, told the members of the Committee on the Constitution that the *Staatenausschuss* had aimed to express the idea of popular as opposed to princely Sovereignty. "What was to be brought out," he is quoted as saying, "was the contrast between the authoritative State and democracy. It was not an attempt to declare that in future the entire Staatsgewalt in the Reich and in the individual States was to be deduced from the competency of the Reich. The total annihilation of the independence (*Selbständigkeit*) of the individual States implied in this proposition must be avoided. In the individual States it is not the Reich which constitutes the source of law. . . . The Revolution has not been uniformly undertaken by Berlin for the whole Reich, but independently by the States. It has not altered the relation between Reich and States. I should therefore like to ask, not to deal with, or if necessary, to answer negatively the question whether the Reich is the source of all law for the States." [38] Dr. v. Preger's plea was seconded by Ministerialrat Schäffer, representative of the State of Württemberg.[39] A compromise was implied in the statement of Dr. Quarck who said that "it was not the object of the phrase in question to contrast people with German people, but people with magistracy (*Obrigkeit*)," and that therefore "the question of

[37] Verf. Ber. und Prot., p. 29.

[38] *Ibid.*, pp. 29-30.

[39] *Ibid.*

National or State Sovereignty was left undecided." [40] The most practical view of the issue was that of Representative Koch. "The chief importance of the article," he declared, "is that it expressly replaces the authoritative State by the *Volksstaat*. The controversy over the Sovereignty of the Reich and the Länder is not to be settled by this article, but rather by the later provisions of the Constitution ('National law supersedes State law,' [by the provisions concerning] the referendum), and by future legislation. . ." [41]

It was clearly on the basis of the compromise interpretation of Dr. Quarck and Representative Koch that the *Verfassungsausschuss* in its first and second reading [illegible] the acceptance of the phrase as Article 2, Section 1, [illegible] the form, "The Staatsgewalt emanates from the people," immediately followed by Section 2 dealing with the exercise of the Staatsgewalt, in the form quoted above [42] as distinguished from the formulation in which it appears as Article 5 in the final text of the Constitution.

There was little discussion in the National Assembly on the subject of the phrase, "The Staatsgewalt emanates from the people." During the second reading of the draft of the Constitution, Dr. Kahl, reporting on the approval of this formulation by the Committee on the Constitution, advised the Assembly as follows: "In Reich and States the people is, in the meaning of [the present] Article 1, in the possession of the Staatsgewalt. The exercise [of the Staatsgewalt] in both [Reich and States] is fixed in principle in Article 5. The organs exercising [the Staatsgewalt] in the affairs of the Reich are determined by the National Constitution and [those exercising the Staatsgewalt in the affairs of the Länder] are determined by the constitu-

[40] *Ibid.*, p. 29.
[41] *Ibid.*, p. 30.
[42] *Ibid.*, pp. 28-31, 405.

tions of the Länder." [43] In the light of the preceding quotations from the debates in the Committee on the Constitution it is hardly necessary to disprove the correctness of Kahl's presentation. It will suffice to assert that what Kahl represents as the Committee's meaning of Article 1 is precisely the interpretation which the Committee refused to agree upon. The meaning of Article 1, Section 2, was discussed by v. Delbrück [44] and Dr. David, National Minister of the Interior,[45] in the interpretation of the Committee, to wit, that the phrase in question signifies no more and no less than the change from the constitutional Monarchy to the democratic Republic. The attempt made during the third reading to expand Section 2 to read, "the Staatsgewalt in the German Reich emanates from the people," failed. In both the second and third reading the entire Article 1 was accepted as submitted by the *Verfassungsausschuss.*[46] It is therefore difficult to understand how under the circumstances Anschütz, as quoted above, could assert that the National Assembly as well as the *Verfassungsausschuss* had accepted an interpretation of Article 1, Section 2, positing on the one hand the democratic form of the National Government, and on the other hand the preservation of the Sovereignty of the Länder in addition to or along with National Sovereignty.

The meaning of the phrase, "The Staatsgewalt emanates from the people," having thus been established to signify the creation of a National democratic republic, and to evade an answer to the question of National or State Sovereignty, the interpretation of the provision for the exercise of the Staatsgewalt should thus after all leave no room

[43] Heilfron, III, p. 540.
[44] *Ibid.*, p. 567 ff.
[45] *Ibid.*, p. 575.
[46] *Ibid.*, III, p. 585; V, pp. 357-358.

for ambiguity or doubt. Referring to the elimination of the words "entire" and "German" from the original version of Article 1, Section 1, Preuss, speaking before the *Verfassungsausschuss* said that this change had been effected because the *Staatenausschuss* had considered the original formulation dangerous for the future political existence of the Länder. He was of the opinion, however, that "if we do not carry the contrast of principles to the extreme, the new formulation may well be accepted." Proceeding to Section 2, i. e. the present Article 5 of the Constitution, he continued: "The acceptance of Section 2 is important not for academic but for practical reasons. Since the first sentence says, 'the Staatsgewalt emanates from the people,' the second sentence must supplement the first in a two-fold way. Thus it must state that the Staatsgewalt is exercised not immediately by the people, but by the organs designated by the Constitution, namely on the one hand by organs of the Reich, and on the other hand, by organs of the Länder. The consideration of the fact that State organs will to a large extent be active in National affairs, constitutes no obstacle to the present formulation of Section 2, since the latter speaks of organs whose competency is determined on the basis of the Constitution of the Reich." [47] Without the expression of an essential dissenting opinion Section 2 was accepted by the Committee on the Constitution [48] and later also by the National Assembly,[49] forming Article 5 of the National Constitution.

However, the editorial committee of the *Verfassungsausschuss* seems to have effected two important, though only formal, changes with regard to the provisions here discussed. In the first place, in the draft returned by the

[47] Verf. Ber. und Prot., p. 29.
[48] *Ibid.*, pp. 29, 31, 405.
[49] Heilfron, III, pp. 540, 609; V, p. 359.

Ausschuss to the National Assembly, Section 2 of Article 2 of the original version of the second Preuss draft, as passed in first and second reading of the *Verfassungsausschuss,* is separated from the phrase, "The Staatsgewalt emanates from the people," thus appearing independently as Article 5. In the second place, the phrase, "The German Reich is a Republic," prefixed in the first reading of the *Ausschuss* to Article 1 dealing with the territorial structure of the Reich, is found detached from that context and joined to the phrase, "The Staatsgewalt emanates from the people," the two constituting henceforth Sections 1 and 2, respectively, of Article 1, i. e., "The German Reich is a Republic," and, "The Staatsgewalt emanates from the people." [50]

It is on the basis of this second change effected by the editorial committee and accepted by the *Ausschuss,* that Poetzsch insists upon the interpretation of the phrase, "The Staatsgewalt emanates from the people," in conjunction with the statement, "The German Reich is a Republic." For it is this connection of the two sentences which, in Poetzsch's opinion, justifies the conclusion that "in Article 1 the term Staatsgewalt can hardly mean anything but Staatsgewalt of the Reich." But he continues, "since the concept Staatsgewalt has apparently the same meaning in Articles 5 and 1, it is after all reasonable to interpret it to mean that the Staatsgewalt exercised by the organs of the Länder on the basis of the *Landesverfassungen* is in the last analysis nothing but the Staatsgewalt of the Reich." [51] In other words, Poetzsch substantiates the interpretation given above to the effect that Article 5 does not attempt to divide the Staatsgewalt between Reich and Länder, but merely lays down certain principles for the exercise of the

[50] Verf. Ber. und Prot., pp. 401-405; Poetzsch, p. 41.

[51] *Ibid.*, p. 41. See also the introduction to his commentary, p. 28.

Staatsgewalt. Thus Article 5 simply states that the Staatsgewalt, i. e. the Staatsgewalt of the Reich, is to be exercised in National affairs by organs of the Reich authorized by the National Constitution and in the affairs of the Länder by the State governments in accord with the State constitutions.

That this is the only possible meaning becomes clear when it is realized that Article 5 was evidently intended to express definitely one great change introduced by the Republican Constitution as compared with that of the Empire, for under the Constitution of 1871, the Empire did not, with the exception of the Diplomatic Service, the Navy, the Army in time of war, the Postal and Telegraph Service, the Reichsgericht, and a few allied services, possess National organs or functionaries, but was dependent for the execution of National legislation upon State organs under the supervision of National officials responsible to the Emperor. The correctness of this interpretation is further proved by the fact that Article 5 is immediately followed by the provisions of Articles 6-12, containing the detailed enumeration of the topics assigned to the exclusive or concurrent legislative competency of Reich and Länder respectively, by the provisions of Article 13, establishing the supremacy of National over State law, and by those of Articles 15-16, defining the relations of the National and State administrations.[52] It is this connection between Articles 5, 6-12, 13, and 15-16, to which attention has been called in the Commentary of Judge Werner Brandis whose only explanation of Article 5 consists of a reference to Articles 6-15 and Article 78, Sections 2-4.[53]

[52] Art. 14 contains the one fundamental exception from the general provision of Art. 5, namely that "the laws of the Reich are to be applied in the State courts, unless otherwise provided by law."

[53] Brandis, p. 85.

National Restrictions on State Constitutions. Another important point in favor of the interpretation of Article 5 here adopted is implied in its reference to the National and State constitutions as the guiding norms for the exercise of the Staatsgewalt by Reich and Länder. The Staatsgewalt is to be exercised in National affairs by the National Government according to the National Constitution and in the affairs of the Länder by the State governments according to their particular constitutions. There certainly can be no question that the National Constitution must be accepted as expressing the sovereign will of the German people as a united Nation, i. e. as expressing the sovereign will of the Reich. Article 17 of the National Constitution prescribes that the constitutions of the Länder must in certain important respects conform to the stipulations of this fundamental National law. The conditions thus laid down are: Each one of the Länder must have a republican constitution. The representative assembly of every one of the Länder must be elected by universal, equal, direct, and secret vote of all German citizens, both men and women, according to the principles of proportional representation. The Government of every State (*Landesregierung*) must have the confidence of its representative assembly. The principles of election for the representative assembly apply also to municipal elections, though by State law (*Landesgesetz*) a residence requirement not exceeding one year of domicile in the municipality may be imposed in such elections.

The Constitution of 1871 did not contain a single one of these far-reaching limitations upon the constitutive powers of the States. The American Federal Constitution guarantees to the States the republican form of government. This guarantee does, of course, imply an inhibition against

any but a republican form of government for the States.[54] The United States Constitution stipulates further that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude," giving to the National Legislature, i. e., to Congress,[55] the right to enforce this Article by suitable legislation. But beyond the insistence upon a republican form of government the American Constitution does not attempt to prescribe any definite conditions for the relations of the executive and legislative branches of the governments of the States, as the German Republican Constitution of 1919 does. In addition to these specific limitations placed by the National Constitution of the German Republic upon the governing activity of the Länder, there is implied the general requirement that the constitutions of the Länder must not contain anything contrary to any provisions of the National Constitution. This inhibition is contained in Article 13 which provides that National law supersedes State law, National and State law being interpreted in German jurisprudence to include the law of the Constitution.[56]

The restrictions placed by the National Constitution upon the Länder in respect to their form and method of government and in regard to the provisions of their constitutions and ordinary legislation, unquestionably constitute a derogation of the Staatsgewalt which the advocates of States rights claim for the Länder. The same must, as will be demonstrated later, be admitted for the National right of determining the boundaries of the Länder, for the formal right of the Reich to restrict further the existing

[54] Art. IV, Sec. 4.

[55] Amendments. Art. XV.

[56] See note 74 and corresponding text.

rights of the Länder, and for the general declaration of the supremacy of National over State law.

Determination of State Boundaries by National Law. The National right to regulate the territory or boundaries of the Länder is embodied in Article 18 which reads in part as follows:

> The division of the Reich into States (Länder) shall serve the highest economic and cultural interests of the people after the most thorough consideration of the wishes of the population affected. The boundaries of the Länder may be altered and new States may be erected within the Reich by an amendment of the National Constitution.
>
> With the consent of the Länder directly affected, it requires only an ordinary law of the Reich.
>
> An ordinary law of the Reich will also suffice if one of the Länder affected does not consent, provided that the change of boundaries or the creation of a new State (Land) is desired by the population concerned and is also required by a preponderant National interest.

The rest of the Article provides for consulting the wishes of the people concerned by way of a referendum, and for the settlement of disputes over property rights arising from such boundary changes.

According to the introductory sentence of Article 18 the division of the Reich into States (Länder) shall serve the highest economic and cultural interests of the people, i. e. the entire German people,[57] after the most thorough consideration of the wishes of the portion of the population affected.[58] The principle involved in this general state-

[57] The interpretation of the term people as the entire German people is forced by its juxtaposition to the expression "population affected."

[58] "Die Gliederung des Reichs in Länder soll unter möglichster Berücksichtigung des Willens der beteiligten Bevölkerung der wirtschaftlichen und kulturellen Höchstleistung des Volkes dienen. . . ."

ment thus places the interests of the entire German people above that of the part affected by the division of the Reich into Länder or States. But it does not in itself seem to deny to the Länder in principle the right to maintain their territorial integrity as based upon historical development and existence. In fact, the consultation of the will of the few immediately concerned is guaranteed. But what is to happen when their will runs counter to the interests, economic and cultural, of the whole German people? According to Article 18, Sections 2 and 3, changes of the territorial status of the Länder may be effected by ordinary National legislation when all the States concerned agree, and when, with only one of them agreeing, the change is demanded by the population concerned and by a preponderant interest of the Reich. But it is quite possible that all the States concerned in the proposed change may disagree or fail to consent. It is clearly in such an emergency that the provision of the second sentence of Section 1 applies, namely that "the boundaries of the Länder may be altered and new States may be erected within the Reich by an amendment of the National Constitution."

Under the Republican Constitution a constitutional amendment is effected in a manner quite different from that provided for in the Constitution of 1871. According to Article 78 of the Constitution of the Empire amendments were effected by way of ordinary legislation. An amendment of the Constitution was considered as rejected when fourteen votes were cast against it in the Bundesrat. But in the Imperial Bundesrat one of the States, Prussia, alone controlled three more than the fourteen votes required to make any amendment to the Constitution impossible. Under the Republican Constitution the National Council (Reichsrat) cannot, by the controlling vote of any

single State, nor by the combined vote of all the States, prevent a constitutional amendment. It can at the most only defer its enactment. The influence of the Reichsrat upon constitutional amendments is limited to two distinct actions. In the first place the Reichsrat has the right, through the expression of disapproval by a two-thirds majority, to object to or veto an amendment proposed by the Reichstag. In the second place, if, ignoring this objection or veto, the Reichstag passes the amendment, the Reichsrat has the right to request, within two weeks from the passage of the amendment by the Reichstag, the submission of the amendment to a popular referendum.[59]

According to the original text of Article 60 of the National Constitution each State was to have at least one vote in the National Council (Reichsrat). Each of the larger States was to receive one vote for each million inhabitants. One additional vote was granted for a surplus population over the last million, if that surplus equalled the total population of the smallest State. But no State was to have more than two-fifths of the total votes. This reduced the vote of Prussia to 25 of the total of 63 votes which the National Council had at the time of its creation.[60] In addition to this curtailment of Prussia's former controlling influence in the Reichsrat, Article 63 provides that "one-half of the votes of Prussia shall in accordance with a [Prussian] State law be represented by the provincial governments of Prussia." In other words, the votes of Prussia in the Reichsrat have been divided in such

[59] Art. 76.

[60] Instead of at least forty votes which she would have had without this restriction. At the time of the establishment of the Reichsrat the total of 63 votes was distributed as follows: Prussia 25, Bavaria 7, Saxony 5, Württemberg and Baden 3 each, Hessen 2, the rest of the States 1 each (Giese, p. 202; Poetzsch, p. 78). Art. 60 has since been amended. For details of this amendment see notes 46-47 and corresponding text.

a manner that only half of them represent Prussia as a State, the other half being distributed among, and representing, her provincial administrative units. This limitation of the powers of the Reichsrat and the complete elimination of the former control of that body by Prussia are significant in view of the fact that the contents of Article 18 which seems to go far in facilitating the division or balancing of State territories, was considerably modified in order to save Prussia from impending division into several new States or Länder. After the defeat in the war and after the disappearance of the imperial office as the chief unifying factor in the Empire, the unity of the Reich seemed to depend upon the curtailment of the predominance of Prussia. Since Prussia represented about forty out of sixty-five million inhabitants of the entire Reich, reasons of constitutional, international, and political expediency seemed, for a time at least, to demand her partition. The document accompanying the so-called first Preuss draft for the proposed National Constitution expressed the National Government's view favoring and justifying the division of Prussia into several smaller units.[61] The sponsors of such a partition found active support in the separatist tendencies manifested at that time in some of Prussia's western provinces, especially in the Rheinland and part of Westphalia. As a result, the formation of a separate Rhenish-Westphalian State from Prussian territory was seriously discussed *pro* and *con* in the Committee of the Constitution [62] and in the National Assembly.[63]

Yielding, however, to the weight of the consideration

[61] "Denkschrift zum Verfassungsentwurf." This document is found with the text of the second Preuss draft in "Deutscher Geschichtskalender," 52. Lieferung, 1919.

[62] On this subject see Verf. Ber. und Prot., p. 92 ff., pp. 431-432.

[63] Heilfron, II, pp. 199, 204, 211-213; III, p. 163; V, p. 14 ff., 403 ff.

that the partition of Prussia at that time would only tend to complicate still more the problem of the relations of Reich and States, and that it would be interpreted by Germany's antagonists as a sign of internal weakness and disunion,[64] a compromise was sought and found by the Committee on the Constitution and the National Assembly in the final phraseology of Article 18,[65] which provides in principle for the partition of any State. But in the National Assembly a supplementary Article 164a, later 167, was added, containing as a concession to Prussia a stipulation according to which Sections 3-6 of Article 18 were not to take effect until two years after the promulgation of the Constitution, the supposition being that in those two years the separatist tendencies within, and the demands for partition from without, would disappear or sufficiently diminish to be finally ignored.

The actual changes made so far in the territorial status of the Länder were those effecting the joining of several States into a new larger unit, namely the creation of Thuringia from seven of the small central Saxon States,[66] the amalgamation of Coburg with Bavaria and that of Waldeck-Pyrmont with Prussia.[67] Since, at the time of the enactment of the National laws sanctioning the creation of Thuringia and the amalgamation of Coburg with Bavaria, the formal consent of the States concerned could not be secured, the National laws in question were passed in

[64] *Ibid.*, V, p. 14 ff.

[65] *Ibid.*, V, p. 16; Art. 18 of the final text of the Constitution corresponds to Article 11 of the second Preuss draft and Art. 15 of the two Government drafts.

[66] The States forming Thuringia were: Sachsen-Weimar-Eisenach, Sachsen-Meiningen, Reuss, Sachsen-Altenburg, Sachsen-Gotha (without Coburg), Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen.

[67] Reichsgesetz of April 30, 1920 (RGBl., 1920, p. 841).

the manner required for constitutional amendments.[68] In the case of the absorption of Waldeck-Pyrmont by Prussia, the consent of the former not being in doubt, an ordinary National law was sufficient.[69]

According to the terms of the Treaty of Versailles a plebiscite was to be held in Upper Silesia to record the desire of its population in regard to the question of its retention by Germany or its cession to Poland. In view of this impending plebiscite the Prussian Government, in October 1919, declared its willingness to divide the Prussian Province of Silesia and to offer to Upper Silesia the status of a State in the Reich.[70] The execution of this plan was interrupted by the occupation of the greater part of Silesia by foreign troops.

The right of Upper Silesia to enact such a change was, of course, implied in principle in Article 18 of the Republican Constitution of the Reich. But owing to foreign occupation and owing to the two years restriction placed in Article 167 upon the application of Article 18, Upper Silesia was not at that time in a position to make use of this right. Prussia's offer to Upper Silesia was, of course, an attempt to influence the population of that part of Silesia to vote in favor of remaining with Germany. Prompted by the same motive the National Government, in November 1920, submitted to the Reichstag an amendment to Article 167 of the National Constitution, by which the restriction placed upon the application of Article 18 was removed in the case of Upper Silesia. According to the terms of the amendment of November 20, 1920, the people of Upper Silesia were to be allowed, within two months following the resumption of authority by German

[68] Poetzsch, Vom Staatsleben . . ., p. 55.

[69] *Ibid.* Amalgamation of Waldeck with Prussia is pending.

[70] Preussische Gesetzsammlung, 1919, p. 169.

officials, to decide by referendum the question of having Upper Silesia organized as a State within the Reich.[71] The result of the referendum or plebiscite was published in the *Reichsanzeiger* of November 20, 1922. The vote stood 517, 812 against, and 50,529 for a separate Upper Silesian State.[72]

The attempt of the Prussian Province of Hanover to regain the position of a State lost in consequence of the Austro-Prussian War in 1866, has apparently found its solution and end in the negative result of the preliminary referendum of May 19, 1924. The holding of the preliminary referendum was ordered by National executive ordinance for the purpose of establishing whether one-third of the population of Hanover, entitled to vote in the elections for the Reichstag, actually desired a popular vote on the question of remaining a province of Prussia or of becoming a State in the Reich. The preliminary referendum which took place on May 18, 1924, resulted in a vote of 449,562 against, and 92,828 for a final plebiscite on the question of statehood.[73] Since less than one-third of those entitled to vote in the Reichstag elections had voted in favor of the change, the question was decided in favor of the retention of the status of a Prussian province.

The provision of the executive ordinance for the holding of a preliminary plebiscite, and the provision for a decision by a vote of one-third or less of those entitled to vote in the elections to the Reichstag, find their legal justification in Section 4 of Article 18, which stipulates that: "The will of the population is to be ascertained by a plebiscite (*Abstimmung*). The National Government orders the voting

[71] Reichsgesetz of Nov. 27, 1920 (RGBl., 1920, p. 1987).
[72] Poetzsch, Vom Staatsleben . . ., p. 56.
[73] *Ibid.*

when the plebiscite is demanded by one-third of the inhabitants of the territory to be detached."

Supremacy of National over State Law. National supremacy in the sphere of legislation has been established in the National Republican Constitution in a three-fold manner. In the first place, it is created in specific articles of the Constitution defining the National right of legislation over that of the Länder for the regulation of particular subjects or conditions, as for instance the regulation of State boundaries by National constitutional or ordinary law as considered in the preceding section. In the second place, it is posited in the provisions of Article 13 containing the general declaration that National Law is supreme over State Law. Lastly, it manifests itself in those stipulations of the Constitution, which asserts the so-called *Kompetenz-Kompetenz* of the Reich. We are here concerned only with the second and third modes of the establishment of supremacy of National law, i. e. with the definite assertions of the general principle of such supremacy.

Article 13, Section 1, positing the general supremacy of National over State law, states that "Reichsrecht bricht Landrecht" (National law supersedes State law). In order to consider this provision in its bearing upon the relative position of Reich and Länder, we must first determine the extent of its validity as revealed in the debates in the National Assembly and in the Committee on the Constitution. In German constitutional practice the term *Recht* as applied in the terms *Reichsrecht* and *Landrecht* is generally held to include not only ordinary but also constitutional law. Thus *Recht* signifies customary, statutory, administrative, treaty, and constitutional law.[74] It

[74] Giese, pp. 98-99; Poetzsch, p. 60; Anschütz, p. 46; and others.

was in this meaning that the term *Recht* was accepted by the Committee on the Constitution and by the National Assembly. As quoted on a previous occasion, Representative Koch, speaking before the Committee on the Constitution on the meaning of the phrase, "the Staatsgewalt emanates from the people," said: "This article has its chief importance in the fact that it posits the democratic State (*Volksstaat*) in place of the authoritative State. The controversy over the Souveränetät of the Reich and the Länder is not settled by this article, but by the later provisions of the Constitution, *Reichsrecht bricht Landrecht, Referendum,* and by future legislation. . . ." [75] It was in this sense that Dr. Kahl, champion of States rights though he was, said: "The principle expressed . . . by the phrase, 'Reichsrecht bricht Landrecht,' is so clear, that I need not lose any time over it. Doubts can exist only in regard to its formulation. The expression is doubtlessly popular, I should almost say poetic; but according to my feeling in the matter, it does not fit into a law. I recommend the form, 'Reichsgesetze gehen den Landesgesetzen vor (National laws precede State laws)'." [76] With the exception of Dr. Quarck's statement registering his agreement with Kahl to the effect that the principle involved in the phrase could not be subject to discussion, the rest of the debates dealt exclusively with the choice of the particular form which Article 10 (the future Article 13) was to have. It was accepted in the first reading in the form, "Reichsrecht bricht Landesrecht." [77] With the exception of the change of the word *Landesrecht* to the original *Landrecht,* the

[75] See note 41 and corresponding text. See also his statement of the debate on this article in the second reading of the draft of the Constitution (Heilfron, III, p. 563).

[76] Verf. Ber. und Prot., p. 37.

[77] *Ibid.*, pp. 37-38.

phrase was accepted with the same unanimity of interpretation in the second reading of the Committee on the Constitution,[78] and in the three readings in the National Assembly.[79] Remarkably to the point and final as to the meaning of the phrase in question was Dr. Kahl's interpretation given in the second reading in the Assembly. Speaking of the relations of National and State law Kahl said:

> This [relation] is covered by Article 13, the principle provision of which reads, "Reichsrecht bricht Landrecht." This principle requires no justification, it follows from the structure of the Bundesstaat and corresponds to the state of affairs in the former [Empire] and in the old Reich [the Holy Roman Empire of the German Nation]. It goes without saying that "Landrecht" in this connection does not signify a particular codification, but general State law in the meaning of the well known popular phrase.
>
> The great practical significance of this principle . . . was illustrated unexpectedly yesterday evening during the debates on the settlement law (*Siedlungsgesetz*). It would therefore be appropriate for me here to state the uniform opinion of the Committee on the Constitution, to wit, that this norm for the relation [of National and State law] holds good without reservation (*dass dieser Grundsatz über das Rangverhältnis ohne Vorbehalt gilt*). National law is not only subsidiary common law, but absolute law. This means that National law prevails not only where State law has not posited a different (*abweichende*) legal norm, but that within the sphere of its supremacy it completely supplants State law. *Reichsrecht bricht Landrecht* means that where and when in the meantime in a field subject to National legislation, the States have taken measures deviating from the provisions of the [National] Constitution, these measures must, after the promulgation of the National Constitution, be brought into harmony with the constitutional

[78] *Ibid.*, pp. 408-410.

[79] Heilfron, II, p. 230; III, p. 545, 626-627; V, p. 360.

law of the Reich. Exceptions from this requirement are allowed only to the extent to which the National Constitution contains such exceptions in favor of the Länder. The [National] Constitution is the norm and limitation for the formulation of State law. . . .[80]

According to this "uniform" interpretation of the Committee on the Constitution, accepted without protest by the National Assembly, Section 1 of Article 2 constitutes a two-fold limitation of State legislation. In the first place, it ordains that all future State law must be in harmony with the ordinary law of the Reich enacted within the sphere of all matters subject to National legislation. In the second place, it means that all future and *existing* State legislation must conform to the provisions of the new National Constitution. In the light of this definition it will be interesting to consider Anschütz's annotation to Article 13, even though some of the items have been questioned by a few of his fellow commentators and by the Governments of some of the States. This is what Anschütz writes concerning Article 13:

Section 1 proclaims the principle of the supremacy of National law over State law, a principle which was recognized in the old law and was followed from the Souveränetät of the Reich over the Länder. . . .

The phrase, "Reichsrecht bricht Landrecht," signifies, as heretofore,[81]. . . that by the enactment of a National law all State law covering the same subject is repealed, and that the creation of new State law on this subject is precluded.[82] Na-

[80] *Ibid.*, III, p. 545.

[81] He refers to Laband II, p. 114 ff; Haenel, p. 248 ff; Meyer-Anschütz, p. 715 ff.

[82] This is the only item in Anschütz's interpretation, which seems to require modification. See notes 86-89 and corresponding text.

tional law is therefore retroactive through the nullification [of existing State law], and preventive as far as future State legislation is concerned.

In particular this repeal of State law signifies not only a conditional invalidation for the duration of the National Law, but the complete nullification of State legislation. National law not only eliminates the binding force of State law, but the law itself. Former State laws are not revived by the repeal of National law, but in case of such repeal the State merely regains the right to reenact defunct State legislation.[83]

The repeal of State law by National law extends to all norms of the State law bearing on the subject matter . . . of the National law, regardless of form and content of the law. Thus the State law repealed may be ordinary, constitutional, ordinance, or customary law. Even State laws whose content is in harmony with National law are subject to annulment. . . .[84]

The material extent of annulment of the existing State law is decided solely by the National law which supersedes the law of the State, to the degree to which it wills to do so. The existence and the extent of this will are to be established by interpretation [of the law in question]. The courts called upon to apply National and State law have, therefore, complete freedom of interpretation. In other words: The right of the courts to examine the validity of State law in regard to National law, and to deny the application of a State law which is found superseded by National law, cannot be limited by State legislation, especially not by a State law which assumes the interpretation of the extent of the derogatory effect of the National law in question.

The limiting power of National law not only prevents the future enactment of State law incompatible with National law, but it means in general that no State legislation on the same subject can be enacted, not even such State laws which repeat, confirm, or interpret the National law. . . .[85]

[83] He refers to Meyer-Anschütz, p. 715, note, and to his own annotation to Art. 12, no. 2.

[84] See note 82.

[85] Anschütz, pp. 46-47.

This interpretation requires only one modification to be in general agreement with the commentaries of Anschütz's fellow jurists.[86] In the second paragraph Anschütz states that "by the enactment of a National law all State law covering the same subject is repealed," and that "the creation of new State law on this subject is precluded. . . ." In the same sense he states later on that "even State laws whose content is in harmony with National law are subject to annulment. . . ." To make sure of the meaning of these statements, he explains in the last paragraph that this applies not only to State laws incompatible with National law, but also to "such State laws which repeat, confirm, or interpret the National law. . . ." This rather far-reaching interpretation has apparently been successfully questioned by several of Anschütz's colleagues. Wittmayer, for instance, calls attention to the fact that the partial reproduction of the contents of National law in State legislation might be advisable or even necessary. As an example he mentions the reproduction by the State constitutions of the provisions for the fundamental rights of the citizen.[87] Hatschek goes one step further inasmuch as he accepts the reproduction of National law by State legislation as permissible and normal. Speaking of the limiting effect of Article 13, Section 1, upon State law, he writes: "In case the State legislature has only reproduced what the National law giver has ordered, the repeal of the National provision by the Reichstag carries with it *ipso jure*, i. e. without special repeal by the State legislature, the annulment of the State reproduction. This can be of practical importance since the Prussian Constitution re-

[86] See Hatscheck, I, pp. 17-18; Poetzsch, p. 60; Wittmayer, pp. 207-208; Meissner, p. 35; Brandis, pp. 98-99; Arndt, p. 65; Giese, pp. 96-97.

[87] p. 208. Wittmayer cites also Triepel as rejecting this particular interpretation of Anschütz.

peats certain legal norms contained in the National Constitution. . . .[88] The principle covering all these reproductions is that a repeal by the Reichstag suffices to annul the provisions of the Prussian State law. . . ." [89]

Practical objection has been raised to the generally accepted interpretation concerning the retroactive character of National law in so far as it affected State legislation existing at the time of the promulgation of the National Constitution. According to Article 13, Section 2, in cases of doubt or difference of opinion concerning the compatibility of State law with National law, the proper authorities of the State or of the Reich may apply to a National Supreme Court for a decision.[90] Under this provision a number of decisions have been rendered by the Reichsgericht from 1919-1925, upholding the retroactive character of Article 13, Section 1, by declaring incompatible with the National Constitution certain provisions of State laws enacted prior to the promulgation of the National Constitution of August 14, 1919.[91]

The full meaning of this supremacy of National over State law becomes clear when we realize the extent of the legislative competency of the Republican Reich as compared with that of the Empire under the Constitution of 1871.

A mere comparison of Article 4 of the Constitution of 1871, and of Articles 6-13 of the Constitution of 1919, does not, however, give a correct idea of the gain of legislative

[88] For the articles concerned see Hatschek, I, p. 18.

[89] *Ibid.*

[90] This phase of the supremacy of National over State law will be given consideration in chapter VII dealing with National judicial control.

[91] For an enumeration of these cases see Poetzsch, Vom Staatsleben . . . , pp. 50-51. These cases will be considered in detail in chapter XIII, section dealing with the so-called *Prüfungsrecht* of the courts.

competency of the Republic over that of the Monarchy. Nor is this gain to be found primarily in the extent of the competence of the Republic over topics concerning which the Monarchy did not have the constitutional right to legislate. For in addition to the concurrent legislation over the subjects enumerated in Article 4 of the Constitution of 1871, the Empire had, for instance, practically exclusive legislative competency over the matters included in Articles 35, 48, 54, 56, 61, and 69, such as:

All matters concerning: The entire system of customs; the taxation of salt and tobacco, of domestic brandy and beer, of sugar and syrup, produced in federal territory; . . . the prevention of fraud in the collection of these taxes; and the security of the common customs frontiers (Art. 35).

The Postal and Telegraph Service within the limitations set forth in Article 48.

The Merchant Marine of all the States of the Reich: Regulation of tonnage and issuing of licenses; of fees and taxes levied in harbors for the use of marine institutions, the power of laying upon foreign vessels or their cargoes taxes other or higher than those paid by the vessels of the German States, etc. (Art. 54).

The Consular Service (Art. 56).

Military legislation for the uniform organization of the Army in time of war (Art. 61).

The preparation of a National budget covering all receipts and expenditures of the Empire, as described in Articles 70-73 (Art. 69).[92]

[92] Some of these topics appear in the list of matters subject to the concurrent legislation of the Empire, as for instance: Merchant Marine and Consular Service, mentioned in Art. 4, Sect. 7; and Postal and Telegraph Service, mentioned in Sect. 10. The special provision of Articles 48, 54, and 56 constitute, therefore, a qualitative extension from concurrent to exclusive legislative competency in some special aspects of the subjects enumerated.

Considered from this point of view the actual gain of the legislative competency of the Republic over the Empire does not seem so great when measured in actual subjects added to the list of Article 4 of the Constitution of 1871, as augmented by the topics of Articles 35 and 69, i. e. customs and taxes as limited by Article 35, and that of a National budget as described in Articles 69, 70-73, and others.[93] But of the topics which have been added under the Constitution of 1919 to the exclusive legislative competency of the Reich three alone are of such overshadowing importance that their addition has fundamentally shifted the balance of legislative supremacy between Monarchy and Republic in favor of the latter. Thus the Republican Reich has, with the creation of a National standing army, assumed exclusive National legislative competency over the organization of National defense (Art. 6, No. 4) and by the taking over of the State railroads, the exclusive legislative right over the railroads (Art. 7, No. 19). The Republican Reich has acquired practical legislative supremacy in financial matters of the States by the control established over the collection of taxes in consequence of the Law concerning the *Reichsabgabenordnung,* of December 13, 1919, which places under the administration of the National financial authorities the collection of all taxes levied entirely or in part for the use of the Reich.[94] It is the restriction of the legislative competence of the Länder, involved in the National legislative supremacy in the matters of the railroads and finances, which has given rise to considerable agitation on the part of the Länder for decentralization in these fields and even to the demand for a return to the status of the

[93] On this subject see also Dambitsch, pp. 99.

[94] The details of this financial control are considered in chapter VI, section: Administrative control with judicial review.

Constitution of 1871 with regard to these two topics or activities.[95]

In resumé, we have the following situation with regard to supremacy of National law and legislation over the law and legislation of the Länder:

1. The National Constitution regulates the vital principles of the constitutive competency of the States.

2. The National Union has been given the right of exclusive legislation over a range of topics quantitatively and qualitatively the most important in the entire sphere of governmental activities subject to legislative enactment. On these topics the States cannot legislate at all. It does not require the prohibitive strictures of Articles 13 to prevent State legislation under the provisions defining this National exclusive right of legislation.

3. The National Union has been given the right to legislate, if it chooses to do so, on certain matters affecting the general and larger interests of the Reich. Until the National Union has made use of this right, the Länder possess the constitutional right to legislate concerning these matters. But, the entire field of this residue of legislative competency of the Länder is under the shadow of Article 13, which states that "Reichsrecht bricht Landrecht. . ." [96]

4. In all matters over which the Reich has been given neither the right of exclusive nor concurrent legislation,

[95] See chapter VIII, section: Increased States rights by change of National Constitution.

[96] In addition to this general supremacy of National law over State law in the sphere of concurrent legislation the National Constitution provides in Article 12, Section 2, that: "The National Cabinet may object to State law relating to the subjects of Article 7, Number 13, whenever the general welfare of the Reich is affected thereby." Article 7, Number 13, establishes the National right of concurrent legislation on the subject of "socialization of natural resources and business enterprises,

the legislative competency remains with the Länder, subject, however, in the last analysis, also to the restrictions of Article 13. For it is self-evident that even in this sphere of exclusive legislation by the States, State law must, first, conform to the general norms of the National Constitution, and second, must not contain anything which could be construed as a violation of any provisions of National law passed under the constitutional legislative competency of the Reich.[97]

In addition to this general assertion of the fundamental supremacy of National over State law, the National Constitution establishes as a climax the principle of the so-called *Kompetenz-Kompetenz*, i. e. the constitutional right of the National Union to determine and extend, by National legislation, its own National competency even to the degree of further limiting the existing competencies of the Länder. This principle is contained in Article 76, providing for the amendment of the National Constitution by National legislation, if necessary, against the will of the State governments expressed by the vote of disapproval in the Reichsrat. For after all, disregard by the Reichstag of the opposition of the Reichsrat to a constitutional

as well as the production, fabrication, distribution, and price-fixing of economic goods for the use of the community." The provision of Article 12, Section 2, thus means that not only has National law on this subject precedence over any concurrent legislation by the States, but that the National Cabinet under the condition given can object even to enactment of any and all legislation on this subject by the States.

[97] Even in the sphere of the exclusive legislation by the Länder, the National Constitution makes one important exception by way of assigning to the National Union under certain conditions the right to lay down by National law the basic principles for one of the most vital governmental activities of the States. Thus Article 11 stipulates that:

"The Reich may prescribe by law fundamental principles concerning the validity and mode of collection of State taxes, in order to prevent:

amendment leaves to the Reichsrat as the sole remedy nothing but the resort to a National referendum as provided in Article 76, Section 2. The functions of the Reichsrat arising under Article 76 thus constitute a corroboration rather than a curtailment of the *Kompetenz-Kompetenz* of the Reich. The possible illusion that this principle of the self-determination by the National Union of its own constitutional competencies is no more than an interesting theory for academic discussion is dispelled by a reference to Article 48 of the National Constitution. It is by this article that the National Government is given the right to execute by force of arms, against any State, the National will expressed, for instance, in an amendment of the Constitution as passed by a National referendum over and against the disapproval of the Reichsrat.

Still, Anschütz, admitting as he does the far-reaching extent of the supremacy of National over State law under the provisions of Article 13, nevertheless defends the State character of the Länder on the ground that the slim margin of Staatsgewalt claimed by him for the States is possessed by them not as a gift of the National Union, but in their own right. In a similar fashion, Stier-Somlo, granting that the Reich can, by constitutional amendment, extend its own competency against the will of the Länder, insists that the phrase, "Reichsrecht bricht Landrecht,"

1. Injury to the revenues or to the trade relations of the Reich;
2. Double taxation;
3. The imposition of excessive burdens, or burdens in restraint of trade on the use of the means and agencies of public communication;
4. Tax discriminations against the products of other States in favour of domestic products in interstate and local commerce; or
5. Export bounties;

or in order to protect important social interests."

only proves the precedence of the Reich. He maintains that by this provision the State character of the Länder is destroyed to no greater degree than was done by the validity of the same principle under the former monarchical constitution.[98]

[98] Stier-Somlo, pp. 84-85. See also Jellinek, Revolution und Reichsverfassung, pp. 80-81. The inconsistency implied in these statements of Anschütz, Stier-Somlo, (and Jellinek) will be considered in chapter VIII dealing with the question of States rights and the National Unitary State.

CHAPTER VI

National Administrative Control Over the Länder

National Control over the Administrative Activities of the Länder. Article 14 of the National Constitution stipulates that "the laws of the Reich are executed by the State authorities, unless otherwise provided by National law." Thus not only the laws of the States, but to a considerable extent those of the Reich are administered by the State authorities and applied in the State Courts. But, having proclaimed the supremacy of National law over State legislation, the National Republican Constitution must, of necessity, provide a system of National control for the execution and application of National law by the organs of the Länder.

The sphere of National control over the execution of National law under the Monarchy was divided between the Emperor and the Bundesrat. Article 17 of the Constitution of 1871 stipulated that "it shall be the duty of the Emperor to prepare and publish the laws of the Empire, and to supervise their execution. The decrees and ordinances of the Emperor shall be issued in the name of the Empire, and shall require for their validity the counter signature of the Imperial Chancellor who thereby assumes the responsibility for them." Article 7, Sections 2 and 3, assigned to the Bundesrat the right of action upon "the general administrative provisions and arrangements necessary for the execution of the imperial laws, so far as no other provision is made by law"; and upon "the defects which may be discovered in the execution of the imperial laws, or of the provisions and arrangements heretofore mentioned."

The specific methods of the supervision of National laws assigned by Article 17 to the Emperor were defined in the provisions of a number of articles dealing with some particular topics enumerated in Article 4 as falling under the National legislative competence. Thus Article 36 of the Constitution of 1871, while in general leaving to the States "the administration and collection of customs duties and of taxes on articles of consumption, . . . as they have heretofore been exercised by each State," added that "the Emperor shall superintend the observance of legal methods by means of imperial officers whom he shall appoint, after consulting the committee of the Bundesrat on customs duties and taxes, to act in cooperation with the customs or tax officials and with the directorial boards of the several States." Article 50 dealt with the appointment and National responsibility of the personnel of the postal and telegraph service of the Reich. The oath of office of all employes stipulated personal responsibility to the Emperor. The officers appointed by him, it was declared, "shall have the duty and the right to see to it that uniformity be established and maintained in the organization of the administration and in the conduct of business, as well as in the qualifications of employes." The Emperor was given the power "to issue governmental instructions and general administrative regulations, and also the exclusive right to regulate the relations with the postal and telegraph systems of other countries." The higher officers of control and supervision such as directors, counselors, and superintendents, throughout the Empire, were appointed by the Emperor. Confirmation and announcement of their appointment was left to the respective States. All other officers and local employes were to be appointed by the States.

According to constitutional theory and practice the Reich had the right to inform itself concerning those activ-

ities of the States covered by Article 4. The States were held to furnish such information not only upon specific request in particular cases subject to complaint, but in general were bound to supply the National authorities with statistical and other data concerning the execution of National law. In the opinion of some jurists the Reich had the right to send to the States special and permanent commissaries for the actual supervision of their activities.[1] The Reich was of course competent to demand the correction of irregularities and violations of the provisions of National legislation and, in case of a refusal on the part of the State, to execute the National will under the authorization of Article 19 of the Imperial Constitution.[2]

National legislative competency over the topics enumerated in Article 4 of the Imperial Constitution did not constitute an exclusive, but only a concurrent right of legislation. National supervision as here discussed, applied not only to the administration by the States of those affairs which had actually been regulated by National law or where the Reich had actually laid down certain fundamental norms for the guidance of State legislation, but equally where the Reich had not yet formally asserted its constitutional right of legislation.[3]

In the consideration of the extent and method of National control under the Republican Constitution we must distinguish between three different classes of legislation

[1] See Dambitsch, pp. 103-104.

[2] "If the States of the Confederation do not fulfill their constitutional duties, they may be compelled to do so by execution. This execution shall be decided upon by the Bundesrat, and carried out by the Emperor."

[3] See Arndt, Verfassung des Deutschen Reichs [of 1871], p. 99. Concerning the minority opinion denying the right of National supervision where the Reich has not yet regulated the matters enumerated in Article 4, see Dambitsch, p. 104.

covering: 1. such matters over which the National Government has the right of exclusive legislation, as enumerated in Article 6; 2. those matters over which the National Government has the right of legislation concurrent with the States, as defined in Articles 7-11;[4] 3. those affairs over which the States have exclusive legislative competence, i. e. those affairs not covered by Articles 6-11.

Article 4 of the Constitution of 1871 established at the same time the right of National legislation and of supervision over the activities of the States in the affairs enumerated. In the Republican Constitution the rights of National legislation and control are dealt with separately. The right of legislation by the Reich is defined in Articles 6-11, while the right of National control is established in Article 15. The object of the framers of the Constitution in thus dealing with the subjects of National control in a separate article is found in the evident attempt to establish more definite provisions for the extent and character of such control as compared with the corresponding provisions of the Imperial Constitution of 1871. This fact is amply proven by an examination of the statements made during the debates in both the Committee on the Constitution [5] and the National Assembly.[6] Like some of the earlier provisions discussed in the preceding chapters, Article 15 in its final form represents a compromise between the demands of the advocates of the National unitary State as embodied in the two Preuss drafts, and the aspirations of the State righters incorporated in the first and second Government drafts.

[4] This class may again be divided into (a) matters over which the Reich has the concurrent right of legislation in detail (Articles 7-9); (b) matters for the regulation of which it has the right to lay down the fundamental principles to be followed by State legislation (Articles 10-11).

[5] Verf. Ber. und Prot., pp. 80-86, 145, 428-429, 466.

[6] Heilfron, III, pp. 548, 627; V, p. 360.

That the National Government should have the right of supervision over the administration by the Länder of the affairs subject to its exclusive legislative competence —as far as the Länder are charged with administration of those affairs[7]—is self-evident from the consideration of the character of the subjects, the Reich having the exclusive right of legislation over: foreign relations; colonial affairs, citizenship, freedom of travel and residence, immigration and emigration, and extradition; organization for National defense; coinage; customs, including the consolidation of customs and trade districts and the free interchange of goods; postal and telegraphs, including telephones.

Concerning the meaning and extent of concurrent legislation the Republican Constitution definitely states in Article 12, Section 1, that: "So long and in so far as the Reich does not exercise its right of legislation, such legislation remains with the States. This does not apply in cases where the Reich possesses the exclusive right of legislation." Thus the Reich has the concurrent right of legislation over the affairs enumerated in Articles 7-11. But this National concurrent right of legislation is of a twofold character. The opening phrase in the case of Articles 7-9 states that "the Reich has the right of legislation" over the affairs enumerated, while Articles 10-11 stipulate that "the Reich may prescribe by law fundamental principles" covering the subject matter specified. The difference implied in the differentiation of the two phrases is that in the case of Articles 7-9 the National Union may regulate the subject matter in question in every detail, while in regard to the topics included in Articles 10-11 it merely has the right to lay down by National law the fundamental principles to be followed in the legislation of

[7] See below, text corresponding to notes 10-16.

the Länder. In other words, under the provisions of Articles 7-9 the Reich may, if it choses to do so, prevent State legislation on the particular subjects in question, while under the stipulations of Articles 10-11 it can only compel the Länder to legislate within the guiding norms of National law. This distinction is important for the determination of the extent of National supervision over State administration of the affairs subject to National legislative competency.

The statement has been made that under the constitutional system of the Empire the National right of supervision was held to extend also over the activities of the States in the affairs subject to National legislative competency when and where the Empire had not yet made formal use of this right. Reference was made, however, to the fact that this constitutional practice was challenged by a minority of German jurists.[8] It was the question of the extent of the National right of State supervision in this particular aspect which formed the chief topic of the debates on the subject of Article 15 in the *Verfassungsausschuss.*

The second (i. e. the published) Preuss draft of the Constitution contained the following provision: "As far as the execution of National laws does not rest with the National authorities, the official organs of the Länder are obliged to follow the instructions of the National Government. It is the duty and right of the National Government to supervise the execution of National laws. For this purpose it may send to the German *Freistaaten* commissioners who shall be given access to the documents and shall be supplied with all the information desired. In case of refusal the guilty officials of the Länder may be

[8] See note 3.

punished in accordance with the disciplinary code in force for the regulation of the National civil service." [9] In this formulation the right of National supervision was apparently intended to cover all matters over which the National Republic had any kind of legislative competence, whether the Reich had actually legislated on the subject or not. Under the particularist influence of the *Staatenkonferenz* and the *Staatenausschuss* this provision was changed to read, "The National Government exercises supervision in all matters which have been regulated by National legislation. . . ." [10] However, the limitation of National supervision to matters actually regulated by National legislation as expressed in the preceding formulation was removed by the moderating vote of the *Verfassungsausschuss*. In support of his motion for the eradication of this limitation Dr. Kahl, speaking before the Committee, said:

Article 14 is of great importance for the future constitutional practice of the Reich. It has been given considerable attention in the [professional] literature, and harbors many doubts and problems. One need mention here only the work of Triepel which, through more than seven hundred pages, treats of the question of National supervision. . . .

Section 1 [of Article 14] constitutes a not inconsiderable

[9] Article 8 of the second Preuss draft.

[10] The rest of the Article read: ". . . As far as National laws are executed by the authorities of the Länder, the National Government has the right to issue general administrative instructions for the execution of National legislation. It is authorized to send commissioners to the central authorities of the Länder for the supervision of the execution of National laws. The Governments of the Länder are obliged to correct, at the request of the National Government, irregularities discovered in the execution of National legislation. In the case of differences of opinion the National Government or the Government of the State affected may have recourse to the decision of the Staatsgerichtshof." (Art. 14 of the first and second Government drafts.)

(*nicht unbedenklich*) retrogression from the existing law, in so far as it makes the exercise of National supervision dependent upon the enactment of National legislation on the subject in question. It thus denies to the Reich the so-called "independent supervision," i. e. the right to supervise the Länder within the sphere of these matters when the Reich has not yet made actual use of its right of legislation. According to modern law the Reich undoubtedly has been in the possession of such a right of independent supervision and it has exercised that right. This can be deduced from the introductory phrase of Article 4 of the former Constitution . . ., from the history [of this competency] . . ., and even more so from actual practice of the Reich which has always applied this right of supervision. Thus the National Union has, decades before the passage of the Emigration Law of 1897, sent supervisory commissaries to the port cities, especially when great irregularities were discovered in Lübeck. In the same way the Reich has made use of this right of supervision in the field of public hygiene. Occasionally this practice has led to differences of opinion between the former Government and the Reichstag, especially in a number of cases in which politics interplayed, as for instance in the supervision of the *Fremdenpolizei* [the police charged with the control of foreigners in the Reich]. For example, the National Government refused to institute measures of supervision in the case of the deportations of Poles and Danes ordered by the Prussian Government. . . . In this respect, however, the National Government has not been consistent. The Reichstag, on the other hand, has never wavered and has ever stood for the right of independent supervision. As far as the political parties are concerned, their position was determined by their attitude toward the question of the unitary or federal character of the National State. . . .

In principle there can be no doubt as to the fact that the Reich cannot do without the right of independent supervision. It is essential to the protection of the Reich and of the general interest. The Reich having once placed its hand upon a cer-

tain matter must take care not to allow legislation to be enacted in any of the Länder, which infringes upon this subject. From the point of view of the whole, it is clear that causes of an international, an economic, a military, and a political nature may . . . make the exercise of the right of independent supervision desirable. The Reich must in this respect be strong.[11]

For these reasons Kahl proposed to change the phrase, ". . . in those matters regulated by National law," to read, "in those matters in which the Reich has according to Articles 9 and 9-a the right of legislation." The right of supervision in the matters covered by Article 9-b, so he

[11] Verf. Ber. und Prot., p. 80. The work of Triepel referred to by Kahl is, "Die Reichsaufsicht. Untersuchungen zum Staatsrecht des Deutschen Reiches . . .," Berlin, 1917. In his review of this work Prof. Wittmayer writes in part: "The imposing groundwork of the entire presentation is, of course, found in everything that centers around the control of the Reich (*Reichsaufsicht*) which in principle is only general supervision (*Oberaufsicht*) (p. 179). Tracing the marks of immediate National control in the various sections of the Constitution, [Triepel leads us] through the winding paths of the German customs, railway, and military law (p. 258). We thus find that 'the constitutional *Reichsaufsicht* over the customs and tax administration (pp. 183-187) goes beyond the line of mere *Oberaufsicht*, that within this sphere it is essentially limited to the weaker phase of . . . observation, but that nevertheless it must be considered as immediate *Reichsaufsicht*' (p. 187). Matters are different and more complicated in the railroad administration (pp. 187-213). Here the Reich has merely gained the possibility to direct its control without regard of the *Landesaufsicht* (supervision by the Länder), and by acts of immediate supervision, to the activities (*das Gebahren*) of all persons connected with the administration of the railroads. . . . In this case the control goes beyond the line of observation. The Reich is competent to . . . issue ordinances, regulations, and corrective instructions (p. 213). A statement doing justice to [Triepel's] exposition [of the *Reichsaufsicht*] in the matter of the complicated military administration (pp. 253-258) cannot here be given. To the Emperor [Triepel] grants only 'the disposition of the army' in contradistinction to the sole au-

held, was out of the question.[12] Simultaneously another motion was introduced by Representative Meerfeld, offering the following formulation: "The National Government exercises supervision in those matters in which the Reich has the right of legislation." [13]

The Articles 9, 9-a, and 9-b mentioned in Kahl's proposal correspond respectively to Articles 6-7, 8-9, and 10-11 of the final text of the Constitution. In other words, Kahl's motion posited the right of supervision, dependent and independent, for all matters over which the Reich had exclusive and concurrent legislative competency. It excluded such right of supervision over those matters for the regulation of which the National Union was competent to lay down the fundamental norms to be followed by State legislation, while the motion of Representative Meerfeld conceded to the Reich the right of supervision also in the latter case. When Preuss, speaking for the National Government, pointed out the difference between the motions of Kahl and Meerfeld, and when he defended the National right of supervision to the full extent of the Meerfeld proposal, Kahl withdrew the limitation implied in his proposition. After a futile attempt by the representatives of Prussia, Bavaria, and Baden, to save the original formula,[14] the section was adopted in the form proposed by Meerfeld and sanctioned by Kahl.[15]

thority of command (p. 228). The imperial inspection is treated in general as immediate *Reichsaufsicht* (p. 247 ff.), and in the three kingdoms possessing their own *Kontingentsherrlichkeit* (p. 250 ff), as mere *Oberaufsicht*. As shown in continuation and in conclusion, the immediate *Reichsaufsicht* constitutes after all and in general the exception, even where it occurs together with mere *Oberaufsicht* (p. 258 ff); it is the latter which is the rule . . ." (Zeitschrift für öffentliches Recht, bd. II, 1922, pp. 231-235).

[12] Verf. Ber. und Prot., p. 80.

[13] *Ibid.*

[14] *Ibid.*, pp. 81, 86.

[15] *Ibid.*, p. 83.

National control as provided in Section 1 of Article 15 of the National Constitution extends, therefore, not only to the cases where the Reich has actually made use of its concurrent right of legislation, but also where it has not yet exercised this right. But where this right has not yet been exercised by the Reich, the National Government's right of control cannot be held to exist to the same degree to which it must be applied where and when National legislation has covered the subject matter in question. The same is true, of course, with regard to the supervision of the Reich over the administration by the States of matters concerning which the Reich has laid down the fundamental guiding norms to be heeded by the State legislatures. This fact was brought out by several speakers during the debates in the Committee on the Constitution. As pointed out by Dr. Freund, Undersecretary of Prussia, the granting of the so-called independent right of supervision means that in the case of those matters not yet regulated by National law, the National Government exercises the right of supervision over the Länder only "to the extent of guarding the interests of the Reich."[16] In other words, the Reich's supervision over the Länder extends in this instance only to the degree of preventing them from exceeding their legislative competency, i. e. from enacting, prior to the regulation by National law, any legislation incompatible with the larger interests of the National Union. Beyond this, National supervision does not in general justify any influence over the administration and legislation of the Länder under the provisions of Articles 7-9, as long as the Reich itself has not, by its own laws, regulated the subjects enumerated in these articles. This interpretation was supported by Dr. Zweigert, National Minister of Jus-

[16] *Ibid.*, p. 82.

tice, whose opinion on this subject is of sufficient importance to be cited in addition to that of Dr. Freund, quoted above. Expressing his conviction that the final vote of the Committee would be one in favor of the right of independent supervision he continued as follows:

> But this [decision] embodies one difficulty. In the case of the supervision of National legislation it is quite clear what the Reich has to supervise. But in the absence of National laws a definite guiding criterion for the exercise of National supervision is lacking. It cannot possibly be the task of the National Government to enforce obedience by the Länder to their own State legislation. That is the business of the individual Länder. With the assumption of such a burden the Reich would undertake a task which in practice it could not carry through. The only criterion for the National right of independent supervision is whether the individual Länder observe the interests placed in the keeping of the Reich, in other words, whether the Länder fulfill the obligations assumed by them under the [National] Constitution. . . .[17]

The extent or limitation of the National right of supervision over the activities of the Länder concerning the subjects included in Articles 10-11, as stated in brief by Preuss and Representative Schultz, was accepted without dissent by the Committee. "If the Reich is competent to lay down guiding norms," Preuss argued, "then it must also have the right to see that these principles are followed. Of course, it has no right of control over the details, but it

[17] To achieve greater clarity with regard to this question Dr. Zweigert proposed the following phraseology (which, however, was not accepted): The Reich has the right of supervision in all matters which it is competent to regulate "by the Constitution, [ordinary law], ordinances, and National treaties" (Verf. Ber. und Prot., p. 82). On this subject consult also Hatschek, I, pp. 96-97; Anschütz, pp. 50-51; Arndt, pp. 67-68; Poetzsch, pp. 63-64; Giese, pp. 101-102.

has such a right to the extent of [enforcing obedience] to the fundamentals. . . ." [18] Replying to Kahl who, though yielding to the argument of Preuss, questioned the premises involved, Representative Schultz said: "Representative Kahl is in error in assuming that principles cannot be supervised. Obedience to fundamentals can very well be subject to control. The only question is whether one desires such supervision or not. In my opinion the necessity prevails for the existence of such a right. . . ." [19]

From the preceding definition of National supervision it follows, of course, that the execution of the third class of legislation, i. e. State legislation passed under the exclusive right of legislation of the Länder, is free from National supervision except in so far as such control is implied in the President's guardianship of the National Constitution as it is provided in Article 48, and in Article 13 placing National law above State law. In other words, National control in this instance exists only to the extent of keeping the course of such State legislation within the directive norms of the National Constitution.[20]

Administrative Control with Judicial Review. But how is this National control effected? Article 13 of the Republican Constitution establishes the supremacy of National legislation over the laws of the States. As to the execution of National law, Article 14 states that "the laws of the Reich will be executed by the State authorities, unless otherwise provided by National law." In principle, the laws of the Reich here referred to are those passed under the National concurrent right of legislation, enu-

[18] Verf. Ber. und Prot., p. 80.
[19] *Ibid.;* see also Hatschek, I, pp. 96-97; Poetzsch, p. 64.
[20] Hatschek, I, p. 94.

merated in Articles 7-11. For the execution of the laws of the Reich enacted by the National Legislature under the right of exclusive legislation, as enumerated in Article 6, the Republican Reich has, as a rule, its own National organs of administration and execution. In the case of the subjects enumerated in Article 6 the execution by the States is exceptional, for the execution of legislation covering these subjects by the Reich is a matter of National principle. The reverse is true in the case of the subjects listed under Articles 7-11.[21]

National control is exercised in two ways: first, on the basis of an administrative decision by the National Cabinet, subject to judicial review by a National Supreme Court; second, on a purely judicial basis, i. e. by the judicial decision of a National Supreme Court at the request of the National or State Cabinets. In the first case we speak of administrative control or supervision with judicial review, in the second instance we speak of National control by judicial supervision or simply of National judicial supervision.[22] The first kind of supervision is authorized by Article 15, the second by Articles 13 and 19, of the National Constitution.

Concerning the method of National administrative supervision with judicial review the National Constitution in Article 15, Sections 2-3, establishes as definite constitutional provisions the essentials of the practice which prevailed under the Empire in the form of constitutional conventions. Thus it stipulates that:

In so far as the laws of the Reich are to be carried into effect by the State authorities, the National Cabinet may issue general instructions. It has the power to send commissioners

[21] Giese, pp 99, 102. In this connection see this chapter, section: Administrative organization of the Reich.

[22] Hatschek, I, pp. 25, 98.

to the central authorities, and, with their consent, to the subordinate State authorities, in order to supervise the execution of National laws.

It is the duty of the State Cabinets, at the request of the National Cabinet, to correct any defects in the execution of the National laws. In case of dispute, either the National Cabinet or that of the State may have recourse to the decision of the Staatsgerichtshof, unless another court is prescribed by National law.[23]

These constitutional provisions have been exemplified by a number of recent National laws and acts of State, embodying specific applications of National supervision in its various aspects. Article 4 of the *Finanzausgleichgesetz* (Finance Equalization Law) of June 23, 1923,[24] demands the repeal or amendment of tax regulations by the Länder or their communities, which contravene the general guiding norms contained in Article 3 of the National law. Article 5 requests that a new kind of State tax, or State regulations, introducing rates in excess of the maximum figures agreed upon by the States and the National Minister of Finance be submitted, prior to their enactment, to the National Minister of Finance. Article 5 further provides that in case no agreement is reached between the State and the National Minister for the enactment of the State regulations in question, a settlement of the issue is to be achieved in accordance with Article 6 of the National law. The question involved may be either of a judicial or of a political character. Thus Section 1 of Article 6 states that "in case where there is a difference of opinion . . . over the question whether a State tax regulation agrees with National law, a decision shall be had by the Staats-

[23] As to courts competent under this section see notes 36, 37, and 39, with corresponding text.

[24] For the text of this law see Poetzsch, Vom Staatsleben . . ., p. 43 ff.

gerichtshof upon request of the National Minister of Finance or the State Government concerned." [25] On the other hand, according to Section 2 of the same Article, "the question whether State or communal taxes are apt to impede the collection of National taxes, and whether preponderant National financial interests oppose the collection of the State or communal tax,[26] is to be decided, at the request of the National Minister of Finance or the State Government, by the National Council (Reichsrat)." [27] Finally, Article 60 of the National *Landessteuergesetz* (State Tax Law) authorizes the National Minister of Finance and the National officials designated by him, to demand of the State and communal Governments information concerning the State and communal taxation and, for the equalization of the financial burden, insight into budgets and annual balances.

Similar specifications for National control are contained in the provisions of the National Law for the uniform Regulation of Salaries of the Civil Service, of December 21, 1920. Article 4 of this law states that "new regulations by the States for the payment of officials . . . must be reported to the National Minister of Finance. . . ." According to Article 5, Sections 1 and 2, the National Minister of Finance may raise objection to such provisions or to any administrative act on the part of the Länder

[25] Under the provisions of this section the Staatsgerichtshof has rendered a number of decisions cited by Poetzsch, *ibid.*, p. 44.

[26] I. e., the question whether State or communal tax regulations agree with the guiding principles laid down in Article 3 of the National law under consideration as enacted by virtue of Article 11, no. 2 of the National Constitution.

[27] Under the provision of Article 6, Section 2, the Reichsrat, in its session of February 1, 1923, rendered a decision in the case of a certain social tax regulation issued by the city of Chemnitz of the State of Saxony, as contravening the general principles of Article 3 of the National *Landessteuergesetz*. In this decision the Reichsrat assumed the right

which constitutes an infringement upon the provisions of the National law in question. Article 10 stipulates that "new State regulations for the payment of officials must not be issued unless they have first been reported to the National Minister of Finance and have either been approved by the latter within a specified time, or if not so approved, have been declared acceptable by the *Reichsverwaltungsgericht* or the *Reichsschiedsgericht*."

Under the provisions of Article 26, Section 1, of the *Arbeitsnachweisgesetz* (Labor Employment Law) of July 22, 1922, the National Employment Bureau exercises in agreement with the highest State authorities the vocational (*fachliche*) supervision over the execution of the law. Article 31 provides that: "For the purpose of accomplishing the tasks enumerated in Article 26, the National Bureau is authorized to conduct investigations concerning the status of the labor market, conditions of labor, strikes and lockouts, and regarding the movement of membership of employers' and labor organizations, and to demand the information necessary thereto."

By the Law regulating the Procedure of Poor Relief, the National Minister of Labor has been authorized in Article 7, Section 2, "to enter into immediate contact with the Poor Relief Courts as far as this is necessary for the orderly execution of the poor relief." [28] In a letter addressed to the Minister of Labor of Saxony under the date of August 26, 1924, the National Minister of Labor requested the withdrawal of an ordinance which he claimed was in

of provisional determination of the extent and character of the communal taxes on entertainments. These provisional regulations were to have the force of National law until the community, with the consent of their State Government, should issue regulations in agreement with the Reichsrat's specifications (Poetzsch, *ibid.*, pp. 44-45).

[28] This survey of the specific provisions for National supervision is based on Poetzsch, *ibid.*, pp. 43-46.

conflict with the National instructions for the regulation of the subject in question, and later also with a National ordinance covering the specific provisions of the State ordinance.[29]

Finally we may mention here an instance of the sending of a National commission to one of the States. This case is, by the way, of additional interest in so far as it shows the difference of sending National commissioners under the provisions of Articles 15 and 48 respectively. By National emergency ordinance of September 26, 1923, issued by virtue of Article 48 of the National Constitution, a military commissioner had been sent to Thuringia for the reestablishment of public order and security. Differences arose between the National and State Governments concerning the competencies and activities of the commissioner. In order to get to the bottom of the difficulty, the National Government sent at the end of December, 1923, a National Commission consisting of the National Commissary for public order and security and a ministerial council composed of one member of each of the three Ministries of the Interior, Justice, and Finance. This commission was authorized by the National Government, under the provisions of Article 15, Section 2, to conduct all necessary investigations. As the result of its labors, a formal agreement was signed by the Federal and State Governments in accordance with which the State Government guaranteed certain essential reforms and the National Government promised to refrain from National enforcement under Article 48.[30]

The sending of a National commissary was considered in the fall of 1920 also in the case of a disagreement between the National Government and the Free City of

[29] *Ibid.*, p. 49.
[30] *Ibid.*, pp. 47-48.

Bremen, concerning a resolution passed by the Bremer House of Commons (*Bürgerschaft*) in favor of the dissolution of the local militia (*Stadtwehr*). In January, 1921, the National Minister of the Interior accompanied by a ministerial official went to Bremen to examine the situation on the spot. As a result of their investigation the Bremen Government was advised in a note from the Ministry of the Interior that the resolution of the *Bürgerschaft* was held to threaten public order and security of the Free City. The note requested a revision of the resolution in view of the financial and general interest which the Reich had in the existence of public order in the city.[31]

As illustrated in the preceding instances, the methods of National administrative supervision with judicial review may be enumerated as follows:

1. General instructions issued by the National Cabinet for the observance by the State Governments in the execution of National law.[32]

2. The sending by the National Cabinet of supervisory commissions or commissioners to the central government organs of the States and, with the latter's consent, to their subordinate organs.

3. The conducting of investigations, examination of witnesses, inspection of State documents by these National commissioners or other officials designated by the National Government.[33]

[31] *Ibid.*, pp. 48-49.

[32] The *Landessteuergesetz* of 1923 stipulates in Article 12 that the communities must levy an amusement tax. According to Article 13, Section 1 of the same law, the Reichsrat is authorized to issue "Musterordnungen" (standard forms) for the regulation of this levy by the communities (Poetzsch, *ibid.*, pp. 43-44). On the subject of instruction by National organs as a means of National control see also Hatschek, I, pp. 96-97.

[33] An attempt was made in the *Verfassungsausschuss* to introduce a definite provision to this effect into the Constitution, but was abandoned on the ground that it would be superfluous to state the obvious and

4. Consideration by the Reichsrat of the political aspect or the expediency of the question of the agreement of State and municipal regulations with the guiding norms of National law enacted under Article 11 of the National Constitution.[34]

5. Objection by the National Cabinet to State laws prior to their enactment, within the limitation of the topics of Article 7, no. 13, of the National Constitution, which gives to the Reich the right of concurrent legislation on the subject of "the socialization of natural resources and business enterprises, as well as the production, fabrication, distribution, and price-fixing of economic goods for the use of the community."

6. Submission to the National Minister concerned for his approval or rejection, prior to their enforcement, of State laws and regulations issued under the limitation of the fundamental guiding principles of National legislation enacted under Articles 10-11 of the National Constitution.[35]

7. Request by the National Government for the correction of State execution contested by the National Cabinet, and, in case of a refusal on the part of the State, recourse to the decision of a National Supreme Court, followed, if necessary, by execution of the decision of the

that a definite constitutional provision of this kind would only tend to add to the irritation of the Länder (Verf. Ber. und Prot., pp. 87, 428-429).

[34] "The question whether State or communal taxes are apt to damage the National tax income, and whether preponderant National interests of finance are opposed to the levy of these taxes, is to be decided by the Reichsrat upon the request of the National Minister of Finance or the State Government concerned" (Article 6, Section 2, of the *Landessteuergesetz* of 1923).

[35] See the provisions of Article 5 of the National *Landessteuergesetz*, and Articles 4, 5 and 10 of the National Law for the Uniform Regulation of the Salaries of the Civil Service, cited at beginning of section: Administrative Control with Judicial Review.

Supreme Court by the National Government in accordance with Article 48 of the National Constitution. The National Supreme Court of first consideration is the Staatsgerichtshof erected by the National Law of July 9, 1921, as called for by Article 108 of the National Constitution.[36] Other National courts to be resorted to under Section 2 of Article 15 are the *Reichsfinanzhof,* the *Reichsverwaltungsgericht,* the *Reichsschiedsgericht,* and whatever other court may be competent in the case of the different activities of the Government in the particular fields for which they have been established.[37]

The kind of dispute referred to in Article 15, Section 2, is one relating to the manner of execution of National law by the State Governments. It is a dispute arising over the administrative activities of the Länder in so far as they have to do with carrying into effect National laws enacted under the National concurrent right of legislation granted by Articles 7-9, and National laws issued as fundamental guiding norms under Articles 10-11. It is evident that the provisions of Article 15, Section 2, do not apply to the primary judicial question of the constitutionality of the law to be applied in the State Courts. It can in general

[36] According to the National Law of July 9, 1921, providing for the creation of the Staatsgerichtshof in compliance with Article 108 of the National Constitution, the Staatsgerichtshof is to be established with the Reichsgericht for all cases arising under Articles 2-15, and with the Reichsverwaltungsgericht for all cases arising under Articles 16-23 and 59 of the National Constitution. Until the Reichsverwaltungsgericht is created, the Reichsgericht takes its place for the purposes of the settlement of cases under Articles 16-23 by the Staatsgerichtshof (RGBl., 1921, p. 905). We are here concerned only with the Staatsgerichtshof formed or to be formed in connection with the Reichsverwaltungsgericht and only in so far as its competency arises from Article 15.

[37] See Article 6 of the *Landesstcuergesetz* and Article 10 of the Law for the Uniform Regulation of the Salaries of the Civil Service (Poetzsch, Vom Staatsleben . . ., pp. 44, 46).

only refer to the procedural aspect of the activities of the courts in question. Nevertheless, there is the possibility that indirectly the criticism by the National Cabinet of a State administrative act or regulation may lead to the question of the legality or constitutionality of a legal norm enacted by a State, the execution of which by the State Government is questioned or inhibited by the National Cabinet. This is the case where the State laws or regulations issued as concurrent legislation under Articles 7-9, or in elaboration of the fundamental guiding rules laid down by the Reich under Articles 10-11, are considered incompatible with the corresponding provisions of the National law in question. However, National supervision or control under the provisions of Article 15 is directed and extends, not to the application of such State regulations in the State Courts, but to the prevention of their enactment. This is shown by the provisions of Articles 5 and 6 of the *Finanzausgleichgesetz,* and Articles 4, 5, and 10, of the Law for the Uniform Regulation of the Salaries of the Civil Service, quoted above.[38] These provisions make it clear that the recourse to the decision of a National Supreme Court, provided for in Section 2 of Article 15, as far as it applies to the question of the agreement of State law with National law, is to be had prior to the going into effect of the State law concerned, that is, before the State regulation actually becomes law. It is rather important to remember this point, for the reason that without the clear understanding of this distinction it will be extremely difficult for the student to draw the line between the decisions of a National Supreme Court concerning the compatibility of State law with National legislation under Article 13 and under Article 15.[39]

[38] Poetzsch, *ibid.*

[39] For list of decisions by the Reichsfinanzhof see Poetzsch, Vom Staatsleben . . ., p. 44.

Diplomatic Intercourse between Reich and Länder. Under the Imperial Constitution the member States maintained ambassadors (*Gesandte*) at the capital of Prussia as the presiding power of the National Union. These ambassadors were identical with the voting representatives of the States in the Bundesrat. There existed, besides this representation of the States at the capital of Prussia, no system of ambassadorial representation of the States with the Reich. The National Republican Constitution does not contain any definite provision which could be interpreted to perpetuate this or to install a different system for the Republican régime. Quite logically, the National Government, shortly after the promulgation of the National Constitution, was of the opinion that the Republican Reichsrat would prove sufficient for the representation of the Länder among themselves and for the representation of Länder and Reich. On the other hand, the opinion prevailed with some organs of the National Government that the Reich should send to the Länder representatives, not of a diplomatic character, but as organs of National supervision over the Länder or, according to still another plan, that the Reich should delegate the task of such supervision to the Presidents of the State Finance Bureaus. Among the States, however, the conviction was predominant that the Republican National Constitution had changed nothing with regard to the question of State representation and that the interests of the Länder, transcending the functions of the Reichsrat as constituted under the Republican Constitution, were not sufficiently served by the Reichsrat's participation in the legislation and administration of the Reich. After protracted negotiations between the Reich and some of the Länder, the National Chancellor, on December 12, 1919, made the following proposal:

It is true, the National Constitution does not contain an explicit provision for the elimination of the former right of

[diplomatic] representation of the States among themselves. It would, nevertheless, be in opposition to the spirit of the Constitution to continue the establishment of embassies in the proper sense, i. e. of diplomatic representation with the ambassadorial prerogatives derived from international law, especially that of exterritoriality. The relations between the German Länder are of a constitutional, not an international legal character. . . . For this reason the [framers of] the National Constitution of August 11, 1919, knowingly refrained from including for the benefit of the members of the Reichsrat a provision similar to that of Article 10 of the former Constitution, which authorized the Emperor to grant to the members of the Bundesrat the customary diplomatic immunity. There can be no question of the continued need of the State Governments to support their wishes before the Government of the Reich, to gather information concerning the legislation, administration, the internal and foreign political situation of the Reich, through the medium of authorized persons permanently or temporarily charged with these tasks. But this need finds its best expression in the representation of the Länder in the Reichsrat. As heretofore, the National Chancellor and each one of the National Ministers will continue to inform the Governments of the Länder in every respect concerning the aims and tendencies of the National Government as explicitly required in Article 67, Sentence 1, of the National Constitution. . . . Judging from remarks made at the meeting of November 21, some of the Länder seem to entertain the desire to continue the practice of assigning to their principal representative in the Reichsrat the official title of ambassador (*Gesandter*). In that case . . . these so-called ambassadors representing the German State Governments in the Reichsrat would . . . not belong in the international legal sense to the Diplomatic Corps accredited in Berlin to the Reich. With this understanding the National Government would not in principle harbor any objection to their official title of *Gesandter,* but it proposes on its own part the title "bevollmächtigter Minister" (Minister plenipotentiary). According to information re-

ceived, the Prussian Government, accepting the point of view here developed and looking forward to its realization, has decided to discontinue from April 1, 1920, the embassies still existing with the State Governments. . . . The question whether and in what form the National Government may send representatives to the individual Länder remains open.

This proposal of the National Chancellor elicited the following reply from the representatives of Bavaria, Württemberg, Baden, and Hessen. The reply, formulated in Stuttgart on January 7, 1920, was subject to the final decision of their respective Governments. It read:

1. A strong representation of the individual Länder with the National Government in Berlin is a pressing need for the protection of the interests of the Länder in every respect.

2. For this purpose the voting representative of the Länder in the Reichsrat is to be recognized by the Government of the Reich as the authorized representative (plenipotentiary) of the individual State. . . .

3. The right of the Länder to maintain embassies with each other is not affected by the National [Republican] Constitution.

4. The Länder are ready to abstain from the exercise of this right as long as the Government of the Reich will refrain from sending permanent representatives to the Länder. . . . Only in case [the Governments of] the Entente [powers] are to send diplomatic representatives to the Länder would no objection be raised by the Länder to the sending of diplomatic representatives by the Reich. The sending of other permanent representatives of the Reich would be detrimental to the interests of the Reich. It would be declined by the population of the individual Länder and could, finally, also not be harmonized with Article 15 of the Constitution of the Reich.

In his response of February 27 the National Chancellor registered his disapproval of propositions three and four.

As a result of a new conference which took place on May 11, between the National Government and the representatives of the States mentioned, the Chancellor advised the States in question as follows:

. . . The Reich undertakes not to send National commissaries to the Länder. It will send only, where it shall prove necessary, representatives of the Foreign Office with diplomatic qualification and the title of *Gesandter* (or possibly chargé d'affaires).

The Länder are expected to transform their embassies in Prussia into embassies accredited to the Reich. In doing so they are free to retain the title of embassy and Prussia on her part agrees that they shall undertake, at the same time, the protection of the interests of the Länder with the Prussian Government.

The Länder are not to maintain embassies among themselves, but there is no objection to the sending of temporary or permanent plenipotentiaries (*Bevollmächtigte*) for the purpose of representing special interests, particularly in the field of economics.

To this the Bavarian Government issued a rejoinder under date of June 7. The representative of the Reich, so the Bavarian reply ran in substance, must, in order to be acceptable to Bavaria, represent the Reich, not the Foreign Office. This concession, it was claimed, had been made by verbal agreement on the occasion of the National Chancellor's visit to Munich in May, 1920. The question of the transformation of the Bavarian embassy in Berlin from one accredited to Prussia to one appointed to the Reich, it was stated, might have to be submitted to the Bavarian *Landtag*. Bavaria persisted in her point of view that the right of the Länder to representation among themselves had not been affected by the National Republican Constitution. But as she informed the Chancellor, Bavaria had

nevertheless closed its embassies in Stuttgart and Dresden and did not at the time contemplate the establishment of new embassies with the German States. The question at issue was therefore not an acute one. Whether other States might wish to send ambassadors to Bavaria was declared to be an affair for them to consider, though Bavaria herself would of course not be in the position to oppose any desires in that direction. . . .[40]

At the beginning of 1925 the situation was essentially as unsettled as it was left by the negotiations cited above. In accordance with the verbal agreement of May 11, 1923, the representative of the National Foreign Office sent to Munich by the National Government was accorded the title of *Gesandter*. It was further conceded by the Reich that the particular individual to be sent should be one with a diplomatic career, that all intercourse with him was to be carried on in diplomatic forms, and that his appointment and term of office should depend upon the approval of the Bavarian Government. The National Government also sent a representative to Darmstadt, the capital of Hessen. However, for reasons which are not far to seek, the Reich's emissary to Hessen merely functions as the official of the Foreign Office with his place of business in Darmstadt.[41]

The state of affairs with regard to representation between the Länder was at this same time still equally undecided and seemed to be left entirely to the pleasure of the parties concerned. As a matter of fact Bavaria reopened the embassy in Stuttgart, which she had informed the National Chancellor, had been closed.[42] On April 1, 1921, the day on which the the Bavarian embassy in Berlin was accredited to the Reich instead of Prussia, the em-

[40] For the documents here quoted see Poetzsch, *ibid.*, pp. 65-69.
[41] *Ibid.*, p. 68.
[42] *Ibid.*

bassy maintained by Prussia in Munich was closed and from July 1, 1920, Prussia was represented in Bavaria by a plenipotentiary (*Bevollmächtigter*). But on May 1, 1924, the Prussian embassy in Munich was reopened and the plenipotentiary transformed into a chargé d'affairés. Saxony, like the rest of the mid-German States, retained its embassy with Prussia and for a time also in Munich (Bavaria). The latter was closed in the fall of 1923, but its reestablishment was under consideration at the end of 1924. The Prussian embassy in Dresden, retained for a while, was closed on March 31, 1924.[43]

While it is thus true that the Länder have so far maintained a formal semblance of diplomatic intercourse with each other and with the Reich, it is important to note that they have accepted, without protest and without reservation, the principal contention of the National Chancellor, namely, that whatever the form of intercourse or the official title of the representatives might be, the relations between Reich and Länder and between the Länder themselves are governed not by international but by constitutional law, and the "ambassadors" of the Länder do not belong to the Diplomatic Corps accredited to the National Government at Berlin.

Administrative Organization of the Reich. With the creation of the North German Confederation there arose, of course, the necessity of some central administrative organization for the conduct of those public matters which directly concerned the Confederation. Thus the so-called *Bundeskanzleramt* was created as the office where all matters assigned to the *Bundeskanzler* were to be attended. With the establishment of the Empire in 1871 this office

[43] *Ibid.*

was called the *Reichskanzleramt.* As a second federal office or department the Prussian Ministry for Foreign Affairs was taken over into the federal service under the name of Foreign Office of the North German Confederation, and later of the German Empire. Gradually other federal departments were added: the Imperial Admiralty; the Administration of the National Invalid Fund; the *Reichseisenbahnamt;* the *Reichsbankadministration.* Other departments were established by the emancipation of specific sections from the Office of the Chancellor. The first branches to become separate National services were the Post Office and the Telegraph Service, later combined under the name of *Reichspostamt.* Next were established by separation from the Office of the Chancellor, the Department of Justice, the Office of Chancellor for Alsace-Lorraine, and the Treasury. The Office of Chancellor for Alsace-Lorraine was abolished by the change of the Constitution of Alsace-Lorraine effected by the Law of July, 1879. In addition to the existing *Reichseisenbahnamt* concerned with the National interests in the various railroads of the States and those of a private character, a *Reichsamt* was created for the administration of the National railroads. Since January 1, 1880, there had remained of the original Office of the Chancellor only the so-called central section which assumed the name of the *Reichsamt des Innern* (Department of the Interior). Finally in 1889 the Marine Administration, heretofore in the hands of the Admiralty, was constituted a separate department.[44]

According to the official Handbook for the German Empire, prepared in the Department of the Interior, the administrative organization of the Empire as it existed shortly before the war may be outlined as follows:[45]

[44] Meyer, Lehrbuch des Deutschen Verwaltungsrechts, 1913, p. 41, note 5.

[45] Handbuch für das Deutsche Reich auf das Jahr 1912.

EMPEROR—BUNDESRAT

NATIONAL CHANCELLOR (*Reichskanzler*)

Appointed by and responsible to the Emperor; presiding officer of the Bundesrat.

The official relations between the Chancellor and his subordinate Departments or Ministries were conducted by the

CHANCELLERY (*Reichskanzlei*)

Subordinate to the Chancellor were the following Departments and Services:

I. THE FOREIGN OFFICE (*Auswärtiges Amt*)

From this Department Imperial Missions and the Consular Service were organized.

II. DEPARTMENT OF THE INTERIOR (*Reichsamt des Innern*)

This Department dealt with all affairs for which no other specific service existed. Subordinate to it were the following Offices and Commissions:

1. Central Directory of the *Monumenta Germaniae Historica*
2. Clearing House of the Kali-industry
3. Redress Commission of the Kali-industry
4. National Commissary for Emigration
5. National School Commission
6. Technical Commission for Navigation
7. National Examination Board for Seamen, etc.
8. Standing Exhibition for the Welfare of Labor
9. Committee on the Exchange (*Börsenausschuss*)
10. Court of Appeal in Affairs concerning the Exchange
11. Federal Office for Home Affairs (*Heimatwesen*) dealing with poor relief and relief organizations

12. Ship Tonnage Control Office (*Schiffsvermessungsamt*)
13. Final Disciplinary Chambers
14. Office for the Investigation of Marine Accidents
15. Bureau of Statistics
16. Commission of Weights and Measures (*Normaleichungskommission*)
17. Bureau of Health
18. Biological Institute for Agriculture and Forestry
19. Patent Office
20. National Insurance Office
21. National Physical-Technical Institute
22. Canal Office
23. Office of Supervision of Private Insurance

III. NAVY DEPARTMENT (*Reichsmarineamt*)
Subject to this Department was the *Seewarte* at Hamburg.

IV. DEPARTMENT OF JUSTICE (*Reichsjustizamt*)

V. TREASURY (*Reichsschatzamt*)

VI. COLONIAL OFFICE (*Reichskolonialamt*)

VII. NATIONAL RAILWAY BUREAU (*Reichseisenbahnamt*)
This office was entrusted with the exercise of the National rights of supervision over those railroads which were not under National management.

VIII. COURT OF ACCOUNTING (*Rechnungshof*)
Under the name, *Rechnungshof des Deutschen Reichs*, the Prussian Court of Accounting exercised the control over the budgets of the Reich, Alsace-Lorraine, and the Colonies. The accounting of the *Reichsbank* was subject to the supervision of the same court.

IX. Administration of the National Invalid Fund (*Verwaltung des Reichsinvalidenfonds*)

X. Post Office Department (*Reichspostamt*)

XI. Administration of National Railroads (*Verwaltung der Reichseisenbahnen*)

XII. National Military Court (*Reichsmilitärgericht*)

XIII. National Bank (*Reichsbank*)

XIV. National Debt Commission (*Reichsschuldenkommission*)

XV. National Commission for Fortress Districts (*Reichsrayonkommission*)

As stated in detail in the preceding sections of this chapter, the administrative activity of the Empire was largely, or rather mostly, one of central control in the form of immediate or indirect supervision over the execution of its own laws by the authorities of the States. Hence the National administrative organization was predominantly a system of central Offices or Departments superimposed upon the corresponding State Services. Only in those fields in which the Reich had the right of immediate administration, such as Foreign Affairs, the Navy, the Postal Services, certain phases of Customs and Taxation, etc., did its administrative organization assume the character of a hierarchical system, as for instance in the elaborate Postal Service reaching into the remotest country districts and the smallest hamlets.

The need of the war period for quick and uniform action in all the official activities affecting the industrial and military functions of the government machine naturally led to the increase and strengthening of the immediate administrative organization of the Reich. As early as

1915 the attempt was made to divide the Department of the Interior. The division was finally effected in 1917 by the establishment of the Office of National Economics (*Reichswirtschaftsamt*).[46] A year later the labor interests succeeded in forcing the creation of the National Labor Office (*Reichsarbeitsamt*).[47] The War Food Office (*Kriegsernährungsamt*), established in 1916 as a service subordinate to the Department of the Interior,[48] and originally intended as a temporary institution for the period of the war, was in 1917 converted into a separate Secretariat or Ministry. In 1918 its name was changed to *Reichsernährungsamt* and in 1919 to *Reichsernährungsministerium*.[49]

Another important factor in favor of the extension of the immediate or direct National administrative organization is to be found in certain stipulations of the Treaty of Peace, especially those concerning Reparations, Waterways, Railroads, the Army and Navy, Police, and others. It was largely under the weight of the responsibility assumed by the Reich in pursuance of that Treaty and under the realization by the Länder of the imperative necessity of National control of the affairs subject to these stipulations, that National legislative competence and direct National administration in these fields of State activity were granted by the framers of the Constitution of 1919. Thus it came to pass that the National Assembly gave to the Reich complete and immediate administrative competence over the Army (*Reichswehr*), the Railroads, general Waterways, Customs, and Consumption Taxes (*Verbrauchssteuern*). Thus only it was made possible for the Reich to assume the

[46] By Imperial Decree of Oct. 21, 1917 (RGBl., 1917, p. 963).
[47] By Imperial Decree of Oct. 4, 1918 (RGBl., 1918, I, p. 1231).
[48] By Imperial Decree of May 22, 1916 (RGBl., 1916, p. 402).
[49] Law of Aug. 18, 1917; Decrees of Aug. 30, 1917; of Nov. 19, 1918; of Mar. 21, 1919 (RGBl., 1917, p. 823 ff; 1918, p. 1319; 1919, p. 327).

direct administration (*reichseigene Verwaltung*) of all National taxes.[50] As a corollary of the extension of this direct National administration Article 107 of the Republican Constitution provides in addition to the administrative courts of the Länder a National Administrative Court (*Reichswirtschaftsgericht*).[51] By the National Criminal Police Law of 1922, the Reich possessed itself of an essential share of the police power formerly held by the Länder.[52] Finally, Article 14 of the National Republican Constitution permits the assumption, by the Reich, of administrative activities formerly exercised by the Länder and, what is most significant, it permits such assumption by ordinary legislation instead of by constitutional amendment as was the case under the Constitution of 1871.[53]

A detailed outline of the administrative hierarchy of the German National Republic as it existed immediately after the war is found in the Contents of the *Handbuch für das*

[50] *Gesetz über die Reichsfinanzverwaltung* of September 10, 1919 (RGBl., 1919, p. 1591 ff); repeated with the exception of Article 46 by the *Reichsabgabenordnung* of Dec. 13, 1919 (RGBl., 1919, p. 1993; 1921, p. 447).

[51] The creation of this court has so far been retarded by the interests hostile to the National unitary State. However, the National Minister of the Interior has laid before the public a draft of a National Law for the establishment of that court and one for the Preservation (*Wahrung*) of National unity (*Reichseinheit*). See Lassar, Reichseigene Verwaltung unter der Weimarer Verfassung, pp. 16-17.

[52] For details and text of this law see the author's "Bavaria and the Reich," p. 112 ff.

[53] Article 14 states that "The laws of the Reich are executed by the State authorities (*Landesbehörden*)," with the qualification, "unless it is determined otherwise by National laws." It is in this qualification that the Constitution gives to the Reich the right to assume for itself activities which, according to the constitutional law of the Monarchy, belonged to the States. As the right granted in this qualification of Article 14 is retroactive, the Reich may deprive the Länder under this provision of administrative activities enjoyed by them at the time of, and since the enactment of the Republican Constitution. It must be

Deutsche Reich for the year 1922, which is here given in a manner as nearly complete as the interests of the non-German student demand or permit.

PART I

NATIONAL PRESIDENT—Bureau of the President

REICHSTAG, REICHSRAT, REICHSWIRTSCHAFTSRAT, STAATSGERICHTSHOF

PART II

NATIONAL GOVERNMENT (*Reichsregierung*)

A. NATIONAL CHANCELLOR (*Reichskanzler*)
- Representative of the Chancellor (*Stellvertreter*)
- National Chancellery (*Reichskanzlei*)
- Representatives of the National Government in Munich
- Representatives of the Länder at the National Government
- United Press Section of the National Government

B. NATIONAL MINISTRIES
and their coordinate and subordinate Services:

I. FOREIGN OFFICE (*Auswärtiges Amt*)
Coordinate and subordinate Services:
1. Branch offices for Foreign Trade
2. Examining Board for Diplomatic and Consular Examinations
3. Council for Emigration Affairs (*Beirat für Auswanderungswesen*)

stated though, that this right of the Reich is limited to the subjects enumerated in Articles 6-11 of the Constitution, i. e., the subjects over which the Reich has the conclusive and concurrent right of legislation. On this subject see Anschütz, pp. 48-49. Concerning the restrictions of this right agreed to by the Reich see the author's "Bavaria and the Reich," p. 125.

4. Archaeological Institute
5. Roman-Germanic Commission
6. German Institute for Egyptian Archaeology in Cairo
7. Representatives of the Länder on the mixed Courts of Arbitration
8. Mixed Courts of Arbitration (*Schiedsgerichtshöfe*)
9. Embassies, Consulates, Passport Bureaus
10. Foreign Diplomatic Representatives in Germany
11. Foreign Consular Representatives in Germany

II. Ministry of the Interior (*Reichsministerium des Innern*)

Attached (*angegliederte*) Services:

1. National Commissary for the Examination of Election Procedure
2. Central Office for the territorial Regrouping (*Neugliederung*) of the Reich
3. National Art Custodian
4. Central Arbitration Office (*Zentralausgleichstelle*)
5. Pension Offices

Sphere of activity (*Geschäftsbereich*):

1. National Commissary for the occupied Rhineland
2. Supervisor of National Elections (*Reichswahlleiter*)
3. National Survey
4. National Health Bureau (*Reichsgesundheitsamt*)
5. National Commissary for the Prevention of Typhoid Fever in Central Germany

6. Federal Office for Home Affairs (*Heimatwesen*)
   Office for the control of poor relief and relief organizations.
7. National Chemical-Technical Institute (*Chemisch-Technische Reichsanstalt*)
8. National Physical-Technical Institute (*Physikalisch-Technische Reichsanstalt*)
9. National Archive
10. Central Directory of the *Monumenta Germaniae Historica*
11. National Film Bureau
12. Film Inspection Bureau
13. Final National Disciplinary Services (*Entscheidende Reichsdisziplinarbehörden*)
14. National Migration Bureau
15. National Emigration Commission for the Protection of the Interests of Emigrants in Port Cities
16. Bureau of Information concerning Soldiers lost in the War and War Graves
17. National Commissaries attached to the Committees appointed for the Determination of War Damages according to the Law of July 3, 1916
18. National Commissaries for the Determination of Damages incurred during the Revolution or Disturbances
19. National Commissary for the Maintenance of Public Order
20. National Water Protection (*Reichswasserschutz*)
    A National Water Police Service transferred by Ordinance of April 10, 1922, to the Ministry of Communication and Traffic.

21. Office for the Settlement of the Affairs of Russian War Prisoners and Internment Camps
22. National Commissary for Civil Prisoners and Fugitives from Justice

III. Ministry of Finance (*Reichsfinanzministerium*)

Subordinate Bureaus and Services:

1. National Finance Court (*Reichsfinanzhof*)
2. Finance Bureaus of the Länder
3. National Monopoly of Distilled Liquor
4. Technical Examining Board
   Concerning chemical and other technical knowledge required by the Customs Service.
5. National Finance Stock Bureau (*Reichsfinanzzeugamt*)
   For production and administration of customs stamps, printed matter, utensils and equipment of material needed by the National Finance Administration.
6. National Accounting Office (*Reichshauptkasse*)
   Treasury, forming a special section of the *Reichsbankhauptkasse* for the accounting of the Reich.
7. Mint Depot (*Münzmetaldepot*)
8. Commissary for Financial Legal Affairs pending from the War
9. National Central Office for War and Civil Prisoners
10. German War Burden Commission (*Deutsche Kriegslastenkommission*)
11. Peace Treaty Accounting Bureau
12. Bureau for Foreign Stocks and Bonds (*Wertpapiere*)

IV. MINISTRY OF ECONOMICS (*Reichswirtschaftsministerium*)

Sphere of Activity (*Geschäftsbereich*):

Services and Central Offices of an official character:

1. National Bureau of Statistics (*Statistisches Reichsamt*)
2. National Institute for Measures and Weights
   Amalgamated by Cabinet Ordinance of 1922 or 1923 with the *Physikalisch Technische Reichsanstalt* under the Ministry of the Interior.
3. National Ship Tonnage Control Office
4. National Council for Supervision of Private Insurance
5. National Economic Court (*Reichswirtschaftsgericht*)
6. National Marine Office (*Reichsoberseeamt*)
7. National Commissaries attached to the Marine Offices
8. National Examining Inspectors
   For matters pertaining to the Marine Service.
9. Technical Commission for Ocean Navigation (*für Seeschiffahrt*)
10. Commission for Socialization
11. Committee on Affairs of the Exchange (*Börsenausschuss*)
12. Chambers of Appeal on Affairs of the Exchange (*Berufungskammern in Börsenehrengerichtssachen*)
13. Commission of Appeal on Stock Exchange Violations (*für das Ordnungsstrafverfahren wegen verbotenen Börsenterminhandels*)
14. National Commission for Export and Import Permits

15. National Commissary for the Distribution of Coal
16. National Commissary for the Iron Industry (*für die Eisenwirtschaft*)
    For the production of iron and steel.
17. National Commissary for Iron and Metal Manufacture (*für Eisen und Metallverarbeitung*)
    Dealing especially with emergency actions of the demobilization period.
18. National Commissary for the Metal Industry
    Entrusted with the work pertaining to the metal industry formerly handled by the National Ministry for Economic Demobilization, and the former Section for Raw Material of the Prussian Ministry of War.
19. Delegates of the National Ministry of Economics for the Mining Regions
20. National Bureau for the Textile Industry
21. National Bureau for Cement
    For the Cement Industry.
22. National Leather Bureau
23. National Committee for the Woodworking Industry

Autonomous Bodies (*Selbstverwaltungskörper*):

1. National Coal Council
2. National Coal Association
3. National Kali Council
4. Kali Examination Bureau and Kali Wage Examination Office of first Instance
5. Kali Appeal Bureau and Kali Wage Examination Office of second Instance
6. Agricultural-Technical Kali Bureau
7. Iron Industry Association (*Eisenwirtschaftsbund*)

8. Industrial Organization for Raw Tar and Tar Products (*Wirtschaftsverband für Rohteer und Teererzeugnisse*)
9. Committee on Sulphuric Acid
10. National Curatory for Economy and Efficiency in Industry and Handicrafts (*Reichskuratorium für Wirtschaftlichkeit in Industrie und Handwerk*)
11. National Curatory for the Scientific Development of the Textile Industry
12. National Economic Bureaus
    For various textile raw products.
13. Foreign Trade Bureaus and other Import and Export Permit Bureaus
    For specific commercial products.

V. Ministry of Labor (*Reichsarbeitsministerium*)

Attached (*angegliederte*) Services:

1. Committee on Labor Law (*Arbeitsrechtausschuss*)
2. Central Arbitration Committee
3. Central Committee for the Interpretation of the so-called Berlin Agreement of Dec. 23, 1913, between Physicians and Sick Relief Associations (*Krankenkassen*)
4. Central Bureau for the Supervision of Explosives and Munitions Factories
5. Standing Committee on Municipal Housing Affairs (*Wohnungswesen*)
6. Standing Council for Homesteads (*Heimstättenwesen*)
7. Standing Committee on Rural Settlements (. . . *für das ländliche Siedelungswesen*)
8. Committee for the Distribution of the Equalization Fund, i. e. building cost subsidies according to the Law of June 26, 1921

9. National Committee for the Care of War Cripples, War Widows, and Orphans (*Reichsausschuss der Kriegsbeschädigten und Kriegshinterbliebenenfürsorge*)
10. Employment Committee of the Organizations of War Cripples, War Widows, and Orphans (*Arbeitsausschuss der Kriegsbeschädigten und Kriegshinterbliebenenorganizationen*)

Subordinate Services:

1. National Insurance Office
2. National Executive Office for Accident Insurance (*Reichsausführungsbehörde für Unfallversicherung*)
3. National Poor Relief and Welfare Court (*Reichsversorgungsgericht*)
4. National Insurance Institute for Salaried Employees (. . . *für Angestellte*)
5. Arbitration Court for Insurance of Salaried Employees
6. National Employment Bureau
7. Standing Exhibition for Welfare of Labor
8. National and State Commissary for Trade Questions for the Province of Westphalia, and the occupied Section of the District of Düsseldorf
9. Administrative Services of National Relief and Welfare Organizations

   Central administration of all official relief and welfare funds.

VI. Department of Justice (*Reichsjustizamt*)

Sphere of Activity (*Geschäftsbereich*):

1. Reichsgericht
2. National Patent Office

VII. MINISTRY OF NATIONAL DEFENSE (*Reichswehrministerium*)
  1. Command of the Army (*Heeresleitung*)
  2. Administration of the Army
  3. Command of the Navy (*Marineleitung*)

VIII. MINISTRY OF POSTS (*Reichspostministerium*)
  Sphere of Activity (*Geschäftsbereich*):
  1. General Postal Accounting Bureau (*Generalpostkasse*)
    a. Technical Telegraph Bureau (*Telegraphentechnisches Reichsamt*)
    b. Postal Directory (*Ober-Postdirektion*)
    c. National Printing Office and Expert Committee

IX. MINISTRY OF COMMUNICATION AND TRAFFIC (*Reichsverkehrsministerium*)
  1. Railroad Section
    Subordinate Bureaus and Services:
    a. General Directory of Railroads, Directories of Railroads, Central Railroad Office, Arbitration Office
  2. Waterways Section
    Subordinate Bureaus:
    a. National Canal Bureau
    b. German *Seewarte*
    c. Neckar River Construction Directory (*Neckarbaudirektion*)
    d. Water Protection Office (*Wasserschutz*)
      Formerly under the Ministry of the Interior (This since April 10, 1922).
  3. Section for Aircraft and High Power Vehicles

X. MINISTRY OF THE TREASURY (*Reichsschatzministerium*) [54]

[54] Dissolved by Presidential Ordinance of March 21, 1923, the subordinate offices reverting to the Ministries of Finance and the Interior, others being dissolved (Lassar, p. 168; RGBl., 1923, p. 233).

Subordinate Services:

1. Finance Bureaus of the Länder
2. National Treasury Section with National Property Bureaus
3. National Property Administration for the occupied Rhineland
4. National Economic and Industrial Enterprises (*Reichseigene wirtschaftliche Betriebe*)

XI. Ministry for Food and Agriculture (*Reichsministerium für Ernährung und Landwirtschaft*)

Sphere of Activity (*Geschäftsbereich*):

1. Commissions, Committees, and Councils

   Under this rubric are enumerated fifteen organizations dealing with such matters as: the surrender of cattle under the terms of the Versailles Treaty; of cattle feeding; fertilizers; technical improvement of agriculture; the cultivation of swamps and arid territory; the scientific study of food; wine culture and trade; lumber trade and paper manufacture. The list includes the Scientific Commission for "Meeresforschung," charged with the study of deep-sea fishing in the German Northern Sea Coast waters.
2. Biological Institute for Agriculture and Forestry
3. Organizations for the Transition of the Economic System from the War Status (*der Kriegs- und Übergangswirtschaft*)

XII. Ministry of Reconstruction (*Reichsministerium für den Wiederaufbau*[55]

[55] Created by Ordinance of November 7, 1919, and dissolved on May 8, 1924. The remaining functions were taken over by the Ministry of the

Subordinate Services:

Here are listed thirteen Commissions and similar organizations charged with the examination and execution of some of the phases of financial or other material reparations exacted from Germany under the Treaty of Versailles, problems arising from the occupation of the Ruhr, the reconstruction of the German commercial fleet. Number six of the list is the Office of the Alien Property Custodian.

PART III

Other National Authorities, Institutes, and Commissions

National Court of Accounting (*Rechnungshof des Deutschen Reichs*)

National Debt Commission

National Debt Administration

National Bank (*Reichsbank*)

National Insurance Institute for Salaried Employees

National Commission for Fortress Districts (*Reichsrayonkommission*)

PART IV

National Representations of Cities, Rural Districts, and Commissions

National City Representation (*Reichsstädtetag*)

National City Association (*Reichsstädtebund*)

Association of Rural Districts (*Verband Deutscher Landkreise*)

Rural Communities Representation (*Deutscher Landgemeindetag*)

Interior, with the exception of the settlement of colonial affairs which was transferred to the Foreign Office (Lassar, pp. 169-170; RGBl., 1924, I, p. 433).

In consequence of the financial and economic necessity of reducing the number of the Civil Service employees as one of the means of balancing the budget preparatory to the effectuation of the Reparation Agreement, a National Savings Commissary was appointed in October 1920.[56] His activity was frustrated by the opposition of the National Ministries. In February 1921 a committee of sixteen was appointed consisting of eight members of the Reichsrat and eight of the Reichstag, under the chairmanship of the Minister of the Interior. This Savings Committee, too, failed in its appointed task of effecting savings in the running of the government machinery. By Cabinet Decision of November 27, 1922, another National Savings Commissary was appointed for the examination of the National budget and the budgetary administration of the different Ministries. The most important change in the government organization effected on the basis of his recommendations was the dissolution of the *Reichsschatzministerium,* listed as number X of the Ministries in the preceding scheme, the dissolution of the *Reichsministerium für den Wiederaufbau,* given as number XII of the scheme, and the amalgamation of the National Institute for Weights and Measures with the *Physikalisch Technische Reichsanstalt.*[57]

By presidential ordinance of December 18, 1923, a commission was appointed for the simplification of the National administrative organization. Since 1924 certain steps have been taken for the simplification of the National administrative machinery and proposals for the reform of particular branches of the service have been published by the committee. The actual changes effected so far have been discussed by Lassar in his *Reichseigene Verwaltung unter der Weimarer Verfassung,* but they are for the most

[56] By Cabinet Decision of October 3, 1920 (Lassar, p. 65).
[57] *Ibid.*, p. 65 ff.

part of too technical a nature to be enumerated in a study intended to serve as text book for non-German students.

As another modification of the 1922 outline reference must be made here to the creation of the Ministry for Occupied Territories. Political motives prompted the National Government to heed the complaints from the peoples of the occupied territories to the extent of establishing a special office for the occupied territories. This move dates back to 1920. On March 18, 1921, the National Cabinet decided to appoint a special Secretary in the Ministry of the Interior for the consideration of questions pertaining to the occupied Rhineland. This Secretariat developed into the National Ministry for Occupied Territories (*Reichsministerium für die besetzten Gebiete*), formally established by presidential ordinance of August 24, 1923. For reasons of economy, however, the portfolio of this Ministry has since November of the same year been assigned to one of the other Ministries, usually to the Minister of Justice.[58] As an important creation of the deflation period mention should be made of the *Rentenbank* which by some authorities is considered as a private law organization while others class it among the public law institutions.[59] The Railway Service has been modified by the terms of the Dawes Plan to the extent of the establishment of the German Railroad Corporation (*Deutsche Reichsbahngesellschaft*) for the immediate administration, financial and technical, of the National Railroads which, however, nominally at least remain the property and under part control of the Reich.[60]

The Reichsregierung, as it exists at the present time, i. e. the end of 1926, consists of the following Ministries:

[58] *Ibid.*, pp. 107-108.
[59] *Ibid.*, p. 110 ff.
[60] On this subject see Lassar, p. 177 ff.

Ministry of Foreign Affairs (*Auswärtiges Amt*)
Ministry of Home Affairs (Interior) (*Reichsministerium des Innern*)
Ministry of Finance (*Reichsfinanzministerium*)
Ministry of Defense (*Reichswehrministerium*)
Ministry of Labor (*Reichsarbeitsministerium*)
Ministry of Food and Agriculture (*Reichsministerium für Ernährung und Landwritschaft*)
Ministry of Posts (*Reichspostministerium*)
Ministry of Transport (*Reichsverkehrsministerium*)
Ministry of Economic Affairs (*Reichswirtschaftsministerium*)
Ministry of Justice and Occupied Territories (*Reichsjustizministerium und Reichsministerium für die besetzten Gebiete*) [61]

With the modifications indicated, the outline of the subordinate and attached services agree with the corresponding scheme of the 1924 issue of the *Handbuch* cited.

[61] Handbuch für das Deutsche Reich, 1924, also Statesman's Year Book, 1926.

CHAPTER VII

National Judicial Control Over the Länder

Judicial Control over State Legislation. The purely judicial supervision of the Reich over the activities of the State Governments arises under the provisions of Article 13, Section 2, and Article 19, Section 1, of the National Constitution. It serves two chief purposes: first, the maintenance of the constitutional division of the legislative competencies of the Reich and the States; and second, the maintenance of peace between the Reich and the States, between the States themselves, and within a State.

The judicial supervision by the Reich for the maintenance of the division of the legislative competence between Reich and States arises under Article 13, Section 1 of which posits the supremacy of National over State law, and Section 2 of which provides that: "If doubt arises, or a difference of opinion, whether State legislation is in harmony with the law of the Reich, the proper authorities of the Reich or the central authorities of the States, in accordance with more specific provisions of a National law, may have recourse to the decision of a supreme court of the Reich."

By the National Law of April 8, 1920, the Reichsgericht has been designated as the court competent under the provisions of Article 13, Section 2, i. e. competent to decide the compatibility with National law of State legislation actually in force and ready to be applied and being applied in the State Courts.[1] As applied in the text of Section 2

[1] *Gesetz zur Ausführung des Articles 13, Absatz 2, der Verfassung des Deutschen Reichs* (RGBl., 1920, p. 510). According to Article 6 of the *Landessteuergesetz* of March 30, 1920, "differences of opinion be-

of Article 13, the particular case under advisement by the court need not be one of actual conflict between the National and State authorities, but merely a matter of difference of opinion or doubt concerning the question whether a certain State law is in harmony with the law of the Reich. Only National and State Cabinets or Ministers can request the court action defined in Article 13, Section 2.[2] This right does not extend to private individuals and organizations or political parties. Recourse to the National Supreme Court by National organs is discretionary, not obligatory.[3] The decision of the court has the character of a declaratory judgment with the force of law and is to be published, without argument, in the *Reichsgesetzblatt*.[4] This formal judicial supervision by the National Supreme Court over State legislation extends only to the material aspect of the State law in question.[5]

The so-called *Prüfungsrecht* (right of examination) of State law by the Reichsgericht derived from Article 13, Section 2, must not be confused with the right to examine State law with regard to its constitutionality or compati-

tween the National Minister of Finance and the State Governments concerning the question whether a State tax regulation is compatible with National law, are to be decided upon request of the National Minister of Finance or of the State Government, by the Reichsfinanzhof. . . ." See decision cited below (note 32 and corresponding text). The same provision is found in Article 6 of the *Finanzausgleichgesetz* of June 23, 1923.

[2] Concerning the functions of the Reichsgericht as a National Court of Appeal in ordinary litigation and the examination, under these functions, of State law with regard to its agreement with National law, see chapter XIII.

[3] See below, section: Parties competent to request the decision of a National Supreme Court.

[4] Article 1 of the National Law for the Execution of Article 13, Section 2.

[5] German jurisprudence considers law in its formal and material aspect. Under the formal aspect is meant all that has to do with the

bility with National law, exercised by the ordinary, i. e. the State Courts, and by the Reichsgericht as the highest court of appeals, as incidental to civil, criminal, and administrative proceedings in suits at law. Under the Monarchy all disputes between private individuals or public organs arising from a civil, criminal, or administrative law matter and involving the question of the compatibility of State law with National law were judiciable only in the ordinary, i. e. State Courts, with appeal to the State Supreme Courts or the Reichsgericht in course of regular litigation. The question as to which particular kind of court was competent depended entirely upon the field of law in which the case arose, i. e. civil, criminal, or administrative law. The courts in question exercised the right of examination of State law with regard to its compatibility with National law only indirectly, i. e. *incidenter*. Their finding that State law did not agree with National law did not result in a formal declaration of nullification of the State law, but merely in the dismissal of the case subject to adjudication.[6] Settlement of a dispute between National and State Governments over the question of the incompatibility of State legislation with National law as provided for under the Constitution of 1871, was to take place by way of arbitration by the Bundesrat, and this failing, by National legislation, i. e. by the elimination of the State law in question through a superseding National law.[7]

process of enacting a legal norm in accordance with the constitutional provisions regulating the procedure of legislation. By the material aspect of law is understood the matter or topic which is subject to legislation under the provisions of the Constitution. In this connection see chapter XI dealing with the ordinance power of the National Government.

[6] Anschütz, p. 47.

[7] Article 76 of the Constitution of 1871. See also Anschütz, p. 47.

With regard to this indirect control over State legislation by the ordinary State Courts and by the Reichsgericht as the Supreme Court of Appeals, nothing has been changed under the Republican Constitution.[8] But there has been introduced in addition to this indirect supervision, the direct control provided in Article 13, Section 2, exercised by the Reichsgericht by way of declaratory decision, not in the course of ordinary litigation, but upon request of an official National or State authority.

The stipulation contained in Article 13, Section 2, was completely absent from the two Preuss drafts. It was inserted in the first Government draft in the *Staatenhaus* as a result of the debates in the *Staatenausschuss* at the suggestion of the National Ministry of Justice for the double purpose of establishing a stable judicial protection of the Länder and at the same time a guarantee for the unity of the Reich.[9] In the form thus introduced as Article 11 it provided quite differently from the final phraseology of Article 13, Section 2, namely that "in case of conflicts over the question whether a State law is compatible with National law, recourse may be had, in accordance with a more detailed provision of a National law, to the decision of a National Supreme Court." The rather protracted discussion on the subject of this provision in the Committee on the Constitution exhibits a considerable uncertainty with regard to the extent of its possible application and culminated in the first reading of the draft in the expectation that the National law to be enacted for the elaboration of what was then Article 11 would give the final answer to the questions left unsolved by the text of the provision itself.

[8] See statements by Preuss, Quarck, Zweigert (Verf. Ber. und Prot., p. 38 ff.).

[9] *Ibid.*

"According to Article 11," Professor Kahl stated, "disputes concerning the compatibility of State legislation with National law . . . shall be submitted to a National Supreme Court. Detailed provisions for this shall be made by a National law. It is a question whether there is any need for the provision of a decision by a National Supreme Court of such conflicts in accordance with a special National law. Is it the intention [of the supporters of the provision] to give to judgments rendered in a suit of law and thereby *incidenter* deciding the question of the constitutionality of State law, a general validity transcending the individual case? Why should the decision not be left to the ordinary courts? I doubt the practical wisdom of the provision and request information concerning the motives of the proposal. . . ." Kahl's statement goes to the bottom of the whole proposition in so far as it raises the question of the relation of the activities of the National Supreme Court under the proposed Article 11, and the function of the Reichsgericht acting as the National Court of Appeals in ordinary litigation and thus passing *incidenter* on the same question of the constitutionality of State law.[10]

Answering Kahl's request for information Preuss said in part: ". . . This Article [11] was not included in the original draft. It was introduced by the *Staatenhaus* in order to create a legal protection for the Länder in view of the stronger position of the Reich. . . . The provision for [the regulation of the details by] a National law means, as rightly suggested by Herr Kahl, that according to conditions the decision is to be submitted to the proper National Supreme Court, as for instance the National Administrative Court (Reichsverwaltungsgericht) . . .

[10] *Ibid.*

the creation of which by National law is provided for [in the draft subject to discussion]. The National law in question would have to provide for a special mode of procedure in the sense that not only the question at issue incidental to private or criminal litigation may be brought to a decision, but also the principle itself, i. e. the question whether the provision, 'National law supersedes State law,' is to be applied. . . ." For a more detailed statement of the case Preuss called upon Herr Zweigert, National Minister of Justice.

Article 11, Herr Zweigert remarked in substance, owes its existence to the suggestion of the National Ministry of Justice. Its purpose is the preservation of the unity of the Reich. Concerning the fundamental question of the compatibility of State legislation with National law no conflicting decisions should be rendered. Only a National Court must decide that question. Zweigert then related an incident from the practice under the Constitution of 1871. A certain law of the Free City of Lübeck, prohibiting strike picketing, was patently incompatible with Article 152 of the National Trade Code (*Gewerbeordnung*), and as such invalid. But there was no direct way of bringing about a decision by the Reichsgericht for the reason that the subject matter was judiciable in the last instance in the State Supreme Court (*Oberlandesgericht*). The Socialist party contemplated a direct appeal to the Reichstag with the hope of securing action by the Reichsgericht by way of remedial National legislation. It was finally decided, however, to create a test case under Article 10 of the National Penal Code (*Strafgesetzbuch*) by the distribution of literature inciting to disobedience to the law in question. Under this procedure the Reichsgericht as the National Court of Appeals declared the law invalid. But, as Zweigert pointed out, the need for a uniform and final method

of deciding the question at issue has been manifested in many other spheres of law, both from the point of view of National and State interests. "The provision [of Article 11]," the speaker continued, "will make it possible to submit the question to a National Supreme Court. For the time being it contains only a program. The detailed elaboration of the principle will be left to a special National law. This law will have to regulate particularly the question as to who shall have the right to request a decision of the Supreme Court. In this regard there are the following possibilities: 1. Request by a party in criminal, civil, or administrative litigation, if in a suit at law the validity of State law in respect to National law is questioned. 2. Presentation of the question by the court engaged in the case when the question [of validity] is raised or in doubt. 3. Recourse to the Supreme Court by other Government organs, such as the National or State Central authorities. 4. Admission of a popular suit, i. e. a suit by which anybody can bring the question to a decision by the Supreme Court. Which one of these possibilities will be chosen, or whether several of them will be combined, remains open. This question requires more serious examination. There are many possible differences of opinion which can hardly be settled within the scope of the Constitution and which would better be left for determination by special National legislation. . . ." In conclusion he advised his hearers that "when speaking of the National Supreme Court, we are not thinking of the Staatsgerichtshof" to be created. "In civil and criminal law matters the decision is to be rendered rather by the Reichsgericht, in administrative law affairs by the proposed National Administrative Court (Reichsverwaltungsgericht)." [11]

[11] *Ibid.*

The settlement of the question involved in Zweigert's enumeration of possibilities, however, was not left to regulation by a special National law, but was effected as the result of further deliberation during the first and second reading in the Committee on the Constitution. In spite of Zweigert's energetic and repeated attempts to reserve a more definite interpretation of Article 11 for regulation by later National legislation, the realization of the need for greater clarity of the constitutional provision quickly gained the upper hand. The final turn in favor of a more restricted formula came as a reaction to the last one of the possibilities enumerated by Zweigert, namely that providing for the admission of popular suits. "Judging from the statement of the representative of the National Ministry of Justice," Dr. Düringer remarked, ". . . everybody will be entitled to have recourse to the Reichsgericht without the observance of the regular sequence of instances. Think of all the measures that have been taken in recent years for the relief of the Reichsgericht. At any rate, the provision does not belong in the Constitution but in the law of procedure. I could, however, well imagine a provision in the Constitution for the settlement of a conflict between public organs." [12] The suggestion implied in Düringer's concluding sentence was put in concrete form by v. Delbrück who definitely stated that Article 11 was, in his opinion, intended to constitute a legal remedy, not to private persons, but to public organs. He therefore offered an amendment to Article 11 in the form of an insertion limiting the resort to a decision by the National Supreme Court to "the National or State Central authorities." A similar amendment had been proposed by Dr. Koch but was withdrawn as being identical with Del-

[12] *Ibid.*, p. 40.

brück's proposal. Despite a last desperate attempt by Zweigert to prevent the limitation contained in the amending phrase, the provision was accepted in the first reading in the form proposed by Delbrück.[13]

As passed in the second reading, the provision of Article 11 was attached to Article 10 which stipulated that "Reichsrecht bricht Landrecht." In this connection both provisions finally got into the text of the Constitution as Article 13, Sections 1 and 2.[14]

Decisions under Article 13, Section 2. A number of conflicts or differences of opinion of the kind defined in Article 13, Section 2, have been decided by the Reichsgericht since 1919. In its decision of May 10, 1921,[15] the Court, acting under authority of Article 13, Section 2, of the National Constitution, held that the Bavarian School Teachers Law of August 14, 1919, prohibiting the employment of married women as teachers, was not compatible with Article 128, Section 2, of the National Constitution, which eliminates "all special provisions (*Ausnahmebestimmungen*) against female [civil service] officials." [16]

In another decision of October 26, 1921, the Reichsgericht declared that certain phases of the State Law of

[13] *Ibid.*, p. 41. As thus accepted, Article 11 read: "In case of conflicts over the question whether State law is compatible with National law, recourse may be had by the National or State central authorities concerned, to a National Supreme Court in accordance with a more detailed provision of a National law." See also debates on this subject in connection with Article 17 dealing with decisions by the Staatsgerichtshof of conflicts of a public law and constitutional nature arising within a State, between States, and between Reich and States (*Ibid.*, p. 113 ff.).

[14] *Ibid.*, p. 408 ff.

[15] In German practice cases are cited by name of Court and date of decisions, not by name of parties involved.

[16] RGBl., 1921, p. 735; RGZ, vol. 102, p. 145 ff.

Braunschweig, of June 20, 1919, were not in harmony with National law. The State law here in question was one intended to amend that section of the Braunschweig Constitution of 1832, which affected the organization and government of the State Church. The National law with which this State law was declared to be in conflict was Article 137, Section 3, of the National Constitution, which states that "every religious society regulates and administers its affairs independently within the limits of the general law. It appoints its officers without interference by the State or the civil community."

The dispute in this case had arisen over the refusal of the State Government to recognize the State Synod elected under the provision of the constitutional amendment contained in the Law of June 20, 1919. The Government claimed that in the election of the members of the Synod the provisions of this law had been violated. In the interest of a settlement the National Minister of the Interior requested a decision of the dispute by the Reichsgericht, suggesting that the sections of the State law in question be found incompatible with Article 137, Section 3, of the National Constitution. The Reichsgericht decided accordingly.[17]

In a decision of November 4, 1920, the Reichsgericht decreed that the Saxon School Law of July 22, 1919, prohibiting the teaching of religion in the Saxon public schools (*Volksschulen*), was not in harmony with Articles 146, 149, and 174 of the National Constitution.[18]

Before a final agreement on the question of religious instruction in the public schools had been reached by the National Assembly, the Governments of several States, such as Braunschweig, Mecklenburg, Hamburg, and Sax-

[17] RGBl., 1921, p. 1359; RGZ, vol. 103, p. 91 ff.
[18] RGBl., 1920, p. 2016.

ony, had made more or less successful attempts to eliminate the teaching of religion from their public schools. Protests against these attempts were brought before the National Assembly by orthodox Protestant and Catholic representatives from these and other States.[19] Dr Bell, National Minister of Colonial Affairs, representing Dr. Preuss, Minister of the Interior, expressed the attitude of the National Government to the effect that under the existing Constitution, i. e. the Provisional Constitution of February 10, 1919, the National Government had no right of supervision over these attempts on the part of the States, for the reason that the Provisional Constitution contained no stipulation for the National regulation of the question of religious instruction in State schools. The question of the regulation of this matter in the permanent Constitution would be taken up by the Committee on the Constitution on the occasion of its consideration of Articles 30 and 31 of the Government draft of the Constitution then before the Committee.[20] Article 30 here referred to dealt with liberty of conscience, and belief and liberty in the exercise of religion. Article 31 dealt with the organization of public instruction without reference to the teaching of religion. The question was again discussed in the National Assembly in connection with the second reading of the Constitution, i. e. of Articles 139 to 147 dealing with education and schools. On this occasion the issue was stated very plainly by the Socialist representative Schultz who said that on this question the Center and Socialist parties held fundamentally different views. The Center, he argued, would consider with favor only the denominational school. The Socialists, however, demanded the purely secular (*weltliche*) school excluding the teaching of reli-

[19] Heilfron, II, p. 366 ff.
[20] *Ibid.*, pp. 369-370.

gion altogether. A change of opinion of either of the two parties he admitted to be impossible.[21] A solution of the difficulty was attempted in the National Constitution by the admission of two types of public schools, one non-denominational, without the teaching of religion, and one denominational, where the teaching of religion is obligatory. But while religious instruction in the last class is to be obligatory, attendance is not, depending rather upon the desire and will of the parents.

The Saxon School Law, enacted prior to the promulgation of the National Constitution and declared unconstitutional by the Reichsgericht, prohibited the teaching of religion in all schools and thus violated the provisions of Article 149 of the National Constitution which stated that: "Religious instruction is included in the regular school curriculum, except in the nonsectarian schools. The instruction in religion is regulated by [State] school laws. Religious instruction is imparted in accordance with the principle of the religious society concerned, without prejudice to the right of supervision of the State. . . ."

The same question was involved in two cases brought before the Court by the Senate of the States of Hamburg and Bremen, and decided on the same day, November 4, 1920. In the first case, the Reichsgericht declared: "The ordinance contained in the Proclamation of the Labor and Soldiers' Council for Hamburg, Altona, and adjacent territory, of December 10, 1918, eliminating religious instruction in all public schools and educational institutions of the former State of Hamburg is incompatible with Articles 146, 149, and 174 of the Constitution of the German Reich." [22] In the second case, the Court stated: "The ordinance of the Labor and Soldiers' Council of Bremen of

[21] *Ibid.*, IV, p. 489 ff.
[22] RGBl., 1920, p. 2017.

January 7, 1919, prohibiting the teaching of religion in the State schools, and the ordinances of the present Government of Bremen of March 2 and 7, 1919, approving the previous order, are incompatible with Articles 146, 149, and 174 of the Constitution of the German Reich." [23]

Other decisions of the Reichsgericht under Article 13, Section 2, are:

Decision of January 19, 1924. The party requesting an opinion was the Senate of Bremen. The Court declared: "The Bremen Law of October 9, 1919, concerning the election of heads of schools . . . contravenes Article 129 of the National Constitution in so far as it relates to the directors and principles of schools, who were in office at the time of its promulgation." [24]

Decision of November 27, 1924. The party requesting an opinion was the National Ministry of the Interior. The Court stated: "The provisions of Article 1, Section 1, and Article 8, Section 1, Sentence 2, of the Saxon Law of May 29, 1923, regulating the age limit and the pensionable time of service of civil service officials including teachers, are incompatible with Article 137, Section 3, Sentence 2, of the National Constitution, in so far as they relate to the

[23] RGBl., 1920, p. 2017.

[24] RGBl., 1924, I, p. 434; RGZ, vol. 107, p. 1 ff. The Bremen law in question replaced the previous provisions for the life time appointment of directors and principals of schools by a system of election by the teaching body of the schools. The officials failing of reelection were given the option of appointment to a teaching position with the salary rights and increases of their former positions as principal or directors, and in case of their refusal of such appointment, the choice of retirement at the full salary of their former position. By this law 54 officials were forced either to regain their office by reelection, to accept a lower position, or to retire. Of the 38 submitting to reelection, all but one regained their position. Of the remaining 16 some chose a teaching position with the same salary, others retired, expecting to seek redress through the courts, or in the instance leading to the present decision by the Reichsgericht, by appeal to the National Cabinet. The pro-

ordinary members of the State Consistory and especially to the president of this official body." [25]

In the preceding cases the request for a decision by the Reichsgericht under Article 13, Section 2, is assumed to be the result of a conflict or a difference of opinion between the State and Federal Cabinets or Ministries concerning the compatibility of State legislation with National law. It is not necessary, however, that an actual conflict, or even a difference of opinion, exist between the agencies concerned. The presence of a mere doubt on the part of one or both with regard to the constitutionality or compatibility of State legislation with National law justifies a request for a decision by the Reichsgericht, as will appear from the following case.

In its decision of February 20, 1923, the Reichsgericht declared unconstitutional certain sections of two different Prussian State liability laws, i. e. Article 2 of the Law of November 16, 1920, and Article 5 of the Law of August 1, 1909. These sections were held to be incompatible with Article 131, Section 1, Sentence 3, of the National Constitution.

In the first two sentences of Section 1 of Article 131 it is provided that: "If an official, in the exercise of the public authority vested in him, violates an official duty incumbent upon him as against a third party, the State or [official] corporation in whose service the official is em-

visions of this law deprived the officials concerned not of their proper salary, but of the performance of the duties of their rightfully acquired position. This, the Reichsgericht declared, was in violation of two provisions of Article 129 of the National Constitution, namely those of Section 1, Sentence 3: "The duly established rights of officials are inviolable," and of Section 2: "Officials may be provisionally relieved of their office, temporarily or permanently retired . . . only under the conditions and in the forms established by law."

[25] RGBl., 1924, I, p. 41; RGZ, vol. 107, p. 287 ff.

ployed is on principle responsible. The claim to an indemnity as against the official is reserved." According to Sentence 3, "the jurisdiction of the regular courts must not be excluded." The two sections of the Prussian State liability laws in question implied a curtailment of the jurisdiction of the regular courts in the case of damage suits to be brought on the part of the third parties injured by *ultra vires* action of public officials.

The question of the compatibility of the two provisions of the Prussian State laws with Article 131 of the National Constitution was placed before the Reichsgericht by the Prussian Ministry of State by virtue of Article 13, Section 2, of the National Constitution. In its consideration of the legality of the request for a decision the Reichsgericht pointed out that the National Ministries of State and of Justice had, in a declaration of April, 1920, accepted the point of view of the Prussian State authorities. They had, like the former, demanded an affirmative answer by the Court to the question contained in the request to declare the Prussian provisions unconstitutional. Apparently, then, there existed no conflict, nor even a difference of opinion between the State and National authorities concerned. Nevertheless, so the Court held, the request was in order for the reason that the wording of Article 13, Section 2, differing from that of Article 19, Section 2, provides for a decision by the Reichsgericht also in cases of mere doubt. As shown by the Court's references to the debates of the National Assembly, this wording was chosen in order to include all cases in which no differences existed between the National and State Cabinets. According to the opinion expressed in the National Assembly, it would be sufficient if the National or State authorities deemed it advisable to have recourse to a decision of the Reichsge-

richt in view of differences of opinion or doubt manifested in some way or other.[26]

Doubts concerning the constitutionality of the State provisions in question had arisen from the fact that there had been conflicting decisions of the Reichsgericht and the State Courts. In two previous decisions the Reichsgericht had declared that Article 131, Section 1, Sentence 3, of the National Constitution invalidated the provisions of Article 5 of the Prussian Liability Law of August 1, 1909.[27] This same view had been accepted by the Reichsgericht in its decision of January 20, 1922.[28] Nevertheless, the Prussian Court for the Decision of Conflicts of Competence, in its decisions of March 12, and December 10, 1921, had declared Article 5 of the Prussian Law permanently valid.

A similar conflict between the National and State Courts had become apparent with regard to Article 2 of the Prussian State Liability Law of November 16, 1920. As the Reichsgericht pointed out, various decisions by the Bavarian Court for Conflicts of Competence, and by the Administrative Courts of Baden, Hessen, and Prussia, suggested that the State Courts in general conceived the principle involved in the provisions of the Prussian law as valid. Though no decision had been rendered on this particular provision by the Reichsgericht, the question here involved, so the Court definitely stated, must be decided in the negative sense as in accord with the previous decision concerning Article 5 of the Prussian Liability Law of August 1, 1909.

It was on the basis of these conflicts in jurisdiction that the Prussian State Ministry, in agreement with the National Ministries of State and Justice, considered itself

[26] See statement by Kahl (Verf. Ber. und Prot., p. 410).
[27] RGZ, vol. 102, p. 166; vol. 104, pp. 243, 291.
[28] RGZ, vol. 106, p. 35.

justified in resorting to a decision of the issue by the Reichsgericht.[29]

The reference by the Reichsgericht to conflicting decisions of State and National Courts indicates that the question at issue had been considered previously by the Reichsgericht acting as the National Court of Appeals in the course of ordinary litigation from the decision of the State Courts. Though a decision by the National Court in a suit at law appealed from the judgment of a State Court should be final and should dispose of the issue, this case shows that actual practice may require in addition and as an *ultima ratio* recourse by the State or National Cabinets to a declaratory judgment under Article 13, Section 2. It is, however, evident that the timely and consistent application of the remedy offered in Article 13, Section 2, will tend to reduce litigation and to prevent conflicting judicial decisions on the part of State and National Courts. In fact, this was the chief aim of the alteration of the text of the provision forced in the Committee on the Constitution against the opposition led by Herr Zweigert.[30] Nevertheless, recourse to the National Supreme Court by the National or State organs concerned is purely discretionary. The text of Article 13, Section 2, states that the National or State Cabinets "may," not "must," have recourse to a decision of the National Supreme Court. The full meaning of this discretionary competence was made clear in a statement of the Reichsgericht in a case decided on December 4, 1923. In this case one of the parties involved had questioned the judiciability of the issue on the ground that certain aspects of the main question should be decided by the Reichsgericht not in the course of ordinary litigation, but in accordance with the

[29] RGBl., 1923, I, p. 292; RGZ, vol. 106, p. 34 ff.

[30] Statement by Düringer (see text corresponding to note 12).

procedure of Article 13, Section 2. To this the Court replied as follows: "The reference of the revision (plaintiff in error) to Article 13, Section 2, of the National Constitution and to the mode of procedure there offered for the decision of doubts concerning the compatibility of State and National law is not in place. The competent National or State authorities may request the decision 'of a Supreme Court of the Reich'. . . , but none of these authorities is compelled to do so. No conclusions are to be drawn from their failure to appeal to the Reichsgericht, despite the existence of doubts or differences of opinion. This holds good all the more, as the request for a supreme judicial decision is a measure of eminently political significance, subject to the influence of political considerations. . . ." [31]

A decision was rendered by the Reichsfinanzhof on November 13, 1920, under the provisions of Articles 2 and 6 of the *Landessteuergesetz* of March 30, 1920, which designates the Reichsfinanzhof as the National Court competent to adjust differences of opinion between the National Minister of Finance and the State Governments in regard to the agreement of State tax regulations with National law. In this decision the Reichsfinanzhof ruled that a private person cannot raise the question whether a State tax law is compatible with National law.[32]

Controversies under Article 19 Defined. The second phrase of the purely judicial supervision on the part of the Reich over the activities of the States, i. e. the maintenance of peace between the Reich and the Länder, between and within the Länder, is based on Article 19 which provides as follows:

[31] RGZ, vol. 107, p. 367 ff. Recent decisions are too numerous to cite.
[32] Poetzsch, Vom Staatsleben . . . p. 44. See above note 7.

If controversies concerning the Constitution arise within a State in which there is no court competent to dispose of them, or if controversies of a public nature arise between different States, or between a State and the Reich, they will be determined upon complaint of one of the parties by the Staatsgerichtshof, unless another National Court is competent.

The President of the Reich executes the judgment of the Staatsgerichtshof.

Reporting to the Committee on the Constitution on the subject of National judicial control as embodied in what was Article 17 of the draft under consideration by the Committee, Dr. Beyerle said:

Compared with the former Constitution, Article 17, [i. e. Article 19 of the final text of the Republican Constitution] offers nothing materially new. According to Article 76 of the . . . Constitution [of 1871] "disputes between the several States of the Union (Bundesstaaten) so far as they do not relate to matters of private law, and are therefore to be decided by the competent judicial authorities, shall be adjusted by the Bundesrat, at the request of one of the parties," [33] and "in disputes relating to constitutional matters in those States of the Union whose constitutions do not designate an authority for the settlement of such differences, the Bundesrat shall, at the request of one of the parties, effect an amicable adjustment, and if this cannot be done, the matter shall be settled by National legislation." [34] In comparison with this formulation . . . the present Article 17 is an almost literal reproduction of Article 13 of the first [i. e. second or published] draft of Minister Preuss. To have recourse to the Staatsgerichtshof, or possibly to another competent National Court, instead of the Bundesrat, doubtlessly constitutes a gain and signifies progress, for the States of the Union are always interested parties

[33] Art. 76, Sect. 1, of the Constitution of 1871.
[34] Art. 76, Sect. 2.

while the Staatsgerichtshof is a judicial instance independent of all parties. . . . [The condition contained in] the relative clause of Section 1 leaves to the States sufficient liberty to bring internal disputes before their own tribunals if such exist. The preference for the Staatsgerichtshof is therefore a two-fold one, first, in view of the altered position of the Reichsrat under the draft of the Constitution [subject to discussion], and secondly, on account of the increased guarantee for the examination [of the controversies] by an impartial [judicial] instance. This signifies, on the other hand, also a protection of the member States against arbitrary interference on the part of the Reich. . . .[85]

Dr. Beyerle's comparison or differentiation of the provisions of Article 76 of the Constitution of 1871 and those of the proposed Article 17 of the draft under discussion by the Committee on the Constitution is correct as far as it goes, but it does not go far enough. In addition to the substitution of the Staatsgerichtshof for the former Bundesrat as the National organ competent to adjust the controversies mentioned, Article 17 of the proposed draft on the one hand increases the scope of the conflicts subject to decision by the Staatsgerichtshof and, on the other hand, eliminates the alternative of a decision by National legislation as provided in case of failure of an amicable adjustment by the Bundesrat under Section 2 of Article 76 of the Constitution of 1871. In other words, Article 17 includes not only controversies concerning a constitutional matter arising within a State and controversies of a public law character between the several States, but also conflicts of the latter kind between the Reich and one of the States. It furthermore gives to the decisions of the Staatsgerichtshof in all these controversies the character of finality inasmuch as it provides for the execution of the Court's judgment by

[85] Verf. Ber. und Prot., p. 113.

the President of the National Union. The substitution of the Staatsgerichtshof for the former Bundesrat as the organ competent to adjust the controversies in question is found already in Article 13 [36] of the second Preuss draft referred to by Beyerle. The extension of the scope of the controversies, i. e. the inclusion of conflicts between the Reich and a State, was apparently effected as a result of the intervening revision of the second Preuss draft by the *Staatenkonferenz*.

The meaning of the terms, "controversies concerning the Constitution," and "controversies of a public nature," as well as the character of the organs competent to act as parties to such controversies and as such competent to have recourse to a decision of the Staatsgerichtshof, can be best demonstrated, first, from the lively debate which arose in the *Verfassungsausschuss* with regard to the relation of Articles 11 and 17 of the draft under discussion, and secondly, from the cases actually adjusted by the Staatsgerichtshof under the provisions of Article 19 of the National Constitution. The proposed Article 11, as shown in the beginning of the present chapter, dealt with the supremacy of National over State law and with the settlement by a National Supreme Court of controversies arising between the National and State central authorities concerning the question of the compatibility of State legislation with National law. The difference between Articles 11 and 17 was well stated by Dr. Zweigert, National Minister of Justice.

The question as to who is competent to be a party to a controversy under Article 17 can be doubtful only with regard to

[36] "Controversies concerning the Constitution arising within a German *Freistaat*, and controversies of a non-private nature arising between different German *Freistaaten*, are to be decided, at the request of one party, by the Staatsgerichtshof for the German Reich.

"The judgment of the Staatsgerichtshof will, if necessary, be executed by the National President" (Art. 13 of the second Preuss draft).

constitutional conflicts arising within a State. As far as the rest of the controversies are concerned, the parties are specifically designated in Article 17. Concerning Article 76, Section 2, of the former Imperial Constitution, providing for the adjustment of constitutional controversies within a member State by way of recourse by one of the parties to the Bundesrat, constitutional jurisprudence and State practice have established as prevailing the interpretation of constitutional controversies as conflicts between the Government and Parliament of one of the States. This situation (*Rechtslage*) has not been modified by Article 17 which essentially agrees with the hitherto prevailing law.

As far as the relation of Articles 17 and 11 is concerned, Article 11 has in my [Zweigert's] opinion . . . a significance of its own. Article 11 makes it possible for the central authorities to have recourse to the Supreme Court in all conflicts and differences of opinion concerning the question whether State law is compatible with National law, no matter what the occasion and who the parties to the conflict. The subject of the decision under Article 11 is solely the abstract legal question [of the compatibility of State and National law], while Article 17 refers to conflicts between definite parties and has as its subject a concrete legal case (*Rechtsverhältnis*). The difference between Articles 11 and 17 is manifested above all by the choice of quite different courts. In the case of Article 11 valid reasons point toward a court of last instance for the decision of a purely legal question, namely the Reichsgericht and the Reichsverwaltungsgericht (National Administrative Court); in Article 17 they point to the Staatsgerichtshof.[37]

The objection raised by the Bavarian plenipotentiary, Dr. Grassmann, to wit, that the constitutional conflicts covered by Article 17 are by no means restricted to controversies between Government and Parliament, but may well include those between the State Government on the

[37] Verf. Ber. und Prot., p. 114.

one side and individual persons and religious societies on the other, found no support with the members of the Committee. Article 17 was accepted in first reading in the form proposed in the draft.[38] The discussion on the same subject was, however, reopened during the second reading of the draft. As in the first reading, it was once more the relation of Articles 11 and 17 which prompted the exchange of views. The debate was opened by the report on Article 11 by Kahl, who spoke in part as follows:

> In the first reading the question of the relation of Articles 11 and 17 was raised. Some of the speakers demanded the union of the two articles, others stressed the need for the maintenance of these articles as separate entities. I was explicitly charged with a reexamination of the question for the second reading. . . .
>
> In this examination I must start with Article 17. It deals with three kinds of conflicts, two of which were already included in Article 76 of the . . . Constitution [of 1871], the third one being new. The first kind concerns constitutional conflicts arising within a State which has no court for the settlement of such controversies, as was the case provided for in Article 76, Section 2, . . . [of the Constitution of 1871]. Constitutional conflicts [in the meaning of this provision] were controversies concerning the interpretation or the application of the State Constitution. The point in question is not that the conflict arises between the State Government and Parliament, though this may be most frequently the case, but that the Constitution is the object of the controversy. Yet even in this instance it is immaterial whether the object of the conflict is a stipulation of the Constitution itself, or whether it is a provision contained in any other constitutional law. . . . It was by the application of Article 76, Section 2, that . . . the controversy of the succession to the throne of Lippe was decided.

[38] *Ibid.*, p. 115.

The parties opposing each other were not the State and the Parliament of Lippe, but these two as parties of the one side against one member of the House of Schaumburg-Lippe and several members of the so-called Weissenfels line as parties of the other side. This controversy and the conflicts defined in Article 11 are certainly not of the same kind, and to this extent Article 11 is indispensable with regard to its relation to Article 17.

The . . . second kind of controversies [covered by Article 17] are those of a non-private law character arising between several States as provided in Article 76, Section 1 [of the Constitution of 1871]. Controversies of a private law nature between the different States are, of course, settled by the regular courts in the course of ordinary litigation. What we here are dealing with are conflicts between the States arising under public law. . . . I may recall, for instance, the controversies between Prussia and Sachsen concerning the Berlin-Dresden railroad;[39] between Prussia and Sachsen-Weimar and Koburg concerning the taxation of the Thuringian railroads; between the two Schwarzburgs[40] with regard to the princely properties (*Kammergut*), and finally the frontier conflict between Mecklenburg and Lübeck, and other such cases. The jurisdiction of the Empire [for the settlement of these cases] on the basis of international legal procedure was provided [in Article 76, Section 1 of the Constitution of 1871] in analogy with Article 11 of the former *Bundesakte* [of 1815]. The *sine qua non* in all these cases is that the States as such act as interested parties, i. e. that we have to do with violations of their public property rights or of other public competencies (*Hoheitsrechte*). It should be clear without further argument that this second kind of conflicts also is not covered by Article 11 and that therefore the latter is not rendered superfluous by Article 17.

We now come to the real issue, namely the third kind of

[39] The Railroad in question being State property.

[40] Schwarzburg-Rudelstadt and Schwarzburg-Sondershausen.

controversy, i. e. conflicts of a non-private nature arising between the Reich and the Länder. This case is new. The Constitution [of 1871] did not specifically designate an organ competent to settle a conflict between Reich and States. . . . This omission was due evidently not to the belief that controversies between Reich and States could not arise, but that under the existing construction of the National Constitution the Bundesrat was considered as the proper medium for the arbitration of such conflicts. In the absence of a motivation of the draft [subject to discussion] it is not quite apparent why the latter provides for this [third] kind [of controversies]. The draft laid before us by the National Minister is, of course, right to the extent of recognizing the possibility of a conflict of a non-private nature between the Reich and a State, and [of making it clear] that the new Reichsrat, not being identical with the Bundesrat, can for that reason not act as the proper organ of settlement [of the conflicts here considered]. . . .

The question remains, What kind of controversies is here understood? Conflicts of a private law nature certainly are excluded. A conflict of a private law character arising to-day between the Reich and a member State is to be decided in the ordinary courts. It is here that the connection with Article 11 reenters; for there can be no doubt that the conflicts here discussed may include also controversies arising over the precedence of National over State law. . . . Thus a controversy may develop over the treaty right of a member State with a foreign power, or over the extent of the National right of supervision concerning the question whether the Constitution of a State is in harmony with Article 16 [i. e. Article 17 of the final text of the National Constitution], or the like. Undoubtedly all kinds of conflicts of a public law nature may arise between Reich and States, but it is certain that controversies concerning the enactment of legal norms on the part of the Länder will, as heretofore, constitute the main group. To that extent those were right who during the lively but somewhat vague discussion of the first reading held that the pro-

vision of Article 11 was in part covered by the contents of Article 17.

Now it must be conceded that conflicts arising over the enactment of a legal norm [by one of the States] can in every case be construed as a State conflict, even when the matter of the State law only concerns private interests. For the State law has been enacted by the Legislature or by virtue of legislative authorization of another public organ. Both authorities concerned are organs of the State and the question of the compatibility of a State law with National law can under all circumstances be construed as a State conflict (*Staatenstreitigkeit*).

It would nevertheless be questionable whether we would do right in eliminating Article 11, or whether we should not rather maintain its independent position. After a careful examination of the question I wish . . . to ask you to retain Article 11. It deals with the everyday and by far most frequent kind of controversies. It applies not always exclusively to conflicts, but simply to cases of doubt existing with the authorities. It covers instances which have to do, not with the decision of a concrete law suit (*Rechtsverhältnis*), but with a decision of abstract legal questions *incidenter* to a conflict in ordinary legislation, concerning which the State central authorities and the National Government are in doubt. . . .[41]

Once more, then, Article 17 was adopted by the *Verfassungsausschuss* in the form proposed in the draft submitted.[42] The provisions of Article 17 were accepted, practically without any discussion and opposition, in all three readings in the National Assembly,[43] as Article 19 of the final text of the National Constitution.

Controversies Concerning the Constitution Arising within a State. Considering first the practical aspect of

[41] Verf. Ber. und Prot., pp. 408-410.
[42] *Ibid.*, pp. 412, 441.
[43] Heilfron, II, p. 123; III, p. 633; V, p. 361.

the settlement of controversies concerning the Constitution arising within a State, it will be of value to inquire into the mode of settlement of such disputes under the Constitution of 1871 and under the American constitutional system. As shown in the discussion of the subject in the Committee on the Constitution, disputes of this sort, i. e. disputes arising over the application and interpretation of the State Constitution within a State, were adjusted under the Constitution of 1871 by way of arbitration before the Bundesrat. If this procedure failed they were eliminated by National legislation. This mode of adjustment was provided in Article 76, Section 2, which read: "In disputes relating to constitutional matters in those States of the Union whose Constitution does not designate an authority for the settlement of such differences, the Bundesrat shall, at the request of one of the parties, effect an amicable adjustment, and if this cannot be done, the matter shall be settled by Federal law." It is to be noted that under the Constitution of the Empire as well as under that of the Republic a settlement by National agencies was and is considered only where the State concerned does not possess a local authority competent for the settlement of the issue in question. According to Article 76 of the Imperial Constitution the State agency for the adjustment of these disputes must be one provided for in the Constitution of the State, while Article 19 of the National Republican Constitution merely states that such controversies are to be settled in the National Courts in the case of those States "in which no court competent to settle them, exists." Prior to the Revolution of 1918 five of the twenty-three States of the Empire had constitutional provisions for the adjustment of the conflicts in question by State authorities, namely Braunschweig, Lübeck, Oldenburg, Sachsen, and Sachsen-Altenburg. The Constitution of Braunschweig

stipulated that: "If the Government and the Estates be of a different opinion regarding the interpretation of particular provisions of the Constitution of the State, the Ducal Ministry of State shall first of all convene with a deputation of the Estates in order to seek an agreement. If this attempt should also be fruitless, both the Government and the Estates shall be at liberty to have the difference settled by law. The decision in this case shall be rendered in first and last instance by a compromise court which shall be composed in the same way as the joint court which is formed when a motion is made for punishment for a violation of the Constitution [as provided by the law of March 19, 1850]." [44] The corresponding provision of the Constitution of Saxony was almost identical and added that "the interpretation decided upon [by the court] in this manner shall be regarded as authentic and be respected accordingly." [45] The Constitution of Lübeck established the same method of procedure "if a disagreement prevails in the Senate and Corporation (*Bürgerschaft* or lower house) regarding the authentic interpretation of established laws, especially when the provisions of the Constitution are contested, or a right is disputed which has been claimed by the Senate or Corporation by virtue of the Constitution." [46] The Constitution of Sachsen-Altenburg called for "an arbitration proceeding analogous to the one provided in the rules of the highest Court of Appeals [of the State] in case of differences of opinion between the State Government and the . . . Diet upon which no agreement can be reached, especially regarding points of the Constitution." [47] The State of Oldenburg provided for arbitration by a State

[44] Braunschweig, Constitution of 1832, Sec. 231.
[45] Sachsen, Constitution of 1831, Art. 153.
[46] Lübeck, Constitution of 1907, Art. 74.
[47] Sachsen-Altenburg, Constitution of 1831, Art. 266, Sect. 2.

Court of differences of opinion between the State Government and the Diet as to the interpretation of the Constitution or as to the limits of the cooperation of the Diet under the Constitution." It added that "in case the State Government or the Diet does not wish to abide by the decision of the Arbitration Court, . . . [the difference is to be submitted to] the German Federal Arbitration Court in last instance." [48] The Constitutions of Hamburg [49] and Reuss-Younger Line [50] provided for the immediate settlement of such disputes by the German Federal Supreme Court, while the Fundamental Law of Reuss-Older Line stipulated that these conflicts were to be adjusted by "the German Federation." [51]

In his interpretation of Article 19 of the National Republican Constitution, Arndt states that "in the States of the Union, in which legal provisions exist for the judicial settlement of such constitutional controversies, as for instance in Saxony, Oldenburg, Braunschweig, Altenburg, Bremen, and Lübeck, Article 19 is therefore not applicable . . . ." With the exception of Bremen, the States enumerated by Arndt are those which had legal or rather constitutional provisions for the judicial settlement of such disputes under the pre-revolutionary régime. Concerning the State constitutions of the post-revolutionary period accessible at the present time, it may be stated that those of Bremen,[52] Braunschweig,[53] and Saxony [54] do not contain

[48] Oldenburg, Constitution of 1852, Articles 209-211.

[49] Hamburg, Constitution of 1879, Art. 71, Sect. 1, and Art. 76.

[50] Reuss-Younger Line, Constitution of 1852, Art. 117.

[51] Reuss-Older Line, Constitution of 1867, Art. 91.

[52] Bremen, Constitution of May 18, 1920 (Jahrbuch des öffentlichen Rechts der Gegenwart, bd. X, p. 393 ff.).

[53] Braunschweig, Constitution of Jan. 6, 1922 (Ruthenberg, Verfassungsgesetze des Deutschen Reichs und der deutschen Länder . . . p. 83 ff.).

[54] Sachsen, Constitution of Nov. 1, 1920 (Jahrbuch des öffentlichen Rechts der Gegenwart, bd. X, p. 285 ff.). Under the provision of the joint

a provision of this kind. A provision for the adjustment by a State Court of controversies concerning the State Constitution arising between different organs of the State Government is found in the new constitutions of Lübeck [55] and Oldenburg.[56] As pointed out above, the National Republican Constitution does not require the presence in the State constitutions of a provision for the settlement of such conflicts by a State Court as a condition for the non-applicability of Article 19. Accordingly, the States not having a constitutional provision to that effect may of course have what Arndt calls legislative provisions for a settlement of constitutional controversies by a State Court. But even this possibility can be definitely disclaimed for Bremen and Braunschweig at the time of Arndt's writing for the reason that in 1921 the National Staatsgerichtshof actually accepted as justiciable under Article 19 such cases of constitutional conflicts from both States.[57]

In American constitutional or legal practice the Federal Courts concern themselves with disputes of such a nature arising within a State only when in consequence of the controversy the private or public rights of a citizen of the United States, i. e. the rights held by a citizen under the provisions of the Federal Constitution are violated. All controversies in which this is not the case are subject to

Constitution of the Duchies of Sachsen-Koburg-Gotha conflicts arising between the diets of Koburg and Gotha concerning the competency of their respective diets, were to be adjusted by judicial arbitration with a last resort to the Supreme Court at Jena (Constitution of May 3, 1852, Sect. 115, Clauses 2-4).

[55] Lübeck, Constitution of May 23, 1920, Art. 60 (*Ibid.*, p. 401 ff.).

[56] Oldenburg, Constitution of June 17, 1919, Art. 75 (*Ibid.*, p. 420 ff.). Altenburg is one of the States which amalgamated to form the new State of Thuringia.

[57] These cases are considered below in section: Decisions in Controversies arising within a State.

the settlement by the States themselves, i. e. in the State Courts. The settlement of all controversies judiciable in the United States Federal Courts is effected only by way of regular litigation and not by declaratory or advisory decision. The same holds true for the adjudication of such cases of conflict in the State Courts, except where a different mode of settlement has been prescribed by the States themselves.

In the United States the constitutions of seven States provide for the settlement, upon request of the Executive or Legislature, by declaratory or advisory judgment in the State Courts, of controversies or differences of opinion of the kind here under discussion. The States are Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. Missouri had a clause to this effect in the Constitution of 1865, which was omitted in the Constitution of 1875. In Maine,[58] Massachusetts,[59] and New Hampshire [60] the judges are to give their opinions "upon important questions of law and upon solemn occasions"; in Rhode Island [61] "upon any question of law, whenever requested"; in Florida,[62] at any time upon the Governor's request "as to the interpretation of any portion of this constitution, or upon any point of law," or as amended, "to any question affecting his executive powers

[58] Maine, Constitution of 1820, Art. VI, Sect. 3.

[59] Massachusetts, Constitution of 1780, Part II, Chapt. III, Sect. II.

[60] New Hampshire, Constitution of 1784, Part II: Judiciary Power [Sect. 2]; Revised Constitution of 1792, Sect. XXIV.

[61] Rhode Island, Constitution of 1842, Art. X, Sect. 3.

[62] Florida, Constitution of 1868, Art. VI, Sect. 16; Art. XI of Amendments of 1875; Constitution of 1885, Art. IV, Sect. 13. In Poore's and Thorpe's texts this provision is erroneously referred to as a revision of "Section sixteen of Article five of the Constitution [of 1868]." This error has been copied also by Thayer in his "Cases on Constitutional Law," p. 175.

and duties." In Colorado the provision reads: "The Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives: and all such opinions shall be published in connection with the reported decisions of the Court." [63] According to Professor Thayer this provision is limited to questions of law and such as are questions *publici juris*. It is supposed to call not merely for the opinions of the justices, but for authoritative judgments of the courts.[64] In South Dakota the Governor may "require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions." [65] In Missouri the provision varied from that of Massachusetts only by the insertion of one word, so as to read, ". . . upon important questions of constitutional law . . .," [66] instead of, ". . . upon important questions of law. . . ."

All these provisions call for judgments or decisions which are declaratory in character, as does Article 19 of the German National Constitution of 1919. They exclude from consideration cases of judicial litigation in which the question at issue is only incidental. To that extent the practice of these American States and that of

[63] Colorado, Constitution of 1876; Amendment of 1886 to Art. VI, Sect. 3 (not found in Thorpe's text. Here quoted from Thayer, pp. 175-176).

[64] Thayer, *ibid.*, p. 176.

[65] South Dakota, Constitution of 1889, Art. V, Sect. 13.

[66] Missouri, Constitution of 1865, Art. VI, Sect. 11. Omitted in Revised Constitution of 1875. "In some states . . ., advisory opinions have been given or provided without constitutional authorization. In early days, advisory opinions were given by New York and Pennsylvania judges. In Minnesota, a statute authorizing the judges of the Supreme Court to give advisory opinions was declared unconstitutional.

the German National Republic seem to agree. There is, however, this important difference. The respective provisions of the American State constitutions cited do not stress, as does the stipulation of Article 19 of the German Constitution, the existence of a conflict between certain official organs of a State as the cause for the Governor's, the Council's, the Senate's, or the House of Representatives' request for an advisory opinion by the Courts, nor does a single one of the American State constitutions contain a clause providing for the execution of the opinion of the Court by the Executive Department. The nearest approach to the compulsory aspect of the decision of the Court under the German practice is found in the stipulation of the Colorado Constitution which states that "all such opinions shall be published in connection with the reported decisions of the Court." As to the subject matter over which the question of doubt may arise, the phraseology in the provisions of the American State constitutions is rather indefinite. Only in the stipulations of the constitutions of Colorado and Missouri do we find the specific limitation to questions of public and constitutional law respectively, i. e. to cases of doubt or differences of opinion of the kind specified in Article 19 of the German Republican Constitution.

The American Federal Constitution like the German National Constitution of 1919 does not contain any statement for or against an appeal to the Federal Courts for a decision, by way of advisory judgment, of a moot question

A Delaware statute of 1852 to the same effect has lain more or less dormant until recent years. A Vermont statute of 1864 was repealed in 1915. The Alabama legislature has recently enacted a similar statute, and the judges have already upheld its validity" (Hudson, M. O., Advisory Opinions of National and International Courts. Reprinted from Harvard Law Review, vol. XXXVII, 1924, p. 977-978).

of this character arising among the Federal Government agencies. However, the framers of the American Constitution contemplated the introduction of a provision for such a procedure, and President Washington actually attempted to introduce this system without constitutional provision. As stated by Thayer in his *Cases on Constitutional Law:* "In the Federal Convention of 1787, it was proposed that 'each branch of the legislature, as well as the supreme executive shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions. . . .' But nothing came of it. It is, however, interesting to see that the first President, who had also presided over the Convention, asked for an opinion from the justices. 'Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined to respond'." [67]

Referring to this instance, Chief Justice Marshall, in his *Life of Washington,* states the reason for the refusal of the Judges of the Federal Supreme Court as follows: "Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." [68] But according to Thayer the choice of the above reasoning as the cause for their refusal was dictated not so much by the principal conviction of legal impossibility to comply with the President's request, as by a belief of the unwisdom of such compliance in view of certain purely accidental circum-

[67] Thayer, *ibid.*, p. 176.

[68] Marshall, The Life of Washington . . . Philadelphia, C. P. Wayne, 1807, pp. 441-442.

stances connected with the affair. As stated in his *Memoir on Advisory Opinions:* "It was, perhaps, fortunate for the Judges and their successors that the questions there proposed came in so formidable a shape as they did. There were twenty-one of them, and they fill three large octavo pages in the Appendix to the tenth volume of Spark's *Washington.* Had they been brief and easily answered the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our National system. . . ." [69]

Both the American and the German constitutional practice allow or rather enable the chief National executive agencies to seek advisory opinions from the Department of Justice and the *Justizministerium* respectively. But this is a procedure essentially different from the one discussed in connection with Article 19 of the German National Constitution.

Decisions in Controversies Arising within a State. The following decisions of the Staatsgerichtshof will illustrate German legal practice in regard to the application of Article 19 as far as it concerns conflicts of a constitutional nature arising within a State which has no court of its own for the adjustment of such controversies.

On July 12, 1921, the Preliminary Staatsgerichtshof rendered a decision *in re* "Landtagsfraktion" of the State Election Association of Braunschweig *v.* the State Ministry.

Prior to the Revolution the State Legislature (*Landtag*) of Braunschweig was elected for the duration of four years. On November 15, 1918, the revolutionary Labor and Soldiers' Councils of the State passed a law stipulating that the communal and State Assemblies should hence-

[69] Thayer, Memoir on Advisory Opinions, p. 13, cited in his "Cases on Constitutional Law . . ." p. 176.

forth be elected annually, the election for the *Landtag* to take place on December 22 of that year. The first two State assemblies elected under the new revolutionary law failed to adjourn after the expiration of their legal term of one year.

The Preliminary Constitution of February 27, 1919, provided in Article 3 that "the *Landesversammlung* elected on December 22, 1918, shall have the task of giving the State a constitution. . . ." But the Assembly failing to adjourn on December 21, 1919, also failed to bring forth the constitution. Although on January 20, 1920, a motion to recognize the illegality of its session was defeated by a vote of 39 against 11, the first State Assembly voted itself out of existence on April 15. The second *Landtag,* elected on May 16, though not specifically authorized by any law to give the State the constitution which the first Assembly had failed to produce, assumed this authorization and under this assumption refused to adjourn at the expiration of its legal term of one year. A motion introduced on May 3, 1921, aiming at the election of a new Assembly on May 16 was rejected. On May 13 another motion, making the termination of the second *Landtag* dependent upon the enactment of a constitution and at the same time providing that its tenure should not exceed two years, was defeated by a vote of 29 against 29. It was after the refusal to adjourn and the failure to legalize a two-year tenure that a minority of the *Landtag,* representing the State Election Association, decided to appeal to the Staatsgerichtshof. In this appeal the minority requested the Court to decide to the effect that in accordance with the Law of November 15, 1918, providing for the annual election of the *Landesversammlung,* the existing second Assembly, elected on May 16, 1920, had reached its end on May 15, 1921, and

that consequently the demand for a new election was in order.

The Preliminary Staatsgerichtshof rejected the petition of the minority on the ground that by construction the second *Landesversammlung* must be assumed to be authorized to give the State a final constitution as directed by Article 3 of the Preliminary State Constitution and that therefore the second *Landesversammlung* was to be considered as a Constituent Assembly.[70]

On the same day, July 12, 1921, the Preliminary Staatsgerichtshof rendered a decision *in re* Senate of Bremen *v.* Legislature (*Bürgerschaft*) of Bremen. The *Bürgerschaft* had passed a resolution to the effect that investigating committees appointed by it could, either themselves or upon their request through the courts and administrative organs, gather testimony. Upon the appeal of the dissenting Senate the Preliminary Staatsgerichtshof declared the resolution to be contrary to the Constitution of Bremen.

Prior to the enactment of the resolution referred to, the Bremer *Bürgerschaft* had appointed a committee charged with the examination of the question whether or not in connection with a particular incident an investigation on the part of the popular representative assembly of the conduct of affairs by an administrative organ be advisable. Several witnesses called by the committee had refused to appear. Thereupon the *Bürgerschaft* enacted as law by a simple majority a resolution which stipulated that: "1. Investigating committees appointed by the *Bürgerschaft* may either themselves or by request through the courts or administrative authorities gather the necessary testimony. The authorities of Bremen are held to comply with the request for the taking of testimony. They must submit

[70] StGH, 1921 (RGZ, vol. 102, pp. 415-425).

their documentary records for the inspection of the committees. . . . 2. . . . Investigating committees are to be appointed upon the demand of one-fifth of the membership of the *Bürgerschaft.*" The Senate, declaring this resolution unconstitutional, appealed to the Staatsgerichtshof of the Reich for a decision in favor of its position.

As the Staatsgerichtshof pointed out, the Senate did not deny the right of the *Bürgerschaft* on particular occasions to appoint investigating committees. What the Senate questioned was the right of these committees to intervene in the functions of the judicial and administrative authorities. Agreeing with the Senate, the Court decided that such a right had to be denied for the reason that from the point of view of constitutional law and theory the assumption of this right by the Legislature must be opposed. Considering the historical background of the question, the Court called attention to the following facts:

The right to appoint investigating committees was first recognized in 1816 in the Constitution of Sachsen-Weimar-Eisenach. Until 1848 it hardly had found recognition anywhere else. The proposed National Constitution of 1849 provided in Article 99 that the Reichstag should be given the right to appoint such committees. Similar provisions have since been incorporated in several State constitutions, such as that of Prussia of 1850, of Waldeck of 1852, and in the Bavarian Law of Procedure of 1872. Attempts to introduce such a provision in the Imperial Constitution of 1871 were defeated.

From the point of view of constitutional law and theory the right of control by the Legislature over the acts of the Government has been generally recognized. It is the extent of such control which has been subject to controversy. With regard to the States, Schulze (*Deutsches Staatsrecht,* vol. 1, p. 479) and Meyer (*Lehrbuch des Staatsrechts,* Section 96, p. 331) conceded the right of legislative control over the entire sphere

of governmental activity, while Anschütz (*Kohler's Encyklopädie,* vol. 4, p. 144) accepted this right only in the form of interpellation and information. Concerning the Empire, Seydel (*Kommentar,* Article 23, III), while denying the right of the Reichstag to investigate facts, admitted its right of oral or written examination of witnesses, holding, however, that such examination was not enforceable. Laband (*Staatsrecht,* vol. 1, Section 33) was willing to grant to the Reichstag the right of gathering information concerning the manner in which the organs of Government had carried on their functions. In the *Deutsche Juristen Zeitung* of 1913 [71] he stated that the Reichstag could appoint committees to investigate the methods of procedure of the Government as well as particular incidents, but he denied to these committees the right of examination and the placing under oath of the witnesses.

From the preceding considerations the Court concluded that according to existing German constitutional law, and in agreement with the corresponding English and French practice, "examining committees are competent only in matters of legislative competency. They may only gather and determine facts, but they must not interfere in the administrative service. Investigating committees may be appointed from time to time for the consideration of definite issues. They possess no governing or administrative powers (*obrigkeitliche oder behördliche Befugnisse stehen ihnen nicht zu*)." Concerning the constitutionality of the resolution of the Bremer *Bürgerschaft,* the Court pointed out that the resolution in question assigned to the proposed investigating committees the right to perform judicial and administrative functions. This the Court declared to be unconstitutional for the following reasons:

The Constitution of Bremen of May 18, 1920, has . . . maintained the pre-revolutionary system of the division of State

[71] Deutsche Juristen Zeitung, 1913, p. 605.

functions. The *Bürgerschaft* is endowed with the right of legislation, the Senate with that of government and administration, the Courts with the application of justice. The *Bürgerschaft* is bound by the principles of its Constitution. For even though in accordance with Article 2 the Staatsgewalt emanates from the people, the popular representative assembly is subject to the limitations set by the Constitution as long as these limitations have not been removed or changed in the manner provided for a constitutional amendment. This is the decisive point. Administrative functions . . . cannot by a simple (*nicht qualifizierter*) majority be delegated to a body other than that charged by the Constitution with the government and administration. Furthermore, the *Bürgerschaft* cannot delegate to a committee rights which it does not itself possess. . .[72]

On January 12, 1922, the regular Staatsgerichtshof rendered a decision *in re* People's party and Agrarian party *v.* Landtag and State of Württemberg, in a case dealing with another phase of the question of the appointment and competency of investigating committees.

According to Article 8, Section 2, of the Constitution of Württemberg of September 25, 1919, "the *Landtag* is authorized and upon demand of one-fifth of its members compelled to appoint committees of investigation." On July 1, 1920, a minority of twenty-six out of one hundred and one members of the *Landtag* submitted the following resolution: "On the basis of Article 8, Section 2, of the Constitution of Württemberg, we request the appointment of an investigating committee of twelve members, this committee to be charged with the task of submitting to a careful and thorough examination the entire State administration of Württemberg from the time of its overthrow on November 9, 1918." This resolution was referred to the

[72] StGH, 1921 (RGZ, vol. 102, pp. 427-429).

State Committee on the Constitution from which it never was reported. On March 21 a second resolution was submitted by twenty, and later supported by twenty-two members of the same group. This resolution was changed to read: "On the basis of Article 8, Section 2, of the Constitution . . . an investigating committee be appointed to examine those official acts of the State administration . . . since November 9, 1918, which presumably are subject to censure or repeal." This second resolution too was referred to the State Committee on the Constitution. Upon the recommendation of the latter the *Landtag* declared that "the resolution of representatives Bazille, Körner, and associates, of March 21, 1921, is not compatible with Article 8 of the Constitution of Württemberg." It was in consequence of this action on the part of the *Landtag* that twenty-four members of the People's and Agrarian parties, to which the supporters of the resolution belonged, appealed to the Staatsgerichtshof for a decision to the effect that the refusal of the *Landtag* to appoint the investigating committee requested in the resolution was a violation of Article 8, Section 2, of the State Constitution. The Staatsgerichtshof argued as follows:

According to Article 8, Section 2, of the Constitution of Württemberg the *Landtag* is compelled to appoint an investigation committee if one-fifth of its members request such an appointment. The *Landtag* acknowledged that the resolution in question was signed by the number required by the Constitution. The phraseology of the resolution of March 21, 1921, does not conflict with that of Article 8, Section 2, of the State Constitution. The latter does not specifically demand the mentioning of a particular act to be the subject of investigation. Nevertheless, such a limitation must be assumed from the history of Article 8, Section 2, and from the purpose of investigating committees in their relation to the *Landtag* and other organs of the State.

Article 8, Section 2, was admittedly patterned after the corresponding Article 34 of the National Republican Constitution. The history of Article 34 proves that those responsible for its formulation did not question the principle that only definite facts or acts could be subject to examination by these investigating committees. A difference of opinion existed only with regard to the question whether the article should expressly state this principle. It was finally decided to abandon the earlier attempts to include an expression of this principle as an unnecessary tautology. The same limitation could be deduced also from the general juristic conception of such investigating committees as auxiliary organs of Parliament. As such their competency is limited by the competency of the Parliament by which they are created. It is the Parliament which decides upon the sphere of action of these committees, not the committees themselves. Article 8, Section 2, of the Constitution of Württemberg gives to a minority of one-fifth the right to demand the appointment by the *Landtag* of an investigating committee, but it does not deprive the *Landtag* of its right to limit the scope of investigation to the particular acts or facts to be investigated.

From these arguments the Court concluded that the request for the appointment of the investigating committee on the basis of Article 8, Section 2, was to be granted only on condition that in this request the facts to be investigated were defined in an unmistakable manner. This, the Staatsgerichtshof held, was not the case in the resolution in question. The Court then cited Prussian and Bavarian constitutional practice as supporting its own argument. It referred to such authorities as Hatschek, Redlich, Moreau, and Esmein to show that the same interpretation prevailed generally in German and foreign constitutional legal practice. Thus it decided that the refusal of the *Landtag* to appoint the committee as requested by the

resolution of March 21, 1921, was not a violation of Article 8, Section 2, of the Constitution of Württemberg.[73]

In its decision of September 29, 1923, the Staatsgerichtshof declared that Articles 6 and 11 of the State Law of Saxony of July 4, 1922, concerning the State Finance Court (*Staatsrechnungshof*) was incompatible with Article 48 of the Saxon State Constitution.[74]

Controversies arising between States and between Reich and States. Article 19 of the National Constitution provides next for the judicial settlement of controversies of a public nature between States and between Reich and State. They are to be decided by the Staatsgerichtshof[75] unless another National Court is competent. Controversies of a public nature between the States are such as the conflict between Saxony and Prussia concerning the Berlin-Dresden railroad—railroads at that time being under State control and ownership—or the dispute between Mecklenburg and Lübeck concerning their mutual frontiers.[76] Controversies between the States and the Reich are, for instance, the question whether rights embodied in a treaty between one of the Länder and a foreign State have been transferred to the Reich; whether the constitution of one of the Länder conforms to Article 17 of the National Constitution, which prescribes the republican form of government for all the Länder and makes their election of popular representatives by the universal, equal, direct, and secret suffrage obligatory; furthermore all con-

[73] StGH, 1922 (RGZ, vol. 104, pp. 423-432).

[74] StGH, 1923, p. 17 (RGZ, vol. 107, Anhang). For other decisions see StGH to date.

[75] Controversies between States and between Reich and States not of a public law character are decided by the regular courts as ordinary suits at law. See Anschütz, p. 67; Giese, p. 116.

[76] Hatschek, I, p. 108.

flicts concerning the interpretation of treaties between the Reich and the Länder; and finally, disputes arising over the assumption of rights by the Reich under protest of a State.[77] The Staatsgerichtshof competent in these cases acts only upon request by one of the parties concerned in the controversy. The action of the Court is not to be considered as arbitration but as adjudication, i. e. as a declaratory judgment which formally and materially has the force of law.

In the Constitution of the Monarchy there was no provision for the settlement of disputes between the Reich and the States. Concerning the adjustment of controversies between States Article 76 stipulated that "disputes between the several States of the Union, so far as they do not relate to matters of private law, and are therefore to be decided by the competent judicial authorities, shall be adjusted by the Bundesrat, at the request of one of the parties." The term "adjusted" in this provision has been interpreted to imply that the Bundesrat might itself render a decision, or submit the dispute to a competent court or to any person or body acting as arbiter. Though the Constitution did not say so, the nature of the controversies in question was such that the decision rendered by the Bundesrat, or the party appointed by the latter, was held to be subject to enforcement by the National Government.[78]

The American Federal Constitution, in Article 3, Section 2, gives a list of cases subject to adjudication in the Federal Courts. According to the provisions of this section

[77] *Ibid.*, p. 111. Controversies concerning the assumption of rights by a State, disputed by the Reich, belong before the Reichsgericht under the provisions of Article 13, Section 2, since the States can assume rights only by State law enacted under their concurrent or exclusive right of legislation.

[78] Arndt, Verfassung des Deutschen Reichs, 1907, 3. Aufl., p. 385 ff; Dambitsch, p. 668 ff.

the judicial power of the United States, i. e. of the Federal Courts, extends, for instance, over cases arising from "controversies to which the United States is a party" and from "controversies between two or more States." The phrase "controversies to which the United States is a party" has been accepted in American judicial practice to cover controversies between the United States and private citizens and those between the United States and one of the States. In U. S. *v.* Texas[79] the Court held that: "The framers of the Constitution . . . could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law."

The jurisdiction of the Federal Courts here discussed applies, of course, only to controversies coming before the courts as ordinary litigation. In other words, the controversies here considered are decided not by arbitration or declaratory judgment, but by judicial decisions in suits at law. But there is one more condition to be mentioned. While the United States may, without restriction, act as plaintiff in controversies with States and citizens, the State and citizen can act as plaintiff against the United States only with the consent of the latter, on the generally accepted legal principle that the sovereign State cannot be sued without its consent.[80]

The American and German constitutional provisions on this subject agree to the extent that under both, controversies of a private law nature between the States or between National Union and a State are subject to settlement

[79] 143 U. S. 644.

[80] See Kansas *v.* U. S. (51 U. S. L. ed. 331). "The United States may not, without its consent, be sued by a State."

by way of ordinary litigation. The principle that the National Union can be sued only with its consent holds good in both systems. They differ, however, in that under the American system these suits must be brought in the Federal Courts, while in Germany, where all ordinary courts are State courts, such cases come before the National Supreme Court only in the form of appeal. The essential difference, of course, is found in the fact that while in the United States controversies over public law matters are treated in the same way in which litigation under private law is handled, in Germany disputes arising under public law are settled by declaratory judgment of a National Supreme Court as provided in Article 19 of the Constitution of 1919.

In two decisions of 1923 and 1924 respectively the Staatsgerichtshof has had occasion to adjust a conflict between the Reich and one of the States. In the first instance, i. e. the decision of June 30, 1923, the Court was asked to settle a public law controversy between the Government of Prussia and the National Ministry of Communication (*Reichsverkehrsministerium*). The controversy arose over the interpretation of Article 90 of the National Constitution and of the Treaty of March 31, 1920, between the Reich and the State of Prussia, regulating the transfer of the Prussian State railroads to the Reich. It also involved the question of the compatibility of Article 17 of the National budgetary law of 1921, and the corresponding articles of the budgetary laws of 1922 and 1923, with Article 7, Section 12, of the National Constitution.[81]

The case decided by the Staatsgerichtshof on July 12, 1924, dealt with a public law conflict between the Reich and the State of Saxony. The controversy originated over

[81] StGH, 1923, p. 1 ff. (RGZ, vol. 107. Anhang).

the question whether the Reich in taking over the Saxon State railroads assumed the obligation established by the Saxon State laws of 1868 and 1913 to grant free transportation to certain Saxon church dignitaries (*Synodalen*). The answer to the question depended upon the interpretation of these laws and of the corresponding provisions of the treaty between Saxony and the Reich, regulating the transfer of the railroads to the Reich.[82]

Parties Competent to Request the Decision of a National Supreme Court. The difficulty of getting an issue involving a constitutional or public law matter before the National Courts will be appreciated when one recalls some of the attempts made in this direction in American legal practice. It is well known how cases have been worked up in the most ingenious manner in order to test the constitutionality of a certain act of legislation or of a particular function of the Government. To get a ruling on the constitutionality of the Federal Income Tax Law of 1894, two private individuals, being shareholders in certain corporations, brought suits in the Circuit Court of the United States for the Southern District of New York,[83] to procure decrees to the effect that the income tax law was unconstitutional and that the corporations as defendants be restrained from squandering their funds by paying the tax under this law. The moving force behind the parties bringing the suit were, of course, the corporations appearing as defendants and arguing their right to pay the tax in question.

[82] StGH, 1924 (RGZ, vol. 108, pp. 426-432. In this connection see also conflicts between the Reich and Bavaria and the Reich and Saxony discussed in chapter VII. For other decisions see StGH to date.

[83] Pollock *v.* The Farmers' Loan and Trust Company *et al.* 158 U. S. 601.

In the case of Wilson *v.* Shaw, Secretary of the Treasury,[84] Mr. Warren B. Wilson as taxpayer in the United States brought suit in the Supreme Court of the District of Columbia to restrain the Secretary of the Treasury from paying out money for the construction of the Panama Canal, from borrowing money for that purpose, and from issuing bonds of the United States therefor. The suit was dismissed, the decree of dismissal being sustained by the Court of Appeals of the District of Columbia and by the Supreme Court of the United States. The Court argued that Congress had the right to construct the Panama Canal in the territory acquired by treaty with the Republic of Panama and that Mr. Wilson, though a taxpayer in the United States, had not sufficient pecuniary interest in the building of the Canal to justify the demand for the injunction against the United States.

In the case of Fairchild *v.* Hughes[85] Mr. Fairchild had brought suit in the District Court of Columbia to restrain the Secretary of State from announcing the ratification of the 19th Amendment and to prevent the Attorney General from enforcing it. The request for relief was based on the plea that the Amendment would prevent the States in which the vote was restricted to the male citizens from having their election duly held and that it would double their election expenses. This suit, too, was dismissed by the Court on the ground that the plaintiff's alleged interest in the question was not such as to afford a basis for this proceeding. As stated by the Court: "Plaintiff has only the right possessed by every citizen, to require that the government be administered according to law, and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the

[84] Wilson *v.* Shaw. 204 U. S. 24.
[85] 258 U. S. 126.

Federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid. . . ."

The same restrictions have been placed by the Federal Courts upon the rights of the States to question the constitutionality of Federal law or of Federal action. In 1923 the State of Massachusetts brought suit in the United States Supreme Court against the Secretary of the United States Treasury to enjoin the latter from enforcing the Maternity Act. The case was based upon the plea that the appropriations of the Maternity Act were for purposes not national, but local, that the burden of the appropriations provided by this act was unequally distributed among the States and rested most heavily upon the industrial States, such as Massachusetts. The complaint alleged that the private rights of the citizens of Massachusetts were thus invaded by the Federal law. The Court dismissed the complaint, arguing that:

It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States [who are also its citizens] from the operation of the statutes thereof.

The question [of the constitutionality of an act of Congress] may be considered [by the Supreme Court of the United States] only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.

The party who invokes the power [of the Court to declare an act of Congress to be unconstitutional] must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[86]

[86] Massachusetts *v.* Mellon. 262 U. S. 447.

In American legal practice it is thus not a question as to who is competent to raise the issue of the constitutionality of a Federal law or of a function of the Federal Government, but rather whether the controversy is justiciable in the Federal Courts. Under the German judicial system, however, all disputes of a public law nature being removed from ordinary litigation and made subject to settlement by declaratory decision in special courts, the question left more or less open is not that of the matter subject to adjudication, but who is or is not competent to raise an issue of the kind covered by Article 19.

The question of the competency of the parties concerned in the conflicts arising under Article 19 played an important rôle in the argument of the Staatsgerichtshof in two cases cited above. The first case was one arising out of a dispute between the majority and minority of the Assembly (*Landesversammlung*) of the State of Braunschweig.[87] The minority, consisting of members of the Assembly and representing the State Election Association, had introduced a motion to the effect that the Assembly adjourn in accordance with the provisions of the Law of November 15, 1918. When this motion was defeated and the subsequent attempt to legalize the continued session of the Assembly had equally failed, the minority appealed to the Staatsgerichtshof for a decision in favor of its original motion for adjournment of the Assembly. The State Ministry denied the existence of a constitutional conflict under Article 19 on the ground that the State Government of Braunschweig was not a party to the dispute and that consequently the existing dispute was one between the majority and minority of the Assembly, the implication of course being that the minority was not competent to bring the case before the Court.

[87] See above, section: Decisions in Controversies Arising within a

Starting with the phraseology of Article 19 of the National Constitution the Court pointed out that the wording of the article itself gives no answer to the question involved. The Court then proceeded to consider the history of Article 19 in connection with the constitutional theory and practice prior to the Revolution. In the Committee on the Constitution appointed by the National Assembly two conflicting views prevailed on the subject. Concerning the meaning of Article 19 (Article 17 of the draft under consideration),[88] Dr. Zweigert, National Minister of Justice, said: "The question of the parties to a conflict under Article 17 can give rise to doubt only in the case of constitutional disputes arising within a member State. . . . Article 76, Section 2, of the Imperial Constitution provided for the adjustment of constitutional disputes arising within a State, upon appeal of one of the parties concerned, by the Bundesrat. In the prevailing legal opinion and practice such constitutional disputes were held to be conflicts between the Government and the representative popular assembly of a State. This situation is not changed by Article 17 which in its decisive points agrees with the old law." [89] The same opinion was expressed in a memorandum sent to the Committee by the National Department of the Interior.[90] On the other hand, the views of the Departments of Justice and the Interior were opposed by von Grassmann and Kahl. The former, representing Bavarian official opinion, answered Dr. Zweigert as follows: "The view . . . that by constitutional conflicts are understood only such conflicts between Government and Parliament is too narrow. Constitutional controversies are conceivable between individuals and the State as also

[88] See above, section: Controversies under Article 19 Defined.

[89] See text corresponding to note 37.

[90] StGH, 1921 (RGZ, vol. 102, p. 420).

between the State and religious bodies." [91] In the Committee session of June 3, Kahl said: "Constitutional disputes are disputes concerning the interpretation or application of the State Constitution. The decisive point is not that the conflict is one between the Government and Parliament, even though this may be most frequently the case, but rather that the object of the dispute concerns the Constitution. . . ." [92]

The Court then proceeded to show that the same difference of opinion existed under the Empire with regard to the interpretation of Article 76, Section 2, which had served as the model for Article 19 of the Republican Constitution. The question of the competency of the parties to constitutional conflicts arising within a State was raised in the old Reichstag in connection with various petitions concerning constitutional conflicts in the State of Mecklenburg. In these instances the National and State Governments as well as the Bundesrat always took the stand now taken by the State Ministry of Braunschweig, holding that constitutional conflicts were such only in which the Government and Parliament are parties.[93] This view was, however, not shared by the Reichstag. A report submitted by a committee of members of that body, appointed to study one of these petitions, contained the following statement: "According to an older opinion only the *Stände* or Parliament are competent [to raise an issue concerning the Constitution]. But the conviction has gained ground that this view leads to absurdities. On the basis of this opinion the State Governments could apparently avoid an undesirable constitutional conflict by the dissolution of the body competent to raise the issue and by the annihilation of the

[91] Verf. Ber. und Prot., p. 115.
[92] *Ibid.*, p. 409.
[93] StGH, 1921 (RGZ, vol. 102, p. 420 ff.).

sole subject entitled to initiate the conflict. The same holds true with respect to another opinion according to which every single citizen as such can start a constitutional controversy. If this were so, every crank would be in the position of placing and maintaining government and people in a state of excitement over the most vital interests of the State." The report referred approvingly to a middle course view which "*in thesi* grants the State citizen the right to initiate a constitutional controversy but which, in order to avoid frivolities, demands that in the particular case (*in hypothesi*) . . . this right be made the subject of judicial discretion." [94]

Finally the Court showed that there had been no agreement on this subject among the constitutional writers of the Monarchy. Thus the opinion that in exceptional cases private individuals and corporations were competent to bring constitutional disputes before the Bundestag of the North German Confederation and before the Bundesrat of the Empire was defended by such jurists as Zachariä,[95] Hänel,[96] Meyer,[97] Fleischmann,[98] while the narrower or official view, to the effect that only the Government and Parliament could be parties to such a conflict, was supported by Laband,[99] Seydel,[100] Jagemann,[101] Arndt,[102] and others.

In order to reach a decision on this question, the Court held that cognizance had to be taken of the fact that the

[94] *Ibid.*

[95] Deutsches Staats- und Bundesrecht, 3. Aufl., 1867, vol. 2, p. 777.

[96] Deutsches Staatsrecht, 1892, p. 568.

[97] Lehrbuch des deutschen Staatsrechts, 7. Aufl., 1919, p. 943, note 12.

[98] Die Zuständigkeit des Bundesrats für Erledigung von öffentlichrechtlichen Streitigkeiten, 1904, p. 37.

[99] Staatsrecht des deutschen Reiches, 5. Aufl., vol. 1 (1911), p. 271.

[100] Kommentar zur Verfassungsurkunde, 2, Aufl., 1897, p. 407.

[101] Die deutsche Reichsverfassung, 1904, p. 218.

[102] Verfassung des Deutschen Reichs, 5. Aufl., 1913, p. 363, note 7.

actual and legal situation in the individual States had been changed considerably by the Revolution. Thus the Court said:

A constitutional conflict between the State Government and the representative Assembly over a breach of the State Constitution of the kind that had occurred in Hanover and in other States, is hardly possible to-day. Such a conflict has been eliminated or is made unlikely (*erschwert*) by Article 19 of the new National Constitution, which provides (1) that each Land must have a republican constitution and a representative assembly elected on the basis of a certain well defined election system, and (2) that the Government of each State depends upon the confidence of the representative Assembly. In case of infractions of these provisions every State must reckon with Federal intervention under Article 48, Section 1, of the National Constitution. But despite Article 19 there remain two possibilities of a mutual breach of the Constitution by a State Government and the majority of the Assembly. In the first place, the Constitution may be changed without the observance of the more difficult course of procedure provided for constitutional amendment. In the second place, the Constitution is not changed, but certain of its provisions, as for instance those relating to the duration of the *Landesversammlung* are actually nullified (*ausser Kraft gesetzt*) in order that the *Landesversammlung* and the Government chosen by it, may as long as possible remain in the possession of political power. The failure to provide in such cases redress under Article 19 would place the minority of the *Landesversammlung* and the great mass of the electors in a state of *Rechtlosigkeit,* the elimination of which by way of the creation of a Federal Court or Staatsgerichtshof has been striven for ever since the days of the German Confederation (See *Frankfurter Reichsverfassung* of March 28, 1849, Section 126 ff.).

In conclusion the Court found as follows: "In the case before the Court a mutual violation of the Constitution on

the part of the State Government and the *Landesversammlung* of Braunschweig is asserted. The plaintiffs must be considered competent to complain of such a violation in the manner provided by the National Constitution, even (*schon*) in their capacity as members of the *Landtag* and of a *Landtagsfraktion*. Whether the same right should be conceded them also in their capacity of qualified voters and citizens the Court need not examine in the present case." [103]

In its decision of January 12, 1922, *in re* Citizens party and Agrarian party of the *Landtag* of Württemberg *v.* the *Landtag* and State of Württemberg, the Staatsgerichtshof, referring to the argument of the Preliminary Staatsgerichtshof in the case concerning the conflict in Braunschweig cited above, decided in favor of the competency of a minority membership of the State Legislature. In its argument the Court said:

The Staatsgerichtshof . . . is competent to render the decision requested by the petitioners only if a constitutional conflict in the meaning of Article 19 is involved. In the constitutional conflict between the members of the State Legislature representing the State Election Association and the State Ministry of Braunschweig . . . the Preliminary Staatsgerichtshof approved the opinion expressed by Kahl reporting before the Committee on the Constitution where he defined constitutional disputes as conflicts concerning the interpretation or application of the State Constitution. On the basis of this definition the Preliminary Staatsgerichtshof concluded that the request for a decision, provided in Article 19, may be made not only by the State Government and the *Landtag* as a corporate entity, but that under particular conditions also parts of the *Landtag*, as for instance members of a party, or single members of the *Landtag* may make such a request (See decision of July 12, 1921, RGZ, vol. 102, pp. 415, 422).

[103] StGH, 1921 (RGZ, vol. 102, pp. 419-422).

In reference to the case before the Court, i. e. the conflict concerning the legality of the vote of the *Landtag* of Württemberg, rejecting the demand of the minority for the appointment of the investigating committee on the ground of its unconstitutionality, the Staatsgerichtshof was of the opinion that this was a conflict in the meaning of Article 19, in so far as it had to do with the interpretation and application of Article 8 of the Constitution of Württemberg. So the Court continued:

> We also have a special case in the meaning of the decision of July 12, 1921, because Article 8 of the Constitution of Württemberg especially accords to a certain part of the membership of the *Landtag*—namely a minority of one-fifth—the right of demanding the appointment of an investigating committee. The petitioners claim that by the [negative] vote of the *Landtag* the constitutional rights of the minority have been violated. They must, therefore, at least as far as they belong to the allegedly aggrieved minority, be considered competent to seek protection of the Staatsgerichtshof for the rights granted them by the State Constitution.[104]

So far, then, the two preceding decisions of the preliminary and the regular Staatsgerichtshof respectively, have established the competency of minorities or of individual members of the State assemblies to appeal to the Staatsgerichtshof as parties to constitutional conflicts arising within the State under Article 19 of the National Constitution. With regard to the competency of private individuals as non-members of Parliament the Court failed to commit itself, leaving the answer to this question to future decisions as the need for them might arise.[105]

[104] *Ibid.*, p. 425.

[105] In its decision of November 13, 1920, the Reichsfinanzhof declared that no private person could raise the question of the compatibility of a State tax regulation with National law (See note, 32).

CHAPTER VIII

States Rights and National Unitary State

The States Rights Doctrine in the United States. Since the German Republican Constitution has been in effect several cases of conflict between the Reich and one of the Länder have arisen, in which recourse to the measures defined in Article 48 was or would have been the ultimate mode of enforcing the National will. The most conspicuous of these cases is that of the conflict between Bavaria and the Reich, which in importance and significance equals that of the struggle between South Carolina and the Federal Union over South Carolina's attempt to nullify the Federal Tariff Law of 1832. The study of the causes leading to the refusal on the part of the German States concerned to concede the superiority of the National law in question, or to comply with the legitimate demands of the National Government thus leads us to a consideration of the extent to which the doctrine of States rights is held in modern Republican Germany. A helpful criterion in this consideration will be found in a short exposition of the theory and application of the doctrine in American constitutional history.

The theory that a member State of the American Union had the legal right to nullify [1] a Federal law which either did not agree with State law or which was held to be detri-

[1] Nullification as applied by Georgia in the Cherokee case of 1825-30 was hardly founded upon the claim of a legal right to suspend the Federal law forbidding intrusion upon Indian territory. "It was rather a successful case of law breaking than of nullification" in the sense in which the term is ordinarily used (Lalor: Nullification).

mental to the particular interests of the State, was based on the premise that the creation of the Federal Union was affected by a compact between the thirteen sovereign or independent States in such a way that their Sovereignty remained undivided with each of the States, that the powers exercised by the Union were those delegated to it by the sovereign States, and that in exercising them the Fedral Government was acting merely in the capacity of the legal agent of the States. Under this conception the doctrine of nullification was held to be, and quite naturally, a logical corollary. The Federal Government was merely exercising the sovereign powers of the States; it did not itself possess sovereign power, for the delegation by the States to the Union of the right to exercise that power was not identical with the surrender of their Sovereignty.[2] However, under the weight of popular opinion and under the influence of the realities of practical politics the theory of nullification as defined above appeared as a practical proposition in a considerably modified form.

Thus, Jefferson, the father of the Kentucky resolutions of 1798, in which the principle of nullification found its first official expression, did not contemplate nullification on the part of a single State, but "a concerted action of States which should, if three-fourths of the States could be induced to agree in reprobating a federal law, 'nullify' it in National Convention by constitutional amendment." On the other hand, a generation later, Calhoun of South Carolina advocated nullification in the sense of a suspension of Federal law "by any aggrieved State, until three-fourths of the States, in National Convention, should overrule the nullification." [3]

[2] Lalor: Nullification. See also Willoughby, The Fundamental Concepts of Public Law, pp. 202, 247 pp.

[3] Lalor: Nullification.

Under the Jeffersonian modification Federal law was to be upheld if more than one-fourth of the States were opposed to its nullification by any one State. Calhoun's modification, however, meant that Federal law would have to yield to amendment if only one more than one-fourth of the States would support the nullifying State. Thus under the claim of the legal right to nullification as defined by Jefferson as well as by Calhoun, secession from the Union on the part of the States whose attempt at nullification had been frustrated by the National Convention could not be resorted to as a legal right but only as a political measure.

Of the several instances in which States have applied the assumed right of nullifying Federal law, the case of the nullification by South Carolina of the Federal Tariff Act of 1832 is considered as the most important one in American constitutional history.

The passage of the Federal tariff bills of 1824 and 1828 had revealed to the South the intention of the National Government to favor a disposition of the northern representatives to support American manufacturers by protective tariff provisions. The South, not having any manufacturing interests to speak of, was opposed to these measures on the ground that they would serve to benefit northern interests at the expense of the whole nation. When, despite the opposition ably expressed by Calhoun, the Clay Tariff Bill of 1832 was passed against the vote of the southern representatives, South Carolina voiced her opposition to the measure by applying the doctrine of nullification. The South Carolina Legislature was convened on October 22 of the same year and on November 19 passed the ordinance nullifying the Federal law in question.

Prior to the passage of the ordinance the Federal President had ordered the collection of the taxes under the Clay

Tariff Bill in the ports of South Carolina and had authorized the application of force if necessary. In South Carolina a "new legislature, which met in December 1832, and was almost entirely made up of nullifiers . . ., put the State in a position of war, and passed various acts reassuming powers which had been expressly prohibited to the States by the [Federal] Constitution."[4] The Governor elected by this Legislature, defending the doctrine of nullification, declared the primary allegiance of every citizen to be due to the State.[5] In January 1833 the Legislature passed all the acts necessary to empower State officers to resist the levy of taxes, to recover property seized for nonpayment of taxes, and to resist mandates of the Federal Courts.

Having ordered the forceful collection of taxes in South Carolina's ports by Federal officials in November 1832, the President issued his "nullification proclamation" in December. In this announcement he declared the doctrine of nullification "incompatible with the existence of the Union," and "contradicted expressly by the letter of the Constitution." In his warning to the people of South Carolina he said: "The dictates of a high duty oblige me solemnly to announce that you cannot succeed. The laws of the United States must be executed. . . . Those who told you that you might peaceably prevent their execution deceived you—they could not have been deceived themselves. Their object is disunion, and disunion by armed force is treason. Are you ready to incur this guilt? If you are, on your unhappy State will fall all the evils of the conflict you force upon the government of your country."[6] In March

[4] *Ibid.*

[5] This case is here described in some detail on account of its similarity with that of the Bavarian nullification ordinance to be considered below.

[6] Lalor: Nullification.

the Federal Congress passed the so-called "bloody bill" for the enforcement of the Tariff Act nullified by South Carolina.

But South Carolina discovered that there was little if any support to be expected from the other States of the South. Thus, disunion was not attempted, nor was resistance offered, despite the State law of December, 1832, to the collection of the Federal taxes by Federal forces. Practical considerations had proved stronger than doctrinary theory. On the other hand, wise statesmanship on the part of the Federal Government offered South Carolina a tactical reason for retreat from her untenable position. A compromise bill approved by Calhoun, South Carolina's representative in the Senate, was introduced in the Federal Congress and passed. It was signed by the President on March 2. Two weeks later the South Carolina Convention repealed the nullification ordinance.[7] Both sides claimed to have triumphed. Nullification, it must be admitted, had forced a reduction in the *ad valorem* duties to be levied upon manufactured American goods. If this was triumph, it was such only in a political sense. From the legal point of view there is only one conclusion possible: nullification did not nullify Federal law, but Federal law forced the repeal of the ordinance of nullification and proved, once for all, that nullification as a legal doctrine had no standing in American constitutional law and no hope of success in American constitutional practice.

The second phase of the manifestation of the doctrine of States rights was the claim of the States to the legal right to secede from the Union in order to prevent the infringement of their sovereign rights by Federal legislation or action. This claim, like that of nullification, was premised upon the assumption that the Union had been

[7] *Ibid.*

established by a compact between the sovereign States. But the adherents of the doctrine of the legality of secession held that by this compact Sovereignty had been divided between the original States as members of the Union and the new Federal Commonwealth established by this compact. Under this premise there could be no logical or legal claim to the legal right of nullification of Federal law passed under the sovereign power of the Union surrendered to it by the States themselves. The only logical, and as it was erroneously held, legal redress left was that of secession.[8]

As the doctrine of the legal right of nullification was demolished by the successful termination of the South Carolina case, so the claim to the legal right to secession was terminated by the results of the Civil War.

Nullification under the German States Rights Doctrine. In the Preface to a former work dealing with the conflict between Bavaria and the Reich over the National Law for the Protection of the Republic,[9] attention has been called to the fact that the German National Union is facing the prospect of a struggle over States rights much the same as that confronting the United States in the early decades of its existence. In the German Republic the States rights doctrine, as in the case of the United States, is based upon the theory that the sovereign States by a voluntary compact or at least by consent united to form the National Union. The same confusion prevails concerning the question of the location of Sovereignty. The answer to this question is made still more difficult by the attempt of the German jurists to distinguish between Sovereignty in the

[8] *Ibid.* See also Willoughby, The Fundamental Concepts of Public Law, p. 202, 247 ff.

[9] See the author's "Bavaria and the Reich . . ." 1922.

constitutional and international legal sense, an attempt intended to recognize the realities of international law and politics as well as to satisfy the assumptions and pretensions of the States righters insisting upon the State character of the States and the possession of Staatsgewalt in their own name.

In the case of Germany the Sovereignty, i. e. independence in the international legal sense, of the States from the dissolution of the Holy Roman Empire until the formation of the North German Confederation is beyond question. The issue here was whether or not they retained this Sovereignty under the new Confederation or whether their Sovereignty was replaced by that of the Union. In other words, the issue was that of deciding whether the North German Confederation and the succeeding Empire of 1871 were a Bundesstaat or a Staatenbund. The majority opinion of contemporary constitutional jurists accepted the *bundesstaatliche Charakter* of the Union, that is to say it recognized as a fact the Sovereignty of the Union in the international legal sense and the non-possession of such independence of the member States.[10] But this applies only to Sovereignty viewed from the point of view of international law. With regard to Sovereignty considered from the aspect of constitutional law there is a different story to tell.

The meaning of Sovereignty in the constitutional sense has been made clear in Chapter III dealing with the conception of State and Sovereignty in German constitutional jurisprudence. Staatsgewalt, the modern equivalent for the older term *Herrschergewalt* or *Herrschermacht,* as defined by Anschütz is the "competence, exclusively belonging to the State, of ruling land and people." According to

[10] On this subject see chapter III, section: Staatsgewalt and Souveränetät.

the same authority this competence or power of the State "is supreme in its sphere," the State's command "has precedence over the commands of all other subordinate powers of the land," and its will "breaks all resistance." [11]

The recognition of the Sovereignty of the North German Confederation and the Empire of 1871 in the international legal sense was predicated upon the doctrine of the indivisibility of Sovereignty. Forced to concede the correctness of that doctrine, and admitting that the non-possession of independence was a necessary corollary for the position of the States in relation to the National Union, a number of German jurists rejected the idea that independence was an essential characteristic of the State, and that Sovereignty in the international legal sense was a necessary element of the Staatsgewalt conceived as Sovereignty in the constitutional legal sense. In other words, since they could not save the State character and the possession of the Staatsgewalt by the States under the Confederation of 1866 and the Empire of 1871 on the presumption of the independence of the States, they simply constructed a theory of statehood and Sovereignty in the constitutional sense, which has no need of the troublesome feature of independence or Sovereignty in the international legal notion.[12]

As Anschütz explains in his work on the German constitutional law of the Monarchy, Sovereignty in the international legal sense, i. e. independence, is not an essential attribute of the State. He rightly refers to the fact that under Laband's influence German juristic opinion had rejected the doctrine still adhered to by such eminent authorities as Seydel and Zorn, that a body politic in order to be a

[11] *Ibid.*, section: Sovereignty and Staatsgewalt.

[12] See chapter V, section: National or State Sovereignty? (Text corresponding to note 28).

State must possess *Unabhängigkeit.* According to Anschütz, the doctrine that the State must possess independence, first proclaimed by Bodin, is both impolitic and unhistoric, at least from the point of view of the constitutional development of the German States which, he points out, as members of the Holy Roman Empire, have long been the sole carriers of the new idea of the modern State. After sixty years of formal and actual independence to which they had no historical claim, they once more became member States of the North German Confederation formed in 1866. But he insists that they remained States and that they retained their Staatsgewalt in their own right. Positing, as he does, the indivisibility of the Staatsgewalt, he holds that in the Confederation of 1866 and the Empire of 1871, as in every Bundesstaat, indivisibility of the Staatsgewalt is not in question. In the Empire there existed, according to Anschütz, only the Staatsgewalt of the States. The Empire possessed no Staatsgewalt above and aside from that of the States. It did not even share the Staatsgewalt of the States, but merely participated in the exercise of functions arising under the Staatsgewalt of the several States.[18]

In his commentary on the National Republican Constitution Anschütz accepts what he seems to consider as a dual, not divided Sovereignty. Article 1, Section 2, and Article 5 of the Constitution of 1919 state respectively that "the Staatsgewalt emanates from the people," and that "the Staatsgewalt is exercised in National affairs by the organs of the Reich in accordance with the National Constitution, in the affairs of the Länder by the organs of the Länder in accordance with the constitutions of the Länder." These provisions Anschütz interprets to the

[18] See the author's "Concepts of State, Sovereignty, and International Law . . .," chapter XI, notes 20-22.

effect that the Staatsgewalt exercised by the National Government emanates from the German people, that exercised by the Länder from the people of the Länder.[14] Hence he concludes that according to the National Republican Constitution the Länder are commonwealths subordinate to the Reich but possessed of a Staatsgewalt in their own right, i. e. a Staatsgewalt which they have not received as a lien from the Reich, nor from anybody else. The Länder are therefore States under the Republic as well as under the Empire. "What elevates the State above the non-State and especially above the community," Anschütz writes, "is not Souveränetät (independence from the outside and from above), but the originality and the non-delegated character (*Eigenständigkeit*) of the *Herrschergewalt*. According to the new as well as the old law, the German individual States, now called Länder, have not lost their statehood by their adherence to the Reich. . . ." [15]

It is easy enough to conceive that under such a construction of the State character of the member States of the Reich and of the possession in their own right of Sovereignty in the constitutional legal sense, an extreme interpretation of that construction might lead to the notion of the legal right of nullification of any National law or act which is held to violate or infringe upon the *Hoheitsrechte* of the States flowing from the possession of the Staatsgewalt in their own right. As has been shown in the description of this phase of the States rights theory in the United States, under this construction the resort to secession cannot be had on the claim of a legal right, but rather as a last means of gaining political redress. In the case of the German States there exists an additional reason in favor

[14] For a refutation of this interpretation see chapter V, section: National or State Sovereignty? (Text corresponding to note 30).

[15] See note 13.

of the non-legal character of secession in the fact that the German States righters, as demonstrated above, admit the supremacy, i. e. Sovereignty of the National Union from the international legal point of view and thus concede the non-possession of independence on the part of the member States of the Union.

While in the United States the South has resorted to secession in the attempt to force the North into recognition of the States rights doctrine in its relation to the slave question, no attempt at secession has so far been made by any German State. In fact the intention to resort to secession has been and is emphatically disclaimed even by those States which have asserted the right of nullifying National law. In consequence of the assassination of Herr Erzberger,[16] former Minister of Finance, the attack upon Philipp Scheidemann,[17] former Minister of Foreign Affairs, and the murder of Dr. Rathenau,[18] at the time Foreign Minister in the Wirth Cabinet, the National Republican Government decided to take drastic action in order to put an end to these outrages committed apparently by members of secret organizations with strong nationalist and anti-republican tendencies. The Government placed before the Reichstag and the Reichsrat a bill dissolving all such secret organizations, prohibiting public slander and abuse of Republican Government officials and colors, public meetings of all kinds tending to lead to violence or abuse of the Republican Government, etc., and publications including material of the same tendency. The bill provided for the deportation of members of former reigning families, when found guilty of such acts. It finally was to establish a new National Court for the Protection of the Republic (*Staats-*

[16] August, 1921.
[17] June, 1922.
[18] July, 1922.

gerichtshof zum Schutze der Republik) before which all violators under the provisions of the bill were to be tried. The law was enacted over the protest of Bavaria, receiving a two-thirds majority in both houses, i. e. a majority required for a constitutional amendment.

The enactment of the law was preceded by two ordinances of the National President, issued under authority of Article 48, Section 2,[10] immediately after the murder of Dr. Rathenau, and containing in substance the provisions of the proposed law. Section 3 of Article 48, however, provides that "the National President must immediately inform the Reichstag of all measures adopted . . ." and that "these measures shall be revoked on the demand of the Reichstag." The Reichstag did not disallow the ordinances but enacted them with considerable modification as National law.

Together with the National Law for the Protection of the Republic, and as part of it, a National Civil Service Law and a National Criminal Police Law were enacted. The former demands of every functionary in the National Civil Service an oath to support the Constitution. It provides for temporary retirement as a punishment for official acts of omission and commission affecting the welfare of the constitutional Republican Government and for repeated infractions dismissal from the service. The National Criminal Police Law establishes a National Police Bureau for criminal cases with the special object of creating a uniform and effective National control for the apprehension of offenders against the safety of the State and

[10] "If public order and security are seriously disturbed or endangered in the Reich, the National President may take all necessary steps for their restoration, intervening if necessary with the aid of the armed forces. For this purpose he may suspend for the time being, wholly or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153."

Republican Constitution. This law limits the police power of the States in so far as it provides in a degree for the transmission of orders by the National authorities to the State Police Bureaus and Stations and gives to the Reich certain rights of execution in the territory of the Länder.[20]

The National Law for the Protection of the Republic was enacted by a majority required for a constitutional amendment, though there would seem to be no doubt that the authority for its enactment might well be found in Article 9 of the Constitution which stipulates that: "Whenever it is necessary to establish uniform rules, the Reich has the right of legislation over (1) the promotion of social welfare; (2) the protection of public order and safety."

Bavaria's protest against the presidential ordinances, as voiced in the Bavarian *Landtag* by the Prime Minister Count Lerchenfeld on June 28, may be summarized under six points: 1. The extension of the protection over former members of the Republican Government seems superfluous; 2. the measures proposed invite espionage; 3. the minimum penalty of three months is too high; 4. the provision for the Staatsgerichtshof for the Protection of the Republic constitutes an attack upon State jurisdiction and State police power (*Justiz- und Polizeihoheit der Länder*); 5. the extension of the pardoning power of the President conflicts with the *Justizhoheit* of the Länder; 6. the retroactive power of the ordinances conflicts with the principles of legal procedure. While the grounds of protest of the first three points are clearly of a political nature, there is implied in the last three the charge that the ordinances transgress the spheres of National competency as defined

[20] For the English text of the Provisions of the Law for the Protection of the Republic, including those of the National Civil Service Law and National Criminal Police Law see Appendices to the author's "Bavaria and the Reich. . . ."

in the National Constitution. However, Bavaria's protest did not prevent the enactment of the National law embodying the features objected to by the Bavarian Government and a large part of the Bavarian *Landtag* and press.

In the time between the enactment of the National law and its formal promulgation the Bavarian Cabinet issued a special ordinance (*Specialverordnung*) with the force of law, which constituted a nullification of part of the National law for Bavarian territory. In the preamble to this special ordinance the Bavarian Government attempted to justify its action on the following grounds: 1. The National law was passed against the well founded protest of Bavaria. 2. The provisions of the National law have caused such excitement in Bavaria that the peace and public safety are endangered. Hence the Bavarian Government is compelled to institute immediate measures to relieve the situation by issuing its own ordinance.

The first point was effectively answered by the National Government in a public statement of July 26, in which the Bavarian ordinance was declared to constitute an infringement of the National Constitution and in which attention was called to the undeniable fact that the National law was enacted in both houses by the majority required for a constitutional amendment. "The National Law for the Protection of the Republic," so the statement read, "was passed in the Reichsrat . . . by a more than two-thirds majority. In the Reichsrat all State Governments have voted for the law with the exception of Bavaria. In the Reichstag the law was accepted also by a two-thirds majority. . . . In both houses the Bavarian Government has had occasion to voice its apprehension in a constitutional manner, and a series of its wishes have been heeded in the final passage of the law. . . ." [21] As to the second point it

[21] For complete text of the statement of the National Government see *ibid.*, pp. 60-61.

is difficult to perceive how the Bavarian ordinance could be called provisional since it was issued not prior to but in consequence of and as a protest against the presidential ordinances and the National law, both of which were expressly aimed at the elimination of the very danger which the Bavarian Government proposed to combat by its own ordinance. Nevertheless, the Bavarian ordinance was defended as an emergency measure in an advisory opinion of the Bavarian Supreme Court on the ground that the good faith of the Bavarian Cabinet with regard to the provisional character of the ordinance under the terms of Section 4 of Article 48 of the National Constitution and Article 64 of the Constitution of the Bavarian State could not be questioned. The National right of demanding the appeal of the State ordinance was admitted, but the ordinance was declared to be binding for Bavarian State Courts as long as Bavaria had not withdrawn the same.[22]

A Compromise between National Supremacy and States Rights. From the point of view of the National Government it was clear that under the authority of Article 48, Section 4, President Ebert or the Reichstag had the legal right to request the revocation of the Bavarian ordinance and under Section 1, in case of a refusal, to hold Bavaria to the performance of the National law by using the armed forces of the Reich.

In view of the critical situation of the Reich, especially from the aspect of its international relations, the National President decided to attempt a solution by diplomacy rather than by the strict rule of law. In a personal letter to Graf von Lerchenfeld, Prime Minister of Bavaria, setting forth the illegality of the Bavarian ordinance, the

[22] For the full text for the opinion of the Court see Poetzsch, Vom Staatsleben . . ., pp. 80-81.

critical situation of the Reich, and the consequent need for cooperation and union, he appealed to the Bavarian Government to withdraw its ordinance so that he, the President of the Reich, would be spared the disagreeable necessity of requesting its revocation. The Bavarian Prime Minister replied in a personal letter, reiterating Bavaria's protest and defending the legality of the ordinance. He promised, however, to cooperate in a settlement of the conflict if certain concessions in the interpretation of the various objectionable features of the National law would be made by the National Government. These modifications were made by negotiations of the parties concerned, affecting particularly the construction and the activities of the new National Court for the Protection of the Republic and the National Criminal Police Law. But in addition to these specific concessions the National Government was forced to declare as a general policy that: ". . . The federal (*bundesstaatliche*) character of the Reich, the State character and the *Hoheit* of the Länder are recognized. The Reich will not absorb the *Hoheitsrechte* of the Länder by way of amendment of its constitutional competencies. In addition, assurance is given that the National Government will not, without necessity and without the consent of the Reichsrat, make use of those competencies which have not yet been applied, and that the National Government will not transfer former State functions to the administration of the Reich by newly created National organs or subordinate services." [23]

In return for these concessions and promises the Bavarian Government consented to revoke its ordinance and actually did revoke it. But the Bavarian Cabinet did not long survive this revocation which the Bavarian States

[23] For a detailed study of this conflict see the author's "Bavaria and the Reich. . . ."

righters considered as yielding too much to the National forces favoring the transformation of the Bundesstaat into a unitary State.

It is strikingly characteristic of all phases of this conflict that wherever the interests of Bavaria or those of the States are concerned, the spokesmen of Bavaria always speak of the *Hoheitsrechte* [24] and the *staatliche Charakter* of the Länder, while in their references to the interests of the Reich they almost uniformly speak in terms of the competencies granted to the Reich by the National Constitution and of the legal limitations which the latter has placed upon the Reich in dealing with the States. Still more significant is the fact that the National President, clearly for reasons of expediency, indulged in the same peculiarity in his personal letter to the Bavarian Premier. In this letter he speaks of himself as the guardian of the National Constitution and of the *Reichsgedanken,* the idea or concept of the Reich. He opposes as erroneous the fear that, through the National law in question, the systematic elimination of the *Hoheitsrechte* of the States was begun. He gives assurance that the provisions of this law cannot change the State character of the Länder. This character is founded on the National Constitution. It represents the very strength of the Reich and to preserve this character shall be his, the President's, special task during his term of office.

What has been said of President Ebert's letter holds true also of the phraseology of the official statements issued by the National Government embodying the terms of the

[24] Within the intent of the spokesmen of Bavaria and the Reich the term "Hoheit" and "Hoheitsrechte" as used in the course of this controversy must be taken for the equivalent of "Staatsgewalt" in the constitutional sense, and must therefore be rendered in English as "Sovereignty" or "sovereign rights."

agreement between München and Berlin. In the semi-official commentary on the terms of the agreement, the Bavarian Government definitely asserts "the Staatlichkeit and the Hoheitsrechte" of Bavaria, "for the protection of which she now has received very valuable securities." The commentary calls attention to the considerable success achieved by Bavaria in the matter of the federal idea for the benefit of all the Länder. The restriction promised by the National Government in the application of its constitutional competencies is interpreted to act as a strong deterrent against further unification and centralization. In view of this success the Bavarian Government generously counsels "joyful cooperation with the Reich."

In this connection it is interesting to note that the National Constitution of 1919 nowhere refers to the component parts of the Reich as "Staaten." Nowhere does it speak of their "staatliche Charakter." It describes them by the nondescript term Länder.[25] The reason for this is not far to seek if we remember that the issue underlying this conflict between Bavaria and the Reich is older than the Law for the Protection of the Republic and even older than the Republican Constitution. The term "Länder" was deliberately chosen by the framers of the Constitution of Weimar for the simple reason that, owing to its nondescript or ambiguous character, it was the only term upon which the proponents of the unitary State and the advocates of States rights could agree.[26] The term "Hoheitsrechte" is found in the Weimar Constitution only once. But this instance provides for the surrender to the National Republic of certain "Hoheitsrechte" held by Bavaria and Württemberg as reserved

[25] See chapter V, section: Stämme, Staaten, Länder.

[26] *Ibid.*

rights (*Sonderrechte*) held by Bavaria and Württemberg under the Constitution of 1871. Wherever the National Constitution of 1919 refers to what Bavaria would call "Hoheitsrechte," it actually speaks of rights of the Länder as, for instance, their right of legislation,[27] or in the form of concessions or *quasi* demands, such as "the law of the Reich will be executed by the State authorities, unless otherwise provided by National law," [28] or, "ordinary jurisdiction will be exercised by the . . . Courts of the Länder." [29]

It thus appears that the whole conflict resolves itself into two phases, the one a conflict of legal principles, the other one of political expediency. The first phase was terminated in favor of the Reich. Bavaria, by the revocation of her ordinance and by the formal acceptance of the National Law for the Protection of the Republic, practically admitted her constitutional legal limitations in the question involved and thus the corresponding supremacy of the Reich. This being so it might seem irrelevant to ask who won the battle from the point of view of political prestige, were it not for the fact that Bavaria's pretensions to statehood and sovereign rights are based upon a purely political interpretation of the constitutional legal premises involved.[30]

National Enforcement Against the States. One of the forms which National supervision and control over the States may take is that of actual execution of the National will by the armed forces of the Reich. This takes place in

[27] Art. 12.

[28] Art. 14.

[29] Art. 103.

[30] In this connection see chapter XIII of the author's "Concepts of State, Sovereignty, and International Law, especially the sections: Confusion of Legal and Political Thinking *and* Political Pretensions versus Legal Facts.

the most extreme cases of the refusal on the part of a State to carry out the obligations imposed upon it by the National Government. This form of supervision is based on Section 1 of Article 48 of the National Constitution, which authorizes the National President to employ the armed forces of the Reich to enforce compliance with the National will by the Länder.[31] The conflict calling forth such enforcement is not one constituting a difference of opinion between Reich and Länder, but one of a categorical refusal by a State to obey the will of the Reich. The refusal in question may be one of rejection of the National President's demand for the repeal of an ordinance of nullification of National law, or the failure to abide by a decision of the Reichsgericht or the Staatsgerichtshof rendered in the settlement of a difference of opinion within a State, between the States, between Reich and States, or opposition to a request of the National Cabinet to correct the State's method of execution of National law, or any combination of these possibilities.

The failure of the Berlin Government to exclude political considerations from the settlement of its conflict with Bavaria concerning a fundamentally constitutional legal issue was to a large extent responsible for the attitude of Bavaria and Saxony in their even more serious controversies with the Reich arising over the ordinances of the National President of September 26, 1923, proclaiming the partial suspension of fundamental rights (*Ausnahmezustand*) for the Reich. When in September, 1923, the new Stresemann Cabinet realized the necessity of discontinuing the policy of passive resistance against the French occupation of the Ruhr, the National Government was con-

[31] "If any State does not perform the duties imposed upon it by the Constitution or by National laws, the National President may hold it to the performance thereof by force of arms." Art. 48, Sect. 1.

fronted by the problem of bringing public opinion in line as quickly as possible. The two elements most violently opposed to the new policy of surrender were the Nationalists and Communists. Both had hoped to gain for their principles and parties from the chaos threatening from the continuance of passive resistance and from the discredit which such chaos would of course place upon the Government of the moderate or middle parties.

On September 26 the National Government issued a proclamation announcing the cessation of passive resistance. On the same day the Bavarian Government published an ordinance temporarily suspending the fundamental rights of its citizens and appointing Herr von Kahr as General State Commissary for Bavaria. This ordinance was claimed to be issued on the authority of Section 4 of Article 48 of the National Constitution, which provided that "if there is danger from delay, the State Cabinet may for its own territory take provisional measures as specified in Section 2.[32] According to the terms of the Bavarian ordinance the executive power was delegated to the State Commissary. With the exception of the courts and the military authorities, all National and State functionaries (*Behörden*) in Bavaria were to be subject to the orders of the Commissary who was authorized to employ the armed forces if necessary.

A few hours later, but still on the same day, the National President, on the basis of the same Section 2 of Article 48, issued an ordinance proclaiming the *Ausnahmezustand* over the entire Reich. This ordinance temporarily sus-

[32] The facts concerning this conflict between Bavaria and the Reich are taken from: Rothenbücher, Der Streit zwischen Bayern und dem Reich um Art. 48 RV. und die Inpflichtnahme der 7. Division im Herbste 1923 (Archiv des öffentlichen Rechts, N.F. 7. bd., 1924, pp. 71-86); Poetzsch, Vom Staatsleben . . .; and from the Osnabrücker Zeitung of the time involved.

pended the fundamental right of the citizens of the Reich. It transferred the executive functions of the Reich to the Minister for National Defense (*Reichswehrminister*) and through him to the National commanders of the various divisions of the *Reichswehr*. In agreement with the Minister of the Interior the Minister of National Defense was to appoint civil commissaries (*Regierungskommissare*) who were to assist the military commanders in the civil administration. As it developed later, the National ordinance was issued mainly in consequence of the action of the Bavarian Government and especially on account of the choice of von Kahr as General State Commissary for Bavaria. For as Herr Stresemann admitted on October 24, at the meeting of the Minister-presidents and delegates of the States, the appointment of a man of von Kahr's political views was likely to encourage the extremists of the right all over the Reich and might lead to acts of violence on their part. It was this danger which the National ordinance was intended to meet.[33]

From the National and legal point of view the situation may be summarized as follows: The Bavarian ordinance, issued under authority of Article 48, Section 4, of the National Constitution, could only be temporary. It was superseded by the National ordinance in so far as the provisions of the two ordinances were identical. The provisions of the Bavarian ordinance exceeding those of the National ordinance might be either valid or invalid. As far as they did not conflict with the ordinance of the National President they could be considered as valid. As far as they did conflict they were, of course, invalid under the provision of Article 13, Section 2, of the National Constitution. According to Section 2 of the National ordi-

[33] Rothenbücher, pp. 72-73.

nance no National civil commissary was to be appointed for Bavaria. Hence the authority of von Kahr as General State Commissary for Bavaria could be deduced only from Bavarian and not from National law. General von Lossow, National Commander of the Bavarian Division of the *Reichswehr,* held the executive power in Bavaria under the terms of the National ordinance. Von Kahr, being Civil Commissary under Bavarian State law, could not claim a legally superior authority over von Lossow as temporary executive under the authority of the National ordinance.[34] But this analysis of the legal situation was not acceptable to Bavaria. According to the reasoning of the Bavarian Government, the National Government had recognized the position of von Kahr as Bavarian State Commissary by its failure to provide for the appointment of a National Civil Commissary for Bavaria.

Under the pressure of Communist excesses in Saxony and Thuringia and under apprehension of the threatening Nationalist attitude elsewhere, the National Government once more failed to insist upon a strictly legal settlement of the difficulty with Bavaria. Instead of bringing the issue before the Staatsgerichtshof it took the position that as far as the provisions of the two ordinances agreed, the *Ausnahmezustand* in Bavaria created by the Bavarian ordinance might be considered as existing alongside that established by the National ordinance for the rest of the Reich.[35] However, an attempt to proceed impartially against both Communists and Nationalists brought the ambiguous position of the National Government into an acute conflict which could not be ignored. An order was issued by the Minister of National Defense for the suppression of a Bavarian Nationalist paper (*Der Völkische*

[34] *Ibid.*, p. 73.
[35] *Ibid.*, pp. 73-74.

Beobachter). General von Lossow, however, refused to carry out this order on the ground that by oral instruction from the Minister of National Defense he was bound to maintain friendly relations with von Kahr, which under this demand for the forceful execution of the order would be impossible. This refusal on the part of von Lossow finally resulted in his suspension and retirement by order of the National Minister of Defense of October 20. On the same day the Bavarian Government issued a proclamation in which it branded von Lossow's suspension by the National Government as an invasion of the police power of Bavaria and announced the appointment of von Lossow as the Bavarian State Commandant of the Bavarian Division of the *Reichswehr*.

The National Government openly declared this act on the part of Bavaria to be a violation of the National Constitution and advised the Bavarian Division to remain faithful to the National oath. This National proclamation was suppressed in Bavaria and the Bavarian Division was, without oath, "obligated to the State of Bavaria as the custodian for the German people" until "harmony between Bavaria and the Reich should be reestablished." [36] General von Lossow accepted the Bavarian appointment and in a public announcement of October 22 defended the action of the Bavarian Government. Professing his and the Bavarian Division's loyalty to the Reich he protested against the attempts of the Berlin Government, subject to Marxist influences, to force upon the Bavarian General State Commissary orders which would result in paralyzing Bavaria as the protectress of German and Nationalist sentiment.

At the request of the Government of Württemberg a

[36] *Ibid.*, pp. 76-77.

meeting of the Minister-presidents and delegates of the States was effected on October 24. As a result of the considerations of this meeting the representatives of all the States, Bavaria excepted, declared that: "In the conflict between Bavaria and the Reich all the representatives of the Länder unanimously take the position of the Reich. They consider the immediate settlement of the question of the personnel essential. In order to avoid similar conflicts in the future the Länder unanimously request (*verlangen*) the early commutation of the military *Ausnahmezustand* into one of a civil character. In agreement with the National Chancellor the representatives of the Länder consider it desirable that negotiations be opened at the proper time for the eventual determination of the relations between Reich and Länder in the direction (*im Sinne*) of a larger degree of autonomy (*Selbständigkeit*)." [37] On the basis of this statement the National Government, on October 29, requested the Government of Bavaria to restore the National command of the Bavarian Division of the *Reichswehr*. This request remained without result.

In the meantime the Reich had become involved also with the Governments of Saxony and Thuringia. The Governments of these States were as strongly Communist as that of Bavaria was Nationalist. The Communist elements in the industries, consisting largely of half grown youths and young men, well organized in hundreds (*Hundertschaften*) and armed, had been terrorizing the older and more balanced ranks of labor and the rest of the population in general. Repeated appeals from the National Government had failed to induce the Governments of the States concerned to restrain the disturbers. In fact, Prime Minister Zeigner of Saxony was generally considered as

[37] Poetzsch, Vom Staatsleben . . ., p. 94.

favorably inclined towards the Communists' aim of a Soviet form of government. General Müller, Commander of the Saxon Division of the *Reichswehr,* ordered the dissolution of the Communist *Hundertschaften.* His action was opposed by the Saxon Government with the active support of the *Landtag.* The subsequent demand of the National Government for the resignation of the Saxon Cabinet was categorically rejected on the ground that it was not the National Government but the Saxon *Landtag* which was competent to decide on the constitutionality of the action of the Saxon Government. This reply was given on October 28.[38] In consequence of the Saxon Government's refusal to comply with the National Cabinet's request for abdication, President Ebert issued an ordinance under authority of Article 48 of the National Constitution, authorizing the National Chancellor to depose members of the Saxon Government and to replace them by others, with the exception of the judges of the regular courts.[39]

On October 20 the Bavarian State Commissary had informed Berlin that the Bavarian Government refused to deal with Minister of National Defense von Gessler, who by the ordinance of President Ebert had been appointed military dictator for the entire Reich. The situation of the National Government was made still more difficult by

[38] The Saxon Prime Minister Dr. Zeigner answered the National Government's request as follows: "Mr. Chancellor: I acknowledge the receipt of your letter of October 27, 1923. The request which it contains is emphatically declined by the Saxon Government. There is no political justification for your demand and from the legal point of view it is incompatible with the National Constitution. Only the Saxon *Landtag* is authorized to recall the Saxon Government. As long as this is not done, the Saxon Government will remain in office. But it will immediately seek a vote of confidence in the *Landtag*" (Poetzsch, Vom Staatsleben . . ., pp. 98-99).

[39] *Ibid.*, p. 99.

the fact that, while Bavaria had made the granting of any concessions to the National Government contingent upon drastic action against the Government of Saxony, the Socialists of the Reich had made their support of and continued participation in the National Government conditional upon the taking of the same rigorous measures against Bavaria.[40] The hand of the National Government was finally forced by serious disturbances in the large cities of Saxony. Additional *Reichswehr* troops were sent to occupy Dresden, the State Capital, and the large industrial cities of the State. A detachment of National troops appearing before the Government building in Dresden, Dr. Zeigner and his Cabinet were informed by them that they had been deposed by National authority and that the Government of Saxony would be temporarily placed in the hands of a National civil governor. A few days later the *Landtag* elected a new Government satisfactory to the Reich.[41] Thus by the end of October Saxony had surrendered to the Reich.

Communism having now successfully been dealt with, the Socialist party threatened to withdraw from the National coalition government unless Berlin would take energetic steps to bring Bavaria to terms.[42] Bavaria on the other hand had apparently made common cause with the extreme Nationalists under Hitler's leadership and demanded as a condition of negotiations with the Reich the elimination of the Socialists from the National Government and a "pure Teutonic and Nationalist dictatorship for the Reich." In addition it broadened the issue by requesting the settlement of the general relations between the Reich and the States. But owing to the fact that the Socialist

[40] New Yorker Staatszeitung, Oct. 20, 1923.

[41] *Ibid.*, Nov. 1, 1923.

[42] Osnabrücker Zeitung, Nov. 1, 1923.

ultimatum was made public in the press, and that coupled with its demand for drastic action against Bavaria was the request for the immediate revocation of the *Ausnahmezustand* for the entire Reich, the National Cabinet realized that yielding to the Socialists in general and in their request for the abandonment of the *Ausnahmezustand* for the Reich in particular would be incompatible with drastic action against Bavaria and would only tend to stiffen the latter's insurrectionist attitude. The ultimatum was declined and the Socialists withdrew from the Government.[43]

One of the Bavarian conditions for a peaceful settlement seemed thus to be fulfilled. But here again, as in the case of Saxony, the National Government's hands were finally forced by open rebellion. The fifth anniversary of the Republic was made the occasion for the Hitler-Ludendorff "Putsch" of November 8. Professedly forced by circumstances beyond his control, von Kahr issued a declaration in which he assumed in conjunction with von Lossow and Seisser "the conduct of State affairs as regent for the Monarchy which five years ago . . . was so ignominiously destroyed." But the very boldness and haste of the revolt proved its undoing. As soon as von Kahr, von Lossow, and Seisser secured their personal freedom they repudiated their action and denied all complicity in the revolt. They asserted their absolute loyalty to the National Republican Government. Von Kahr was in favor of a Nationalist Germany, but he believed that a Nationalist Government could be established without actual revolution against the National Union. He was in favor of monarchy for both Bavaria and for the Reich, but he held that the time for the return to Monarchy had not yet come. As the Bavarian *Reichswehr* and the State Police had remained loyal to von

[43] *Ibid.*, Nov. 6, 1923.

Lossow, the rebellion was quelled before the march against Berlin had progressed beyond Munich. Ludendorff was arrested and Hitler fled the country. In the meantime the Berlin Government had issued a manifesto condemning the revolt and announcing rigorous measures to restore the constitutional status. "The German Government," part of the text read, "possesses the means and power to meet successfully every Putsch and to protect the Constitution of the Reich. The *Reichswehr* and the National Police (*Schutzpolizei*), faithful to their oath, will do their duty."[44] It was the firmness of this proclamation which is held to have influenced von Kahr greatly in his apparently negative attitude towards the insurgents.

Increased States Rights by Change of the National Constitution. The National Government had warned the Bavarian revolutionists that it would restore the constitutional status in their State by the most rigorous measures if such would prove necessary. Having successfully broken the resistance of the Saxon Government, it was at last physically in the position to make good its threat against Bavaria. The hands of the National Executive were further strengthened by the State Government of Württemberg which had issued a statement condemning the Bavarian revolt.[45] But even more important was the fact that in this instance there was little cause for fear of foreign intervention for the reason that the French Ambassador in Berlin expressed his Government's appre-

[44] Schwäbischer Merkur. Wochenausgabe für das Ausland, Nov. 3-9, 1923.

[45] The proclamation of the State Government of Württemberg strongly condemned the Nationalist attempt to overthrow the National Government and forbade "every kind of activity which might appear as support of the Bavarian insurgents" (Schwäbischer Merkur . . ., Nov. 3-9, 1923).

hension concerning the possibility of the restoration of the Monarchy as a possible consequence of a successful outcome of the Bavarian Putsch.[46] But no forceful measures were found to be required. Through its ignominious failure the Hitler-Ludendorff revolt, aimed at the overthrow of the Republican National Constitution of 1919 and of the National Republic founded upon that Constitution, succeeded in doing what the National Government had so far failed to accomplish. It considerably weakened the whole of the States rights movement as a political factor in the relations of Reich and States and to the same degree strengthened the chances for a strictly legal adjustment of the differences between Länder and Reich by way of eventual changes of the National Constitution, if such changes should prove necessary and feasible. An opinion to this effect was expressed by the National Chancellor in a review of the external and internal situation of the Reich on November 23, 1923. Referring to the relations of the Reich with the States he said:

. . . The negotiations between Bavaria require as a first basis the return to constitutional conditions and the subordination of the Bavarian Division of the *Reichswehr* under the [National] Army command. This thought has also penetrated wide circles in Bavaria. Other tendencies go in different directions. These concern the question of federation. They have been formulated in the Reichstag in proposals of the Bavarian People's party. I do not wish to consider all the details of these proposals, but I may announce that discussions have taken place within the National Government concerning the question of the extent to which changes of the present Constitution in its effect upon the Länder may be possible. This is

[46] Associated Press dispatch. New Yorker Staatszeitung, Nov. 10, 1923.

not only a Bavarian question. These demands have been made also by other States. It is not a question of loyalty to the Constitution, for every State has the right to propose a change of the Constitution. The second question is one of greater decentralization of the *Verkehrswesen* [railroads], the third one of the *Steuer- und Finanzhoheit*. . . .[47]

The negotiations for the return to the constitutional status here referred to by the National Chancellor finally resulted in an agreement between Bavaria and the Reich, published on February 18, 1924, the salient points of which are as follows:

1. In the future Bavaria's wishes shall be considered before the recall of the Commander of the Bavarian Division of the Reichswehr. 2. Prior to the employment of Bavarian troops outside of Bavaria the Bavarian Government shall be consulted if possible and its wishes duly considered, especially in regard to the internal security of the State. 3. The form of the oath for the Reichswehr shall be changed to read, "I swear allegiance to the Constitution of the German Reich and to that of my native State . . . and obedience to the National President and to my superiors."

In consequence of these concessions on the part of the National Government, General von Lossow tendered his resignation and the Bavarian Division of the *Reichswehr* once more came under National command. On the same day a National ministerial ordinance appeared in which "the territory of the Free State of Bavaria was excepted from the application of Sections 2 and 4 of the ordinance of the National President, by which the *Ausnahmezustand* for the Reich had been established, in view of the fact that

[47] Osnabrücker Zeitung, Nov. 23, 1923.

in this territory the "*Ausnahmezustand* is already in existence and is to continue."

The significance of this agreement is this. In the matter of the command of the Bavarian Division the National Government nominally and actually secured the recognition of the National rights. As far as the National and Bavarian State ordinances are concerned the National Government technically and actually renounced the enforcement of the National ordinance in Bavarian territory. A formal recognition of the supremacy of the National ordinance may, however, be construed from the fact that the existence of the Bavarian *Ausnahmezustand* was sanctioned by the National ministerial ordinance of February 18, exempting Bavaria from the application of the National ordinance on the ground that in Bavaria the *Ausnahmezustand* was already in existence.

As to the other topics referred to by the National Chancellor as being subject to future regulation in the direction of decentralization by way of amendment of the National Constitution, several attempts have been made by the interested parties but no essential changes of the kind desired have up to this time been effected. On September 20, 1920, the Bavarian People's party, convened in State Convention of Bamberg, passed the following resolution known as the Bamberger Program:

The Bavarian People's party holds faithfully to the Reich. It sees in the federal development of its Constitution the sole guarantee of its reconstruction and happiness. For this reason it demands:

1. The federal (*bundesstaatliche*) form of the Reich and the reestablishment of an organ of the States equivalent to the former Bundesrat.

2. The right of the States to decide their own form of State

and Constitution and the early possibility of the creation of member States in a constitutional legal manner.

3. No further curtailment of the competencies of the Länder by new [National] laws and ordinances.

4. The greatest possible assimilation of National organs active in the States to the administrative system of the States.

5. Execution of the National Laws by State organs.

6. The right of the individual States of concluding treaties with foreign States in matters of their own competence as established by the National Constitution and the right to appoint representatives to foreign States.

7. The establishment of the States' right of taxation (*Steuerhoheit der Staaten*) in the form of levying their own taxes and of increasing National taxes [to meet the States' needs]. The levying and administration of all taxes and dues by the States. . . .

8. Decisive participation of the member States in the affairs of the postal and railway service and of the waterways of the States serving the general commerce and traffic.

9. Development and management (*Betrieb*) of water power by the States.

10. Division of the *Reichswehr* into State contingents. The independent right of the States to establish the *Ausnahmezustand* for their territories for the maintenance of public security and order and the right to employ their own army contingents for that purpose.

11. Regulation of the school system by the States as the main field of its cultural policy, leaving to the Reich a definite guarantee for the education of the children in accordance with the will of those endowed with the right of educating the young. . . . The right of the States to regulate its scientific libraries.

12. Guarantee for the security of Bavarian State property against further infringement by the Reich.[48]

[48] Poetzsch, Vom Staatsleben . . ., pp. 99-100.

In October of the same year the President of the *Landtag* of Baden issued a pamphlet entitled "Reich und Länder," proposing a readjustment of the relations of the Reich and the States in the direction of the old Constitution. On the 24th of the same month the representatives of the Länder, convened in connection with the conflict of the Reich and Bavaria over the dismissal of General von Lossow, expressed the desire for negotiations for the same purpose. On November 6 the German Nationals (*Deutschnationalen*) submitted to the Reichstag a motion calling for "the appointment of a committee of 28 charged with the examination of the Weimar Constitution with a view to a better consideration of sound federal principles." On November 20 the Bavarian People's party moved for an appeal to the National Government in favor of a speedy submission of a bill for the amendment of the National Constitution on the basis of the Bamberg Program. On January 8, 1924, the Bavarian Government submitted to the National Government a memorial "For the Revision of the Weimar Constitution." Finally on May 28 of the same year the German People's party renewed the motion of the Nationals for "the creation of a committee of 28 to be charged with the examination of the Constitution of August 11, 1919, in the light of the experiences acquired since that date, especially with regard to the sphere of mutual competences between Reich and Länder in the field of legislation and administration." [49]

As stated above, no essential changes have up to this time been effected in the apportionment of the competences between Reich and Länder, all these efforts notwithstanding; and it may be added, no essential changes in that direction are likely to be made for many years to come.

[49] *Ibid.*, pp. 100-101.

It is true, in the Empire the railroads had been under State control. The Reich of 1871 had claimed the supervision of and legislation "over such taxes as are to be applied to the use of the Empire." Under the terms of the Republican Constitution the *Hoheitsrechte* of the States over their railroads were transferred to the Reich. According to Article 8 of the National Constitution of 1919 the National Republic has not only "the right of legislation over taxation and other income, in so far as they may be claimed in whole or in part for its purposes," but it may also claim "any source of revenue which formerly belonged to the States," though when doing so "it must have consideration for the financial requirements of the States." Thus, in accordance with Article 8, the Republican Reich has established by National legislation National control in the matter of inheritance taxation; an extraordinary war contribution for the year 1919; a war contribution based on the increase of the wealth of the individual; a tax on the acquisition of land; the match tax; the tax on playing cards; the tobacco tax; the *Reichsnotopfer;* and various others.[50] The *Reichsabgabenordnung* of December 13, 1919, provides for a National administrative system with subordinate State finance bureaus. The National Finance Court (Reichsfinanzhof) is the highest financial authority for the Reich and the States. The State tax law passed by the Reichstag on March 30, 1920, still leaves to the Länder and communes the right to collect taxes according to State law, but only in so far as this right does not conflict with the provisions of he National Constitution and with National legislation.[51] Article 2 of the law specifically states that "the collection of taxes for the Reich precludes the collection of kindred taxes by the Länder

[50] For details see Giese, pp. 88-89.

[51] *Landessteuergesetz vom 30 März, 1920,* Art. 1.

and communes unless it is otherwise provided by National legislation." It specifically prohibits the increase of the National taxes by the Länder or communes without the authorization by National law. Article 3 stipulates that "State and communal taxes which tend to impair (*schädigen*) the tax income of the Reich are not to be levied if the preponderant interests of the Reich so demand." Most significant of all, Article 5 demands that new State regulations for the collection of taxes by the communes must, prior to their promulgation, be submitted to the National Minister of Finance and, according to Article 6, in case of a disagreement between National and State authorities, to the Reichsfinanzhof whose decision is binding upon the States.[52]

The revision of this law of July 23, 1924, known as the *Finanzausgleichgesetz* has allowed a few technical ameliorations in favor of the States but it strictly adheres to the principles of the *Landessteuergesetz* of 1920 as stated above.

Aside from the resentment over the loss of the control of the railroads by Bavaria and Württemberg, it is the almost total disappearance of local autonomy in the sphere of public finance which is chiefly responsible for the general demand for revision of the National Constitution in favor of greater decentralization, or as it is usually expressed, in favor of a return to the Constitution of Bismarck. However, with the acceptance of the Dawes Plan and the subsequent transformation of the National railway system into an international corporation, and furthermore with the acceptance of the provisions for the heavy cash payments by the Reich as stipulated by the Dawes Plan, there seems little hope for any decided change in the direction of the

[52] Sartorius, p. 496 ff.

decentralization of the *Verkehrswesen* or of the financial system of the Reich. The ambitions of the Länder in the direction of individualistic self-realization or self-expression must at least for the time being find their outlet in the sphere of legitimate cultural and social specialization rather than in pursuit of particularist aspirations of politics and government. And the longer such changes are of necessity deferred, the greater are the chances that the present impetuous demands will give place to a soberer aspect of the situation and eventually to less exorbitant demands on the part of the Länder in more normal and prosperous times.

Einheits- or Bundesstaat? As under the Empire of 1871 German juristic opinion was divided on the question whether the Empire was a Bundesstaat or a Staatenbund, so to-day, under the Republic, it is equally at odds in the attempt to decide whether the Republican Reich is a unitary or federated State (Einheits- oder Bundesstaat). The answer to this question would also determine the character of the Länder as States or as mere administrative units. The extreme view in favor of the unitary character of the Reich is held by such constitutional authorities as Giese, Poetzsch, and Wenzel, while the extreme States righters are represented by Stier-Somlo, Jellinek, Arndt, and others.[53] In his commentary on the new National Constitution Giese says: "Whether the Reich is a unitary State or a Bundesstaat depends upon the State character of the Länder. . . . Considered from the formal aspect of the law the Länder are treated as States and thus the Reich is a Bundesstaat. Considered from the material side of

[53] See Brunet, tr. Gollomb, p. 70. Brunet includes in this list Jacobi, Einheitsstaat oder Bundesstaat, Leipzig, 1919. Jacobi, however, does not describe what is, but what he thinks will be.

the law the Länder can no longer be termed States and the Reich must thus be called a unitary State." [54] Speaking of the duties which the National Constitution places upon the Länder, Giese holds that "there can be no question of membership duties as in the former Empire, for the Republican Reich is no longer built upon the Länder but upon the German people. The Länder are only autonomous provinces of the decentralized unitary National State."[55]

The State character of the Länder and the corresponding non-unitary character of the Reich is asserted by the States righters on the basis of the doctrine that a State is a State and possesses Staatsgewalt, i. e. Sovereignty in the constitutional legal sense, regardless of its status from the international legal aspect.[56] In other words, it is based on the theory that independence in the international legal sense is not an essential characteristic of the State and of the Staatsgewalt conceived as Sovereignty in the constitutional legal sense. In his discussion of the Republican Constitution of the Reich and the constitutions of the Länder, Jellinek concedes that the Länder have lost in importance in the same degree in which the Reich has gained. The Länder, he points out, still have in principle the full power of legislation. But there is left to them hardly an important sphere for the exercise of this power. With the impending removal of the income tax from the activities of the Länder they will be deprived of their most important medium of independence (*Selbständigkeit*) in their relation to the Reich. The Länder still possess in principle

[54] Giese, pp. 63-64.

[55] *Ibid.*, p. 177.

[56] This doctrine has been considered to some extent in chapter III dealing with the conception of State and Sovereignty in German constitutional jurisprudence, and in its significance in international law and relations in the author's "Concepts of State, Sovereignty, and International Law," chapters XI and XIII.

their own system of judicial procedure and administration. But the administration and conduct of foreign and military affairs has been taken over by the Reich. Their share in the financial administration is insignificant, that of the railroads and rivers has been undertaken by the Reich. The Länder still possess territorial Sovereignty (*Gebietshoheit*), but by a National constitutional amendment, and in some cases an ordinary National law, their territorial possessions may be changed against their will. The Länder still have their own State citizens, but every German has equal rights and duties with the citizens of every one of the Länder. The Länder still have the constitutive power, but the Reich prescribes for them the republican and parliamentary form of government and the fundamental principles for the State and municipal election laws. Nevertheless he concludes that the Länder are States. Though Sovereignty, in the international legal sense, is the most certain attribute of the State, it is not the decisive one. If it were, the Länder would not be States, for they are not sovereign in this sense. According to Jellinek the criterion of the State character of the Länder is to be found in the answer to the question as to what the Länder would do, or would have to do, in case the superior system of the National Republic were suddenly removed from them. Finding themselves deprived of their present authority (*Macht*), would they dissolve in anarchy and be forced to reorganize as in revolution or in the case of the formation of a new State? If so, then they would not be States but provinces or Länder. Would they, on the other hand, without interruption continue to exist on the basis of their present constitutions? If so, the "Landesgewalt" exists not by the grace of the Reich, and the Länder are States even under the Constitution of the Reich. Measured by this criterion Jellinek holds that the Länder are States. As he points out,

the republican form of government had been accepted by the States, with the exception of Gotha, before it was prescribed by the National Constitution. The Länder still participate in the formation of the National will through their representation in the Reichsrat. Though the Reichsrat cannot prevent the enactment of National law, it can essentially influence such legislation by the enforcement of a popular referendum on the amendment in question. Thus he concludes that "since the Reich is a State composed of other subordinate States participating in the formation of the National will, the Reich is a Bundesstaat." [57]

The theory of the dual Staatsgewalt of the Republican Reich, as here expressed by Jellinek, is shared also by Anschütz. In his works on the German constitutional law of the Monarchy Anschütz posits the indivisibility of the Staatsgewalt.[58] Nevertheless, he holds that in the Empire as in every other Bundesstaat the indivisibility of the Staatsgewalt is not in question. In the Empire there was only the Staatsgewalt of the States. The Empire possessed no Staatsgewalt above and aside from that of the States. It did not even share the Staatsgewalt of the States, but merely participated in the exercise of functions arising under the Sovereignties of the several States.[59] It is difficult to see how Anschütz under these conditions could speak of the Empire as a Bundesstaat. For we assume the Bundesstaat to be the possessor of Sovereignty in the sense that the final will, the *ultima ratio,* is that of the National Union. In his commentary on the Republican Constitution Anschütz accepts what he seems to consider as a dual, not a divided Staatsgewalt. He interprets

[57] Jellinek, pp. 80-81.
[58] See chapter III, pp. 102-103.
[59] See chapter V, p. 167 ff.

Article 2, Section 1, and Article 5 of the National Constitution to the effect that the Staatsgewalt exercised by the National Government emanates from the German people, that exercised by the Länder from the people of the Länder. Hence he concludes that according to the National Constitution the Länder are commonwealths subordinate to the Reich but possessed of a Staatsgewalt in their own right, i. e. a Staatsgewalt which they have not received as a lien from the Reich nor from anybody else. The Länder are therefore under the Republic, as well as under the Empire, Staaten and the National Republic is a Bundesstaat.[60]

Between these two extreme views stands the opinion of Professor Piloty, expressed in connection with his consideration of the conflict between Bavaria and the Reich.[61] Were the provisions of the National Law for the Protection of the Republic, Piloty asks, a political blunder of such magnitude that they necessitated the methods of political fight resorted to by Bavaria? Did the Reich in passing these measures transgress its constitutional competencies and did it thus give Bavaria the right to act contrary to the National Constitution? Was the Bavarian counter ordinance a breach of the Constitution of the Reich? Was the passing of the ordinance a political necessity? According to Piloty, an answer to these questions, fruitful for the inner political and the constitutional development of the Reich, can be given only on the basis of a clear and unequivocal acceptance of the "Rechtsnatur des Reiches," that is, of the "Reich als Rechtsstaat." This is possible only if we recognize the Constitution of Weimar as the supreme source for the law prevailing to-day. He holds that it is no longer possible to operate with the principles

[60] Anschütz, p. 29.

[61] Piloty, Der Streit zwischen Bayern und dem Reich . . . (Archiv des öffentlichen Rechts, 43. bd., 1922, pp. 308-348).

underlying the pacts between the German States in 1870, preceding the resurrection of the Reich in January 1871; or with the conceptions resulting in the reserved rights then granted to some of the States; or still to adhere to the legal norms of the old Constitution of the German Confederation of 1815, and those of the Holy Roman Empire of the German Nation.

Accepting the National Constitution of 1919 as the legal basis for the definition of the relations of Reich and Länder, Piloty reasons that the characterization of the Reich as Bundesstaat or as Staatenbund does not serve to clarify these relations. He holds that the Reich, from the aspect of its organization, its competencies, and the functioning of its government, is not a Bund but a Staat, and this, he believes, is brought out much more definitely by the Constitution of Weimar than by that of 1871. "If Sovereignty, supreme power in the constitutional sense, is the essential of the State as claimed by the correct doctrine, then the Reich alone is a State . . . and the Länder are not States." However, Piloty does not conceive of the Länder as provinces or communities of the Reich. They have, he declares, a certain degree of autonomy which places them above these categories. "The German States constitute a special constitutional type, being neither province nor State, but simply Land, that is, a kind of elevated or exalted (*gehobener*) public law tribal association (*öffentlichrechtlicher Stammesverband*), endowed with definite rights and kept in definite dependence by the will of the Reich and by the National Constitution."

There are, Piloty admits, no *Hoheitsrechte* of the States which are not subject to the limitations of the Reich. But the States possess all those *Hoheitsrechte* which have not been withdrawn from them. As stated by Piloty: "The Länder have been deprived, with the exception of small

residues, of the *auswärtige Hoheit,* the *Militär-, Finanz-, und Verkehrshoheit.* In all other sovereign spheres (*Hoheiten*), in those of the *Justiz-, Polizei-, und Wohlfahrtsverwaltung,* the Länder possess large competencies. But also in these spheres they are subject to limitations in the general interest of the Reich. These limitations, however, are not capable of final definition, because the general interest of the Reich, i. e. of the German people, cannot once for all be defined at one given time."

Accepting Piloty's view that the inner political and constitutional development will be fruitful for the future of the Reich only on the basis of the clear and unequivocal recognition of the *Rechtsnatur* of the Reich, established by the Weimar Constitution as the unquestionable supreme source of all existing law, it must follow that such a recognition predicates the submission by the States to the supremacy of the Reich in all spheres of State action including that of the so-called "staatliche Hoheitsrechte." Concerning Piloty's belief that such a recognition will be assured by adherence to the legal strictures of the National Constitution, it must be stated that this faith in the legal efficacy of the Constitution is not supported by Bavaria's fundamental attitude in the matter of National supremacy over the *Hoheitsrechte* of the States. During all the phases of the conflict and of the attempted settlement of the conflict over the Law for the Protection of the Republic, Bavaria professed for herself, and demanded from the spokesmen of the Reich, just such an application of the provisions of the National Constitution as the legal basis for her refusal to accept the National law in question, i. e. as a legal justification of her refusal to recognize the supremacy of the Reich over the *Hoheitsrechte* which this National law was claimed to invade. The undeniable prerequisite to a full acceptance of National supremacy as

defined above is an interpretation of the National Constitution asserting and enforcing such a supremacy. But the willingness to accept and to put into practice such an interpretation presupposes the relinquishment on the part of the Länder of their present way of envisaging a constitutional question from a political point of vantage. It requires as a *sine qua non* the abandonment by the Länder of their present mode of thinking in political terms when using and applying legal phrases. It is difficult, however, to see how such a change in the attitude of the Länder can be expected as long as statesmen and even jurists persist, as Piloty and many of his colleagues do, in speaking of *Hoheitsrechte,* where the term competencies (*Zuständigkeiten*) seems to be all that a purely juristic interpretation of the National Constitution admits.

The most interesting fact in connection with the question as to whether the Republican Reich is an *Einheitsstaat* or not is found in a statement made before the National Assembly. In the two drafts of the National Constitution prepared by him, Preuss had shown himself to be a strong advocate of the unitary form of the Republican Reich. In answer to a demand from the Independent Socialists that the unitary character of the Reich should be expressly stated or provided for in the Constitution, Preuss said:

> It would be futile now to argue the question whether in the first impulse of November [1918] the complete unitary State could or could not have been established; nor would it, . . . as matters now stand, further the unification which we all desire. At any rate we are confronted by the fact that at this time the unitary State cannot be created. . . . A strong popular tendency for the unitary State in Germany, if it had been in existence, would have asserted itself under pressure from without, which has rested upon us these last weeks, and would with elemental force and power have swept away the State

particularism. But this has not happened. . . . Nor shall we reach the goal which we all desire by acclaiming the unitary State where it does not exist, or by insisting that it must be created. . . . I believe the provisions of the draft before you —with the exception of debatable details—generally and principally grant to the Reich and to National unity all that is required at this moment. . . . They leave to the Länder the degree of independence which is possible without endangering the interests of the Reich. Satisfied with this fact, we should for the time honestly accept this compromise between unity of the Reich and independence of the Länder and leave the rest to the natural development in the course of internal events.[62]

The preceding résumé of authoritative opinions seems to indicate that no unqualified answer to the question at issue can be given. While some of the authorities hold that the Reich is a unitary State, others hold that it is not. While some believe that in certain respects it is unitary in character, the rest are sure that in other respects it falls short of that quality. The one who perhaps comes nearest to a generally acceptable answer, if such is possible, is Professor Giese who, as already mentioned, holds that "considered from the formal aspect of the law, the Länder are treated as States and thus the Reich is a Bundesstaat; considered from the material side of the law, the Länder can no longer be termed States and the Reich must thus be called a unitary State." [63]

However, shortly after the establishment of the Weimar Constitution a very practical move was made to clarify the situation in this respect. The most remarkable aspect of this move was that it originated from the State of Prussia which more than even Bavaria was suspected of opposing the unitary character of the Reich for the reason that in a

[62] Heilfron, III, pp. 558-559.
[63] See note 54.

unitary National State it would forever have to resign itself to a position of equality instead of superiority with regard to the other States of the union.

But conscious of having in the past contributed successfully to the grandeur of the old Empire Prussia seems to have been eager to contribute in equal measure to the welfare of the young National Republic. Fortunately, the men responsible for the policy of State realized that such service to the National cause could under the changed conditions be effected only in the spirit of sacrifice on the part of the member States and not by an attempt at hegemony on the part of one State over the rest. It was apparently in this spirit that during the third reading of the State Budget in December, 1919, the Prussian Democratic, Social-Democratic, and Center parties submitted to the *Landtag* a motion the text of which deserves to be given in full.

The National Constitution has created the foundation for the German unitary State in such a way that its establishment is only a question of time, i. e. a question of a more or less slow or speedy development. The intense distress of the German people, the miserable financial and economic situation of Reich, Länder, and communes, the constantly increasing difficulties and impediments caused by the parallel existence of the National and numerous State Governments seem to justify the attempt to bring about as soon as possible the unification (*Zusammenfassung*) of all the forces of the people (*aller Volkskräfte*) within one unitary State. In all circles of our people, regardless of political affiliation, this thought is constantly gaining deeper root and the desire is constantly increasing for the union of all German racial groups (Stämme) in one single German *Volksstaat* in which the individual Stämme are assured the most far-reaching autonomy [of administration]. Repeatedly the State of Prussia has through its Government and its House of Representatives expressed its willingness to be merged in the German unitary State if the same willingness

be manifested by the other States. Prussia is now about to give itself a new constitution. As the largest of the German Länder Prussia considers it as her duty to make the first attempt for the immediate establishment of a German unitary State. On the basis of such considerations the Prussian *Landesversammlung* requests that the State Government immediately and prior to the submission of the final [Prussian State] Constitution induce the National Government to enter into negotiations with the Governments of all German States concerning the establishment of the German unitary State.[64]

As was to be expected, this motion caused a rather violent reaction in Bavaria. The *Bayerische Staatszeitung* wrote: "We must earnestly warn against the unfortunate experiment of steering in the direction of the political unitary State. . . . The idea of the unitary State is destructive in its effect upon the Reich." [65] The political parties of the Bavarian *Landtag* went on record as opposing the Prussian move in the proportion of four to two, only the Socialists and the Independents expressing an opinion favorable to the establishment of the unitary National State. The Bavarian Government in which the Socialist, and as such unitarian, Minister held the presiding position, confined itself to a semi-official announcement that in view of the disquieting effect which the move for a unitary State had upon the public, the Bavarian Government had requested the National Government to invite the State Governments as soon as possible to a discussion of the problem.[66] The negotiations called for in the motion submitted to the Prussian *Landtag* and the discussion requested by the Bavarian Government did not, however, materialize. In a

[64] Poetzsch, Vom Staatsleben . . ., pp. 71-72.
[65] *Ibid.*, pp. 74-75.
[66] *Ibid.*, pp. 73-74.

joint meeting of the National and the Prussian State Cabinets the whole matter was dropped on the advice of the National Minister of the Interior. A communication from the National Government reported the result of the meeting as follows:

In a joint meeting of the National and Prussian State Cabinets the motion of the Prussian *Landesversammlung* concerning the establishment of a unitary State has been discussed. Unanimity prevailed with regard to the fact that the National Constitution offers a sufficient guarantee for the maintenance and the extension of the unitary foundations of the Reich. The apprehension prevailing especially in the southern States to the effect that the Reich intended to curtail their political rights against their will was therefore declared to be unjustified. It was furthermore recognized that in view of the need of decentralization, always present in a country of the size of Germany notwithstanding its constitutional organization, and probably necessitating an extension in many directions, there was no justification for the transformation of the structure of the southern States. On the other hand, there was no failure to realize the difficulties of embodying the Prussian State in a decentralized Reich. But also in this respect the remedy was seen not in the unhistoric idea of the breaking up of Prussia, but in the realization that the development would have to be organic, i. e. in the same manner in which the importance of the Reich has increased *ipso facto* with its enlarged competence, and will continue to increase. It was agreed that the decentralization of Prussia would have to be extended. The participants in the joint meeting were well aware that in the mutual responsibility of the Reich and Prussia for many important political tasks, difficulties would arise as they did repeatedly under the old National Constitution. It is necessary, therefore, to examine how these difficulties can be overcome by way of closer relations. For the further clarification of the ques-

tions involved a subcommittee was formed consisting of three National and three Prussian Ministers.[67]

This subcommittee has not been active and as Poetzsch remarks, the immediate establishment of the unitary State was abandoned.[68] But though the move for the unitary State failed for the time at least as far as positive results are concerned, it remained very much alive in the memory and imagination of advocates and opponents alike. It proved an important element in the attitude of Bavaria in the instances of her nullification of National law and of her resistance to the terms of the National ordinance proclaiming the *Ausnahmezustand* for the Reich, as related above in the earlier sections of this chapter and, after nearly a decade of agitation, led to another attempt to bring about the establishment of the unitary State by way of a revision of the National Constitution.

As in 1919 this second attempt had the official support of Prussia. Expressing the view of his Government, the Prussian representative in the National Council (Reichsrat), Ministerial Director Nobis, stated:

In the last analysis Prussia too wishes to merge in a really unitary Germany, but she wishes also that the other States go the same way with her. . . . This development [in the direction of the National unitary State] will be advanced if the Reich makes the fullest use of the legislative competences acquired by the National Constitution, and if in principle and without exception it takes the position that those of the

[67] *Ibid.*, pp. 71-72.

[68] *Ibid.*, 71-72. The same negative result has been shown above to have followed the repeated efforts of the States righters for the amelioration of the National Constitution in the opposite direction, i. e. in favor of federal decentralization and a greater degree of autonomy on the part of the Länder.

Länder which feel the need of holding on to their State character should pay to the limit for their "Eigenstaatlichkeit" and should therefore under no circumstances expect subsidies of any kind . . . [from the Reich]. Only then will the time be at hand when the disparity between the organization of the Länder and their remaining competences will appear so glaring as to render its continuance impossible. Then the psychological moment will probably have come for the Prussian Government . . . to transfer its own administration to the Reich. This step would *per se* carry with it the collapse of the present structure of the Reichsrat, so that the Prussian example would be expected to find of necessity immediate emulation in most of the other States.[69]

This time, however, the business and industrial interests of the Reich had rallied to the support of the movement with the result that in December, 1927, there was created "The Association for the Renovation of the Reich" (*Der Bund für die Erneuerung des Reiches*). The two hundred members of the Bund, under the chairmanship of former National Chancellor Dr. Luther, are of the opinion that the economic situation of the Reich can be placed on a sound foundation only by the assumption on the part of the Reich of the fullest possible control in all matters pertaining to public finance and National economics. They believe that such control is possible only through the amalgamation of the State administrations with the administration of the Reich. The membership of the Association includes representatives of industry, of the banking and shipping interests, of agriculture, commerce, the handicrafts, and others.[70]

The movement culminated in the calling of a States Con-

[69] Deutsche Wirtschaftszeitung (cited in Osnabrücker Zeitung, Dec. 29, 1927).

[70] Osnabrücker Zeitung, Jan. 8-9, 1928.

ference (*Länderkonferenz*) composed of the Presidents or Minister-presidents of the Länder under the chairmanship of the National Chancellor. As was to be expected, the idea of the revision of the National Constitution in favor of the unitary character of the Reich found its chief advocate in the Socialist Minister-president of Prussia, Dr. Braun, while Bavaria and Saxony led the ranks of the opposition. The result of the Conference was embodied in a statement which reads in part as follows:

1. The Reichsregierung and the representatives of the Länder are of the opinion that the regulation of the relations between Reich and Länder [established in] Weimar is unsatisfactory and in need of fundamental reform. Even though no agreement has been reached concerning the question whether the unitary or federative forces should be strengthened, or which kind of new amalgamation of the forces would be possible, there exists, nevertheless, unanimity concerning the conviction that a strong Reichsgewalt is necessary.

Agreement was registered on the following points: The solution of the problem should not be partial but must be complete. The financial needs of the weaker States are to be met by the Reich but not by subsidies. The Reich shall not enlarge its financial competence by the exploitation of the Länder. The merger of small States in the larger ones shall be facilitated by the Reich. There shall be more frequent and speedier agreements between the Länder for the simplification of legal and administrative affairs and procedure. In the conclusion of these agreements the Reich shall give its cooperation. The solution of the whole problem shall be prepared by the report of a committee to be composed of an equal number of members of the National and State Governments under the chairmanship of the National Chancellor.

2. In the interest of the solution of the whole problem the Reichsregierung promises the following measures:

In order to overcome financial stress occasioned by condi-

tions in the States the Reich is willing, beyond its constitutional competences, to take over suitable administrative activities of financially weak States. The Reich will cooperate for the elimination of territorial enclaves within the States and will establish an organ to act as court of arbitration. For the sake of the simplication of the National administration the Reich will soon offer new proposals for the National Administrative Court (Reichsverwaltungsgericht).

3. The Reichsregierung and the Regierungen of the Länder agree that measures are needed for the enforcement of extreme saving in the financial conduct of business in Reich, States, and communes. A committee consisting of at least four State Ministers of Finance under the chairmanship of the National Minister of Finance shall examine the ways and means to be applied for this purpose.

4. Concerning the question of administrative reform the Reichsregierung and the Regierungen of the Länder are agreed on the need for a speedier execution of suitable reform in Reich and States. These reforms are to cover: Suitable combination of hitherto parallel services and suitable limitation of the districts of the local and intermediary authorities.

In order to assure an even execution of the needed administrative reforms in the States and secure their conformity with the corresponding provisions of the Reich, the Reichsregierung and the Regierungen of the Länder consider it advisable that the Governments of the Länder report to the National Government (the National Savings Commissary) their plans for administrative reform and that the National Savings Commissary render an advisory opinion on these plans if such be requested by the States. . . .

It remains to be seen whether the two committees appointed by the *Länderkonferenz* of 1928 will be more productive than the one of 1919. A big item in favor of an affirmative answer to this question, momentous for Germany, is to be found in the fact that in 1928 the business

interests of the entire Nation have openly cast their influence in the direction of reform towards the unitary State and a highly centralized National administration.[71]

In conclusion of Part II, dealing with the relations of Reich and Länder, mention must be made of an extra-constitutional device established to smooth the often rather difficult intercourse between the Reichsregierung and the Governments of the Länder. What may develop in the United States from the Governors' Conferences, and what has been introduced in the British Empire under the name of Imperial Conference, has become a general practice in the German National Republic in the system of joint meetings of the Reichsregierung and the Presidents of the Länder, or where no such presidents exist, of their *Ministerpräsidenten,* at the call and under the chairmanship of the National Chancellor. Such meetings take place whenever an issue of vital importance to the Reich or the Länder demands quick and harmonious action on the part of the Reich. The first meeting of this kind took place a few days after the assumption of the chancellorship by Herr Ebert, with the avowed purpose of ironing out the difficulties between Reich and Länder which at that time seemed to threaten the permanence of the Reich,[72] the last at the time of the publication of the present work was the one of January, 1928, dealing like the first one with the question of the establishment of the unitary form of State for the Reich.

[71] A somewhat condensed translation from the text given in the Osnabrücker Zeitung, Jan. 20, 1928. Negotiations are in progress between the Reich and Thuringia for the transfer to the Reich of the tax administration of that State (*Ibid.*, Jan. 6, 28, Feb. 4, 1928).

[72] See chapter II, text corresponding to note 60.

PART II

THE NATIONAL GOVERNMENT

CHAPTER IX

The Choice of a Parliamentary Form of Government

Different Types of Popular Government. The Preamble of the National Constitution predicates two chief points of difference between the Empire of 1871 and the Republic of 1919. The first point, the increase and extension of the supremacy of the Reich over the States under the Constitution of 1919, has been dealt with in the preceding chapters of Part II. The second point of difference, the change from Monarchy to Republic and popular government, will be considered in the following chapters under the general topic "National Government."

The mere assumption of popular Sovereignty implied in the statements of the Preamble and of Article 1 of the Constitution of 1919, namely that "the German people has for itself created this Constitution" and that "the Staatsgewalt emanates from the people," does not in itself constitute such a decisive departure from the system of the Empire. The popular notion, expounded chiefly for political purposes, that during the pre-revolutionary era Sovereignty was possessed by the Emperor, the Kings and Princes of the Empire, has been from the juristic point of view untenable for at least several decades preceding the Revolution.

Accepting the juristic conception of the State, German jurists, even under the Empire, had come to hold that Sovereignty was the attribute of, and was possessed by the State. Conceived as a legal person, the State was defined as "the union of all human beings of a certain terri-

tory into a collective personality (*Gesamtpersönlichkeit*) clothed with supreme power over land and people."[1] Thus "the State represents the people inclusive of the one or number of ruling individuals in the legal unit of a commonwealth (*Gemeinwesen*) endowed with personality." In the actual constitutional system of the Empire, as differentiated from the purely formal and legal idea of the State as a generic concept, the ruler (*Herrscher*) was the supreme organ, the *praesidium* (*Vorstand*) of this commonwealth. "The concepts of ruler and State," says Anschütz, "stand in the same relation to each other as representatives to those represented. The ruler—in monarchies the monarch—is not the State; he does not possess Sovereignty but represents the State; he exercises Sovereignty."[2] The essential difference then between the past and the present is to be found in the fact that the form of government created by the Constitution of 1919 is a republic, i. e. that the ruler is not a monarch, claiming the exercise of Sovereignty or Staatsgewalt by his own, or by hereditary right as the German monarchs of the pre-republican Reich and States did, but an organ or a number of organs exercising the Staatsgewalt by virtue of definite norms and in accordance with conditions laid down in the Constitution as the will of the State or Nation. In the technical language of German constitutional law, the constitutional monarchy has given way to a popular republican government. A general statement of this kind, however, merely denotes a result, it does not connote the method or form through which this result is effected by the Constitution.

In the past such popular government has been achieved

[1] Anschütz, Deutsches Staatsrecht . . ., p. 11.

[2] *Ibid.*, pp. 10-11. In this connection see chapter III, section: Location and Exercise of Sovereignty.

under various forms. Political science or constitutional theory usually classifies them all under three standard patterns, namely: The republic with the so-called division of powers; the parliamentary republic; the immediate republic or pure democracy. The reason for the attempts to accomplish popular government by different methods must of course be sought in the different causes back of these attempts. If we want to understand the principle which the framers of the various existing constitutions wished to establish in the fundamental laws they were about to create, we must consider the grievances which led to the demand or necessity of establishing a new constitution. It is from this point of view that it will be helpful to study the chief points of these three standard types of popular government before we give our attention to the particular type or combination chosen by the National Assembly of Weimar.

The first form, i. e. the republic or government with the so-called division of powers, is recognized by the following criteria: 1. The executive is not elected by the legislature. 2. The cabinet is not responsible to the legislature. It is appointed by and responsible solely to the executive. 3. The members of the cabinet have neither seat nor vote in the legislature and are excluded from its deliberations. 4. The executive holds no power of dissolution over the legislature.[3]

The country which has attempted to establish popular government under this form is the United States. In this instance two elements were influential in the choice of this form. First, the desire to establish a system which would guarantee a certain degree of popular freedom and protection against the encroachments of governmental usurpation from which the Colonies had been suffering under

[3] Hatschek, I, p. 39.

British rule. Second, the belief that such a system was offered in a republic built upon the principle of the division of powers as described by Montesquieu and correctly interpreted by Madison.[4] Fundamentally these two elements may be expressed in the axiom that human nature usually reacts in extremes in so far as it attempts to remedy one extreme by means of another.

In 1776 it was the general belief in the American Colonies that it was the King in Council who was responsible for the offences against their charter rights. Hence the almost complete absence of the executive in the attempted creation of a central government for the early federation. But by the time the Continental Congress set out to create a more perfect union the realization had come that it was not the King in Council, but the King in Parliament, i. e. the British legislature which, through the Stamp Act and similar legislation, had encroached upon the assumed rights and liberties of the Colonies. It was therefore the legislature which under the American Constitution had to be marshalled with regard to its constitutional powers.[5]

Speaking of the tendency of the legislative authority to absorb the authority of the other departments of government, as illustrated by Madison from the early history of the American States, Alexander Hamilton accepted Madison's conclusions concerning the constitutional checks required to prevent such a development in the new Union. Expressing his view on this subject in the *Federalist* he wrote: "In governments purely republican this tendency

[4] The Federalist, nos. 47-51.

[5] The manifestation of this change of opinion in the Constitutions of the American States and Federal Union has been admirably set forth by Charles C. Thach in "The Creation of the Presidency, 1775-1789, a Study in Constitutional History," Baltimore, The Johns Hopkins Press, 1922.

is always irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disquiet at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege, and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum, as to make it very difficult for the other members of the government to maintain the balance of the constitution." [6] Hence it was considered evident by the framers of the Constitution "that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others" and that "the members of each department should be as little dependent as possible on those of the other, for the emoluments annexed to their offices." If the executive magistrate or the judges were not independent of the legislature in this particular, their independence in every other respect would be merely nominal.[7]

According to Madison's interpretation the principle of the division of power could not, of course, be accepted literally, i. e. without considerable modification, for if it were "rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judicial magistracies, should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another." [8] It was

[6] The Federalist, no. 71.
[7] Madison in The Federalist, nos. 51, 73.
[8] *Ibid.*, no. 51.

therefore not so much the absolute division of powers of the various departments which, according to the writers of the *Federalist,* the American Constitution had attempted to establish, but rather a system of checks and balances designed to keep each in the place assigned to it.[9] Thus the legislature, i. e. Congress, being naturally the strongest of the organs of government in the republican body politic, was divided into two houses, one holding the balance against the other. The one was to be composed of representatives on the basis of population, the other should represent the interests of the State as individual commonwealths. In addition, the two weaker departments, the executive and the judicial, were to be strengthened. The executive was to have the negative veto power over the acts of the legislature, not to the extent of preventing, but of retarding legislation.[10] The judicial department, the Federal Supreme Court, should have the right to examine all legislation in respect to its compatibility with the Federal Constitution. It was argued that this function did not give the Supreme Court any authority over Congress. Through its guardianship over the laws of the country it was to demonstrate merely that both departments had to recognize as their mutual superior the popular will expressed in the Constitution as the fundamental law of the land.[11]

The second form under which popular government has been established is that of the parliamentary republic or parliamentary system of which republican France has been the most conspicuous example. Here again we note that back of the adoption of this particular form was the intention to protect the Nation in the future against the en-

[9] *Ibid.*
[10] *Ibid.*, nos. 51, 73.
[11] *Ibid.*, no. 78.

croachment upon popular rights and liberty, which in monarchical France had come not from the legislature, but from the executive, the King, and in the first and second Empires, from the two Napoleons. In the second place, there was present in the minds of some of the framers of the republican constitutions of France the belief that this aim could be achieved best by a considerable curtailment of the executive powers in favor of the legislature and through direct or indirect control of the legislature by the Nation itself. Hence there are four main elements which characterize this form: 1. the executive is elected by the legislature. 2. The ministry or the cabinet is to all practical purposes a committee of the legislature, chosen at the request of the president by the prime minister from the leaders of the legislature. These ministers retain their seats in the legislature. 3. As members of the cabinet they are responsible to the legislature which by a vote of lack of confidence can bring about their resignation and the fall of the whole cabinet. 4. The president, with the consent of the upper house, has the right to dissolve the lower house, if in his opinion the latter does not represent the will of the Nation. New elections are expected to return new representatives who, at least in theory, are supposed to express the true will of the people. This true will of the people is manifested by the majority vote, or, as is the case in the French Republic, on the basis of proportional representation so that each shade of opinion may find its own proper share in the government.

The essence of the theory of parliamentary government as developed for France by Prévost-Paradol, may be expressed in one short sentence, namely, that "the Nation or State be in the possession of a democratic government; in other words, that the people govern itself in accordance with the will of the greatest number and in obedience to

the law of the majority." [12] Starting from the parliamentary government of monarchical England, Prévost-Paradol points out the difference between such democratic government in a monarchy and a republic. In the former, he says, the monarch uses parliament, so to speak, as the last means to preserve his own hereditary rights and prerogatives, while in the parliamentary republic parliament is held to be the chief organ through which popular liberty is maintained. In the hereditary monarchy the starting point is the hereditary rights of the monarch, in the parliamentary republic the principle from which we start is popular liberties. In the monarchy the last word rests with the monarch or with the cabinet acting in his name, in the parliamentary republic with the lower house of the legislature. In the parliamentary monarchy an appeal to the people for new elections constitutes an attempt on the part of the executive to surmount a government crisis, in the parliamentary republic it serves to make the will of the Nation the supreme arbiter in cases of differences of opinions with its own organs of government, or as expressed by Prévost-Paradol, "rendre à la nation son libre arbitre et la mettre en demeure de se prononcer avec une souveraine indépendance sur la conduite de ses représentants." [13]

The third form of popular government is that of the immediate republic or pure democracy. The main features of this system are: 1. The people, not through representatives, but directly in popular assemblies perform the most

[12] Prévost-Paradol, La France nouvelle . . . 1869 (cited, Hatschek, I, p. 41).

[13] Cited, Hatschek, I, pp. 41-42. In order to establish this preponderance of the lower house, Prévost-Paradol suggests that the prime minister be appointed and dismissed by the lower house. French practice, however, does not follow his theory to such length (See Hatschek, I, p. 42).

important functions of government, particularly that of legislation. 2. Hence there is no division of powers between different organs of government, because the government is the popular assembly, the executive and the judiciary are mere agents of the legislature. 3. The executive acts as a directorate of the popular assembly. Its members are responsible to the latter only for violations of the law, not in a political sense, for political responsibility rests solely with the legislature whose politics are binding for the executive. 4. There is no party rule under this system. Proportional representation assures the participation of majority and minorities in the formation and in the actual functioning of the government.[14]

The theory of this kind of popular government has been worked out by Rousseau. Its nearest realization is found in Switzerland. As a practical proposition it can be considered only in so far as some of its features may be found to be in some measure applicable in the modern and geographically large State.

Conflicting Interests in the Choice of Popular Government. In the choice of the particular form of popular government which was to answer the particular needs of the German Nation, the fathers of the Constitution of Weimar were subject to the influence of three main trends of thought or elements, all three powerful and insistent upon recognition.

In the first place there was in the National Assembly (*Nationalversammlung*) a body of opinion which insisted upon the undeniable necessity of abolishing forever those aspects of the old system which were characteristic of the monarchical Empire and which were held to be chiefly responsible for the condition and resentment which that

[14] See Hatschek, I, p. 43.

Empire had left behind. The idea of monarchical Sovereignty prevalent in the popular mind and exaggerated in the political struggle of the past had now, in consequence of the disastrous war of the Empire, generated the irresistible demand for the recognition of the extreme in the other direction, i. e. of popular Sovereignty under the republican form of government, to be realized in the creation of a strong legislature and a correspondingly weak executive department. This element was represented by various shades of political opinion, such as that of the extreme or Independent Socialist group, of the moderate or Majority Socialists, the Catholic Center, the newly formed Democratic party, and to some extent also the People's party.

The extreme Socialist or Independent group, together with the still more radical Communist element, had been successful in getting an effective but short-lived hold upon the revolutionary or *de facto* Socialist Government of the Reich. However, their failure to force at the same time the creation of a National constitution embodying their extreme radical principles resulted in the gradual weakening of the influence and strength of the extreme radical element in determining the policy of the *de facto* Socialist Government, and finally, even before the National Constituent Assembly convened, in the complete elimination of the Independents from the provisional Government of the Reich.[15] In the National Assembly the Independent Socialist group was hardly in a position to force its demands upon the rest of the Assembly. Nevertheless, it still possessed an element of strength in so far as it at least could and did to a large extent support the more moderate aspirations of the Majority Socialists for a socialist, though not a radical or communist, form of State

[15] See chapter II, text corresponding to note 28.

or government. The extremists of the *Spartakus Bund* had failed to secure representation in the Assembly.

In the second place there were the adherents of the old system who, though realizing the necessity of yielding to this popular demand for the recognition of the principle of popular Sovereignty, were still bent on making every effort to save as much from the wreck of the Constitution of the Empire as could possibly be retained. While admitting that the form of the State was bound to be changed, this element insisted that the legal principles of constitutional jurisprudence of the past must be maintained as far as possible. They found powerful support in two important facts: In German constitutional law, as distinguished from popular opinion, the conception of the monarch as the possessor and dispenser of the sovereign power of the State appeared in a quite different light. In the interpretation of the prevailing juristic conception Sovereignty was the attribute of the State, the monarch exercised this Sovereignty by hereditary right but in accordance with a Constitution proposed by him and sanctioned by the legislature.[16] Furthermore, the political aspirations of the last decades before the Revolution in the direction of parliamentary government[17] had culminated in the Reform Acts of October 1918.

By the Law of October 28, 1918, the Imperial Constitution was amended to the effect that henceforth the Chancellor should be responsible to the Bundesrat and the Reichstag. Section 2 of Article 21 of the old Constitution had stipulated that a member of the Reichstag accepting certain positions under the Government was to lose seat and vote in the legislature. By the repeal of this section

[16] See notes 1-2.

[17] For a detailed historical account of this movement in Germany see Hatschek, I, p. 580 ff.

it was made possible now to select the members of the National Cabinet from the party leaders in the Reichstag.[18] Thus from the point of view of those who for years had been working for the realization of popular government in Germany as well as of those who on general principles wished to deviate as little as possible from the direction which constitutional development in Germany had taken, parliamentary government was the one likely to be chosen by the framers of the Republican Constitution. Another important element in favor of this choice was the fact that parliamentary government had been holding the center of the stage in the political theory of the years preceding the German Revolution.

This brings us to the third element of influence in connection with the choice of the type of popular government for republican Germany, namely the experience of other nations in solving problems similar to those confronting the German National Assembly and the criticism of their attempted solutions by their own political and legal authorities.

In his *Allgemeine Staatslehre* Jellinek pointed out in the year 1900 that the dependence of the French President upon the French Parliament was due to his election by the latter and to the further fact that his constitutional position could be changed at any time by the unilateral action of the legislature.[19] In two books published in 1905 and 1911 respectively,[20] Professor Fahlbeck of Sweden dis-

[18] For a more detailed treatment of the provisions of the Reform Acts see chapter I, section: The German Empire of 1871 and the Reform Acts of October, 1918.

[19] Jellinek, Allgemeine Staatslehre . . ., pp. 665 ff., 670; 3. ed. 1914, pp. 727, 762.

[20] Fahlbeck, La Constitution suédoise et le parlementarisme moderne . . . 1905; *and* Die Regierungsform Schwedens . . . 1911 (Discussed by Hatschek, I, pp. 46-47).

tinguished between what he calls the "monistic" form of parliamentarism of France and England, and the "dualistic" form of Sweden. Under the monistic form the executive organ of the government is placed in total dependence upon the legislature, while under the dualistic form of parliamentarism of Sweden the balance between parliament and executive is established by the complete division of power between the two departments concerned. Of the two forms Fahlbeck recommends the dualism of the Swedish system.

The same position had been taken shortly before the German Revolution by the Alsatian Professor Redslob. Agreeing with Fahlbeck in favoring the dualistic over and against the monistic type of parliamentarism, he differs in calling them the "false" and "true" (*unecht* und *wahr*) forms of parliamentary government, and in classing the English with true (dualistic) instead of with the false (monistic) as does Fahlbeck.[21] According to Redslob there are two main types of parliamentarism. Under the one type there exists a well established political balance between the executive and the legislative departments, notwithstanding the links which connect them. Both can in the case of controversy appeal to the people which decides the issue by way of new elections for the legislature. This appeal is made directly by the executive through dissolution of the legislature and the call for new elections, and indirectly by the legislature through the rejection of important legislation, chiefly the budget, thus forcing the executive to resort to dissolution. This, Redslob says, is the true form of parliamentarism. But under this form the executive must be politically independent of the legislature. Opposed to this system is the false type of

[21] Redslob, Die parlamentarische Regierung in ihrer wahren und ihrer unechten Form . . . 1918 (Discussed by Hatschek, I, pp. 46-47).

parliamentary government as found in France, which is characterized by the complete subservience of the executive to the legislature. According to Redslob, this subservience is due mainly to the election of the President by the Chambers. It leads of necessity to the practical inability on the part of the President to resort to his nominal right of dissolving the Chamber of Deputies. "There is," Redslob declares, "no such dissolution in France." And as a matter of fact, since 1877 no French President has dared to make use of this right. Another result of this dependence of the executive is found in the fact that the deputies have come to play a game of personal politics and refuse to be bound by the political interests of the groups which they are supposed to represent.[22]

Redslob's criticism of the French system is based on Duguit's definition of the true and false form of parliamentarism and on the latter's remarks concerning the French type of parliamentary government. According to Duguit, the parliamentary form of government is based essentially on the equality of parliament and executive. "The first condition for the normal functioning of the parliamentary régime," Duguit writes, "is the equality in prestige and influence of parliament and government." Such he holds to be the case in England, while in France the President occupies a position of inferiority because of his election by the Chambers. The French President,

[22] Interesting in this connection is the fact that the Republican People's party of Alsace, supporting the recent French attempts to strengthen the position of the President, proposed "the revision of the [French] Constitution to the effect of creating a strong, permanent, independent government, unlimited right of control over the Legislature, participation of the general and municipal councils in the elections of the President so as to give to the President the character of popular authorization, and the introduction of the popular referendum as the last resort in all important legislative affairs (Lukas, Die organisatorischen Grundlagen der neuen Reichsverfassung . . . 1920, p. 29).

Duguit says, is nothing but "'un commis simple du parlement." His right of dissolution and his veto power are nothing but dead letters and since 1877 no President of the Republic has dared to speak of exercising these rights.[23]

The difference between the standard forms of parliamentary government, and between the monistic or false and the dualistic or true types of parliamentarism, as far as it concerns the choice of a popular government for the German Republic, centers in the respective provisions of these systems for the regulation of the relations of the executive and legislative departments of the Government. In the consideration of the debates before the National Assembly and the Committee on the Constitution (*Verfassungsausschuss*) on the subject of these relations we find that it was especially Redslob's book which had a decisive influence upon the juristic elements among the framers of the German Republican Constitution. In the document accompanying the two Preuss drafts of the Constitution, Preuss expressed himself in favor of the acceptance of the parliamentary form of government for the National Republic. Modifying the meaning of the term he explained in the language of Redslob that:

> This does not require an election of the President by parliament as in France. On the contrary, the French system of parliamentarism may be strikingly called a false parliamentarism. True parliamentarism presupposes two essentially equal supreme organs of government. In the parliamentary monarchy the king holds a position equal to (*neben*) that of parliament. In the parliamentary democracy, where all political power emanates from the popular will, the president has a position equal to that of parliament which is elected

[23] Duguit, Traité de droit constitutionnel . . . 1923-5, II, p. 657 ff.

immediately by the people only if he is elected not by the legislature, but immediately by the people. . . .[24]

The same view was expressed by him [25] and other speakers in the National Assembly and in the Committee on the Constitution. Discussing the French form of parliamentarism in connection with the tentative provisions of the second Government draft for the constitutional position of the president, Dr. Ablass warned the Committee on the Constitution, saying:

In his opinion therefore Redslob is right when he states that French parliamentarism, as laid down in the Constitution, has finally completely degenerated. I think . . . that we will be doing right, if in our Constitution we completely avoid the example of the French presidency. . . . True parliamentarism consists in this, that parliament is not omnipotent and that it is subject to a balancing control exercised in turn by a democratic organ (*Instanz*). This democratic organ is in our case the National President. To this we must hold. These two organs, parliament, i. e. the Reichstag, as well as the President, emanate from the same source, the pure will of the people. . . .[26]

The opinions of Preuss and Ablass, summarizing the experiences gathered from the practical application of the types of parliamentary government discussed, represent the judgment of those who sought to temper the more radical demands of the extreme left for a strong legislature as a guarantee against executive absolutism. This was clearly recognized for instance by the Independent Socialist mem-

[24] Cited, Lukas, p. 30.

[25] Verf. Ber. und Prot., p. 235.

[26] *Ibid.*, pp. 231-232. For summary of his statement in the National Assembly see below, text corresponding to notes 29-30.

bers of the Assembly, representing the first element of the conflicting forces contending for the decision in the choice of the form of popular government which the German Republic was to have. During the second reading of the section of the Constitution dealing with the office of the National President, Representative Haase of the Independent Socialists supported a resolution introduced by his party for the complete elimination of the office of the *Reichspräsident* from the federal system of government. In justification of the demand of this resolution he explained the fear of his political colleagues that the intention of certain sections of the National Assembly to create for the *Reichspräsident* a position of independence of the legislature constituted a circuitous attempt to lead back to monarchy and to weaken the democratic principle by curtailing the powers of the Reichstag as the organ through which the sovereign will of the people was realized.[27] This fear was representative of that element of influence in the National Assembly which was bent on curing the evils of the system of the past by the creation of a new organization as different from the former as possible. Hence the weak legislature and the strong executive of the Monarchy should be succeeded by a strong legislative assembly in the Republic and a weak executive or no executive at all. As Representative Haase admitted, the Independent Socialists were indeed greatly worried lest the National President, as provided in the particular provisions of the new Constitution, might easily develop a strong personal régime. He alleged, for instance, that the then officiating provisional President had already exceeded his constitutional competencies when he stated that whatever might happen the Treaty of Versailles would

[27] Heilfron, IV, p. 56 ff.

never be signed. Such a statement, the speaker asserted, was not only a violation of his constitutional powers, but was also likely to embarrass him in his dealings with foreign powers in case the peace treaty would have to be signed in spite of his assertion. Consequently, Representative Haase continued, "we are of the opinion that the policy [of the Nation] should be determined by the ministry in agreement with the popular representative assembly." A minister making a rash statement is simply eliminated; another, unencumbered in the critical question involved, takes his place and the political life of the Government continues without further disturbances. "It is for these reasons," he concluded, "that we oppose the institution of a National president. We desire to have democratic control. We do not want a personal head which may lead to a personal régime. We know that our resolution will not succeed, but we have introduced it through a sense of duty. . . ." [28]

In reply to Representative Haase's expression of alarm at the prospective powers of the future National executive, Dr. Ablass of the German Democratic party stated that he favored as a guarantee of true democracy a strong president. Repeating his argument advanced before the Committee on the Constitution, he told the National Assembly that in a democracy the legislature was that organ of the Government which most conspicuously incorporated the principle of popular Sovereignty. It was that organ, therefore, which was most easily tempted to extend its competencies at the expense of the executive. Thus it was this same organ which most certainly required an effective control in the form of a strong president. Where, on the other hand, the president was elected not by popular vote,

[28] *Ibid.*, pp. 58-59.

but by the legislature as was the case in France, and where the legislature, feeling secure in the preponderance of its constitutional competencies, was apt to fall into a dangerous state of "quietism," a strong executive was needed to hold the legislature to the performance of its duties.

But according to Dr. Ablass the German Republican Constitution should not follow the constitutional system of the United States, which, as the speaker stated, places all legislative power in the hands of the legislators and all executive competencies in those of the federal president. This division of the spheres of legislation and administration was to be avoided in the Constitution of Weimar by means of a detailed specialization of the competencies of the National legislature in the field of National administration,[29] so as to prevent an encroachment upon these competencies by the executive.[30]

The question of the advisability of dispensing with the office of the National President had been given serious consideration also in the *Verfassungsausschuss*. Speaking in favor of the elimination of the office, Representative Fischer, Majority Socialist, first summarized the position of the National Government on the subject. According to the opinion held by the National Government, a country of the size of Germany needed a representative head. It considered the office of the National President, as proposed in the draft of the Constitution under discussion, a balancing force against parliament. But as he pointed out, the reduction of the normal official life of the Reichstag from five to three years constitutes a considerable weakening of that body, especially in view of the fact that the proposed seven year period of office for the President gives the latter an opportunity to extend his influence over more

[29] See Articles 33-35, 39, 64-67 of the National Constitution.
[30] Heilfron, IV, p. 59 ff.

than two legislative periods of the Reichstag. Fischer conceded that the majority of the political parties seemed to call for a presidential office capable of interposing an element of stability in the political confusion of parliament. But what was to be the principle upon which the position of the President should be established? Were the Government and the presidential office to be on a basis of equality? If they were, the President would even in that supposition have the upper hand if he were to appoint the Government. Such a solution, Fischer contended, would be in contradiction to the concept of democracy. Or was the Government to be the real bearer of the Staatsgewalt, leaving to the President the position of a mere decorative head who could appoint the Government, but who in doing so would be subject to the will of parliament inasmuch as he could appoint only those who enjoy the confidence of the Reichstag?

Referring to the United States as the country in which the first principle was in vogue, Fischer concluded that in view of the circumstance leading to the Spanish-American War and of the rôle which the American President in consequence of the "fulness of his power" had played in the World War, the framers of the German Constitution had good reasons to be apprehensive of "such an institution." Calling attention to France as the country which had tried the second principle, i. e. the election of the President by the Senate and the House of Deputies, Fischer stated that also this form had proven itself dangerous in so far as immediately after the election of the French President (then in office) it was considered certain that war with Germany was only a question of time. "We may restrict the powers of the President by the Constitution as much as we please," the speaker declared, "in times of excitement he will play a determining rôle against which Parliament will be powerless."

Fischer continued to show that the draft of the Constitution under discussion proposed to follow a middle course between the two principles outlined above. In order to give the President a certain importance he was to be elected by the people. He was to be placed alongside (*neben*) not under Parliament. His tenure of office was intended to be for seven years, while the Reichstag was to be elected only for three years. Fischer wanted to know whether the incidentals (*Begleiterscheinungen*) of the American presidential elections were to be introduced also in Germany. According to the proposed draft the National President was not restricted in his choice of Ministers to members of Parliament, but, as Fischer pointed out, the Ministers appointed by him could function without the confidence of Parliament. They might even upon request of Parliament be forced to resign against the will of the President. Furthermore, the National policy was to be determined not by the President but by the Prime Minister. Thus politically speaking the National President would seem to be hanging in the air. This fact was apparently recognized by the authors of the constitutional draft under consideration, which consequently provided the President with a number of definite functions such as the supreme control of the Army and Navy, the appointment of officers and functionaries, the concluding of alliances, and within certain limitations of other treaties.

Representative Fischer then proceeded to mention some of the difficulties which might arise under the Constitution as proposed in the draft. If public peace and security were endangered the National President would be authorized to employ the armed forces against a member State refusing to comply with the constitutional demands of the Reich. He must, of course, immediately seek the consent of the Reichstag. But what was he to do when the Reichs-

tag was not in session? All presidential ordinances and decrees must be countersigned by the Prime Minister or by one National Minister. But what does this mean? Was the signature of one Minister to be sufficient? If so, the day might come when a National President, against the will of the Cabinet as a whole, might issue his decrees with the signature of one Minister, say the Minister of War. And how about ministerial countersignature in the case of a new Ministry not yet presented to Parliament and not yet endowed with the vote of confidence? How about a change of Government when the Reichstag was not in session, or when the President had dissolved the latter against its will? What was to be the result if the President and the Prime Minister were at odds over important political questions, especially in case the President had been elected by a small majority, or chosen by the drawing of lots, while the Prime Minister was supported by a large majority in the Reichstag? Fischer concluded that all these considerations forced him to look upon the office of the National President as superfluous and undesirable from the point of view of the tranquil development of the Reich. In substantiation of this opinion he referred to a significant statement by the official sponsor of the draft whom he quoted as saying that "the framers of the Constitution refrained from the creation of the office of a Vice-President because they did not wish to create the position of a Crown Prince who would merely be waiting for the disappearance of the President, and because such a position would only be a cause of friction." [31]

The speaker here quoted was Preuss, National Minister of the Interior and spokesman for the National Government. Replying to Representative Fischer's remarks and

[31] Verf. Ber. und Prot., pp. 274-275.

recommendation, Preuss suggested two ways of meeting the Socialists' demand for a National Government without the office of the President, but he came to the conclusion that neither of them would serve the best interests of the Reich and the German people. As he pointed out, there could be, in the first place, a directorate (*Direktorium*), i. e. a collegiate head of the State which could select and appoint the ministry. Such a body, consisting of three or five men might be elected either by the people or by parliament. As a matter of fact, such a body had existed immediately after the Revolution in the form of the so-called Council of Commissioners (*Rat der Volksbeauftragten*), a kind of political cabinet which kept the old Government department heads for the technical administration of the various Government resorts. But as Preuss remarked, in a large State such a directorial college must inevitably lead to a dictatorship just as in France it led to Napoleon. The popular voice would soon be found clamoring for a leader and savior who in his person represented the active forces of the people and if the Constitution did not provide for such a possibility, the popular demand would assert itself in an extra-constitutional manner. On the other hand, under a directorial college the position of the ministerial heads of the Government departments would be an impossible one. It had been made bearable under the Council of Commissioners by mutual agreement and only for the period of transition. As a permanent institution a directorate would reduce the ministry to a position of political impotence, a fact which in turn would weaken parliament, dependent as it was to be upon the assertion of its power through its influence over the ministry.

As a second possibility of a National democratic government without a president Preuss mentioned the Swiss sys-

tem under which parliament elects a governing council whose members act as ministerial heads of the various departments of the National Government. But this system, Preuss contended, was feasible only in States with relatively simple conditions. For a people of several millions, like that of Germany, with the external and internal situation as it was, and with its present States question, the system of Switzerland would hardly be feasible. On what basis for instance would the election of the members of the ministry by parliament proceed? Naturally on that of political parties, i. e. parliament would have to assign the various ministerial posts in proportion to the size of existing parties. Proceeding logically, there would be no majority Government, but all parties would, as is the case in Switzerland, have to be represented. But in Germany the various States would certainly demand representation also. Considering the number of States and their difference in size, such representation would not be easy to accomplish. Probably also religious considerations would be necessary. Then there would still be the question of personal fitness which undoubtedly would have to be considered. "Do you really think," Preuss asked his audience, "that a parliament in direct election could conquer these difficulties?" For his part he emphatically declared his doubt. "I do not believe it," he said, and he continued:

As a consequence of such elections there would be no guarantee of a practical administration of the Government departments and above all would there be no coordination (*Einheitheitlichkeit*). As a matter of fact, we must get used to the idea that we shall have to construct our future cabinets a little differently from the way we have recently done. We must give the President and the Prime Minister greater freedom in the

selection of their associates. It will not do to apportion the members of the Cabinet according to the size of parties, nor to leave to the parties the choice of election. The Prime Minister must choose his Cabinet in cooperation and agreement with the President and with the parties from which he intends to draw his support. This is the only way which meets the spirit of the parliamentary system and corresponds to its practical necessities. But for this very reason a personal head is needed. . . .[32]

The Republic with Parliamentary Dualism. As a result of these conflicting interests, each checking the extreme demands of the other, not one of the standard forms of popular government proved acceptable to the National Assembly. The system of popular government finally adopted is one combining in principle the chief elements of all three. From the first, the republic with the division of power, it accepted the freedom of the National executive from legislative appointment or election. From the second, the parliamentary system, it adopted the principle of the cabinet responsible to the legislature and the right of the executive to dissolve the representative assembly. From the third, the immediate democracy or republic, it borrowed a limited resort to the popular referendum. The main principles thus drawn from the three standard types of popular government are correlated in such a manner, and each one in itself is circumscribed by a selection of minor features taken from the same sources, so as to act as a system of checks and balances respectively between (1) the President and his Cabinet; (2) the Reichstag and the Reichsrat; (3) the executive and legislative departments of the Government in general and their respective

[32] *Ibid.*, pp. 275-277.

organs in particular; (4) the electorate on the one hand and Reichstag and President on the other.

Expressed in terms of actual competencies and limitations this system of checks and balances may be summarized in a general way as follows:

1. The President chooses and appoints the Chancellor but the Chancellor chooses his own Cabinet. The Cabinet is responsible, not to the President, but to the Reichstag. The respective administrative and ordinance making powers of President and Cabinet are well defined.

2. The former preponderance of the Bundesrat in the process of National legislation has been completely removed in the shaping of the powers of the Reichsrat. Technically its participation in legislation is purely negative, its share being limited to a veto power with the effect of deferring, not of preventing legislation. The same applies to amendments of the Constitution.

3. Both the President and the Reichstag are elected by National popular vote. The President may dissolve the Reichstag, but only once for the same cause. He may not, while holding office, be a member of the Reichstag. The Reichstag may propose the removal by popular vote of the President before the end of his term. The Reichstag may impeach the President, the Chancellor, and the Cabinet Ministers before the Staatsgerichtshof.

4. The rejection by popular vote of the Reichstag's proposal for the removal of the President has the effect of a reelection of the President and entails the dissolution of the Reichstag. The President has the right to submit to popular vote such acts of the Reichstag which he holds formally unconstitutional or contrary to the interests of the Reich.[33]

[33] The provisions of the Constitution given in the above outline will be considered in greater detail in the following chapters.

Admitting that the system here roughly sketched contains some of the principal features of all the known forms of popular government, Hatschek nevertheless insists that "in spite of . . ., appearances, it is not a *mixtum compositum,* but a uniform, though new, type . . . of the republic with parliamentary dualism." [34]

[34] Hatschek, I, p. 45. Concerning the dualism of the German parliamentary system see also Lukas, p. 24 ff.

CHAPTER X

Executive and Legislative Departments

The President and the Cabinet. The division of the executive powers between the President and the Cabinet as provided in the National Constitution was one of the concessions made by the National Assembly to those elements which were apprehensive of the possibility of a personal régime on the part of a strong personality in the presidential office.[1]

Though the National President appoints and dismisses the National Chancellor, and upon the Chancellor's proposal, the Cabinet Ministers,[2] this power is only a formal one. From the material or practical point of view, the exercise of this formal appointment and dismissal is dependent upon the confidence or want of confidence in the Government by the Reichstag, since "the National Chancellor and the National Ministers require for the exercise of their functions the confidence of the Reichstag" and "each of them must resign if the Reichstag by formal resolution withdraws its confidence."[3] This means that the President must, in the first place, choose a National Chancellor who is reasonably certain to be *persona grata* with the Reichstag with which he will have to deal. In the second place, it means that this subject of the presidential

[1] See chapter IX, section: Conflicting Interests in the Choice of Popular Government.

[2] Art. 53.

[3] Art. 54. See also Anschütz, p. 113; and Giese, pp. 190-191. On the subject of the Reichstag's withdrawal of confidence and the resignation of the Cabinet see below, section: Executive and Legislature.

choice is expected to select as his ministerial associates only such candidates as are likely to possess the confidence of the Reichstag. The letter of the Constitution does not prescribe the mode by which the President may gain the indispensable knowledge regarding the Chancellor's and the Ministers' benevolent reception by the Reichstag except by inference to the effect that a future expression by the Reichstag may prove the President to have rightly chosen or to have erred in his judgment of the availability of his appointees from the point of view of the confidence of the Reichstag. In order to avoid the hazard which the exercise of the unassisted judgment of the President would inject into each and every choice of Chancellor and Cabinet, the two occupants of the presidential office have resorted to the logical and practical expedient of securing in advance of selection or appointment an expression of the confidence of the leaders of the political parties expected to form or to cooperate with the future Government. But even this expedient, sound and reasonable as it may be, does not offer any guarantee of the acceptance of that Government by the Reichstag when the parties giving their assurance constitute a minority and when the opposition is united in its aversion to the policies of the minority and the Government chosen by the latter.[4]

The Constitution does not require that the National Chancellor or his ministerial colleagues be chosen from the membership of political parties forming the Government, nor from the membership of any parliamentary party. The most conspicuous case of a Cabinet selected from non-parliamentary talent is the so-called cabinet of business men under Chancellor Cuno, formerly Director of the Hamburg-American Line, and being without party

[4] As demonstrated by the fall of the Luther Cabinet in consequence of the flag incident (Osnabrücker Zeitung, 1926, May 12 ff.).

affiliation.[5] The Constitution does demand, however, that non-parliamentary as well as the parliamentary appointees prove themselves in the possession of the Reichstag's confidence when they assume the functions of government.

The National President does not in his official capacity form part of or control the Cabinet. On this subject the Constitution definitely states in Article 52 that "the National Cabinet consists of the National Chancellor and the National Ministers," and with equal precision in Article 55 that "the National Chancellor presides over the National Cabinet and conducts its affairs in accordance with the rules of procedure, which will be framed by the National Cabinet and approved by the National President." Officially the President's influence upon the Cabinet is limited to the minor item of approving the rules of procedure, though in practice, of course, a strong President will always exercise a considerable power upon the deliberations and decisions of Chancellor and Cabinet, especially when, as has been the case in the earlier years of the Republic, the Government is faced by decisions affecting the public order and the existence or non-existence of the Reich from the point of view of external relations.

According to the Rules of Procedure (*Geschäftsordnung der Reichsregierung*) adopted on May 3, 1924, the Chancellor as chairman of the National Government (Reichsregierung) conducts the business of the National Government. . . .[6] At the suggestion of the Chancellor the National President may designate one of the National Ministers to act as his representative. The extent of this representation is determined by the Chancellor.[7] The

[5] Poetzsch, Vom Staatsleben . . ., p. 167.

[6] Geschäftsordnung für die Reichsregierung vom 3. Mai, 1924 (Poetzsch, Vom Staatsleben . . ., pp. 174-178), Art. 6.

[7] Art. 7.

National Chancellor presides at the meetings of the Cabinet, or the Regierung, as the Rules state. In the absence of the Chancellor the representing Minister takes the chair, in case of his unavailability the meeting is conducted by a Minister designated either by the Chancellor or by his regular representative, or failing such designation, by one chosen on the basis of seniority in continuous service.[8] Attendance at the Cabinet meeting is enlarged by the regular presence of the Director of the Bureau of the President, the Chief of the National Press Bureau, and the recording Secretary (*Schriftführer*). The National Chancellor may restrict the meeting to National Ministers.[9] Thus neither the National Constitution nor the Rules of Cabinet Procedure either grants or denies the National President the right of official attendance at the Cabinet meetings. According to Article 4 of the Rules, "the *Reichspräsident* is to be kept currently informed about the policy of the National Chancellor and the conduct of business on the part of the individual Ministers by the transmission of essential documents, by written reports concerning affairs of special importance, and in case of need by personal address." Nevertheless, the enormity of the responsibility involved in the decisions to be reached by the Cabinet has on various occasions been such that the Chancellor has resorted to the direct method of securing the President's advice and approval during the Cabinet meeting rather than obtaining the same before or after the meeting. Thus the practice of holding Cabinet meetings in the presence of the President has been established at least on occasions when decisions of vital importance to the Reich had to be reached. As a matter of fact, the Presi-

[8] Art. 29.
[9] Art. 30.

dent may on such occasions even assume leadership or preside if he desires, but he may not vote. The question of this right of the President and of the Chancellor's position and attitude was discussed in a masterly fashion by National Minister of the Interior Preuss, during the debates in the *Verfassungsausschuss*. Taking up first various inquiries with regard to the President's right to request information from the ministerial heads of the Government departments, Preuss said:

I am in the position to state that actual practice has also in this respect already been established inasmuch as the President in office has already requested such information, and it is clear that this will continue to be done to the extent dictated by the conditions of public affairs. I think that without a specific provision of the Constitution the broad relation of the National President to the Government called by him predicates the right of the President to be kept informed by the Ministers concerning the conduct of Government affairs. . . .

With regard to the question whether the President has the right to membership and seat in the Cabinet or Government, he continued:

Has the President a seat in the *Ministerium*? Certainly not in the sense of having the right to vote, but without doubt, in the sense that he can assume the chairmanship, just as it was done without special legislative provision in the old Crown Council. Actual practice has been established in this respect in so far as President Ebert has already presided in important meetings of the Cabinet. This practice will always be recognized in case of important matters especially of those pertaining to foreign policy. I do not consider it necessary to insert a provision to that effect in the Constitution. In my opinion it goes without saying that the President may at any time appear in the Cabinet and that on such an occasion he

may preside. It is equally clear that he cannot participate in the vote. . . .

Coming finally to the more general question of the relation of President and Chancellor he concluded:

This answers also the question of the subordination of the Chancellor. This whole matter must not be considered from too formalistic an aspect. The relation of subordination, i. e. the relation of superior and subordinate does not, of course, apply here; the relations of President and Chancellor must be guided by a sense of political and personal tact. The National President is the supreme organ of the Reich; the Ministers are his nearest counselors without whom he cannot act politically. Their relation depends upon mutual consideration, upon mutual yielding. The President is not a superior officer in the sense that he can give commands to Chancellor or Ministers. Chancellor and Ministers are politically responsible and do no act in consequence of orders, but according to their political conviction and political responsibility. But aside from these considerations the President will be accorded the place of honor, and there will be no questioning of the fact that this position is due him as the supreme organ. He must, of course, possess the personal insight not to tax the ministers by commands which they cannot and should not fulfill. But this should not be set down in juristic form.[10]

The question of the President's decision to accept or to refuse the resignation of Chancellor and Cabinet or individual Ministers is one to be considered below in connection with the executive's relation to the legislature. What concerns us here is the fact that his acceptance of the resignation tendered is not equivalent to immediate release from office. His acceptance merely establishes an

[10] Verf. Ber. und Prot., pp. 237-238.

intermediate status according to which the resigning Cabinet or Minister continues the conduct of the Government's business until the successors in office have been appointed. In that case the Cabinet is said to function as "geschäftsführende Regierung." [11]

The significance of this rather cautious method will become clear if we take into consideration that in countries like Germany, afflicted with a hopeless multitude of political opinions and parties, the intermediate status may be at times a rather protracted one. Let us consider a concrete case. On December 5, 1925, the Luther Cabinet, returning from London where it had affixed the Reich's signature to the Locarno pacts, tendered its resignation. Accepting their resignation the President requested the Chancellor and his Ministers to continue in office until a new government could be formed. The resignation had become necessary on account of the withdrawal of the Nationalist membership from the existing coalition and of their Ministers from the Cabinet. Within three days the President received the leaders of the political factions, with the exception of the "Deutschvölkischen" and Communists, with a view to securing their consent to the formation of a Cabinet of the *Grosse Coalition*. This coalition was to include all parties with the exception of the German Nationalists (*Deutschnationalen*) and the two mentioned above as having failed to attend the meeting with the President. As no definite agreement could be reached at the time nor in the days following, President Hindenburg appointed on December 14 the former Minister of the Interior and Vice Chancellor Koch, a member of the Democratic party, to form a government. On the preceding day President Hindenburg had approached Herr

[11] Poetzsch, Vom Staatsleben . . ., p. 173.

Fehrenbach, member of the Center party and former Chancellor, with a request to the same effect. For personal and party reasons Fehrenbach had declared his inability to comply. On December 17 Vice Chancellor Koch reported to the President his failure to form a government on the basis of the proposed coalition. The Christmas and New Year holidays were allowed to pass. On January 8, 1926, immediately after Chancellor Luther's return from Switzerland, President Hindenburg discussed the formation of a government with Herr Luther and afterwards with the rest of the Cabinet Ministers. Another week passed before the President found it possible to extend the definite request for the formation of a government without the Nationalists and Socialists. The request was extended to Dr. Luther on January 13 and was accepted on the same day. One more week passed without result until finally on January 19 President Hindenburg found it necessary to confront the leaders of the parties concerned with the demand for immediate action. At a conference with the leaders of the middle parties the President said:

. . . I have called you in order to tell you that in my opinion a government must now be formed. The withdrawal of the German National People's party has taken the ground from under the former majority government. The devoted and worthy attempts of Herr Koch to establish another majority government in the form of the great coalition were unsuccessful. There remains the less effective but still quite passable solution of a government of the middle. If this attempt should fail, the German fatherland would be confronted by a situation of the greatest seriousness, inasmuch as the very thought of the formation of any other government offers the gravest objections. . . .

. . . Unfortunately it has not been possible to overcome the difficulties encountered. But the condition of the country can-

not stand any further delay. What would follow if last week's attempt to form a government of the middle would completely fail cannot be forseen. Under these circumstances I have considered it my duty to ask Chancellor Luther to lay before . . . the parties concerned a plan for a final decision on the subject of ministerial nominations.

The list [of names] has just been given to you. It is clear that the Chancellor could not consider all opinions or fulfill all legitimate wishes. But we know that there is no other way to overcome this crisis. . . . I beg of you to announce your final attitude to [the Chancellor's] proposals this evening. . . .[12]

Thus six weeks and a half had elapsed between the official tender of resignation by the Cabinet and the formation of a new Ministry, and for six weeks and a half the resigning Ministry had to continue in the performance of the functions of government.

Under the terms of the oath of office taken by the President before the National Assembly, he acts in a general way as the guardian of the Constitution and of the laws of the Reich.[13] This guardianship implies not only the negative duty of preventing legislation which is formally unconstitutional or which is incompatible with the interest of the Reich, but also the positive duty of aiding the execution of National law. In the case of this positive duty the President's guardianship is shared by the Chancellor and by the Ministers of the Cabinet. For though Article 70 assigns to the President the right and duty of compiling and promulgating the laws constitutionally enacted, the actual supervision over the execution of these laws by agencies of the Reich or the Länder concerned is assigned exclusively to the National Cabinet by the provisions of

[12] Osnabrücker Zeitung, Dec. 6, 9, 14, 1925; Jan. 20, 1926.
[13] National Republican Constitution of 1919, Art. 42.

Article 15, Section 1 of which states that "the National Cabinet supervises the conduct of affairs over which the Reich has the right of legislation" and Sections 2-3 of which provide for the methods of such supervision. To the President is given the right to enforce National law against any agency offering resistance to the supervisory action of the National Cabinet, or refusing to accept the decision of a National Supreme Court in the case of controversies arising from the supervisory control of the National Cabinet.[14] The following enumerated powers are assigned by the Constitution to the supreme executive: "The National President represents the Reich in matters of international law. He concludes in the name of the Reich alliances and other treaties with foreign powers. He accredits and receives ambassadors. . . ." [15] He "appoints and dismisses the civil and military officers of the Reich if not otherwise provided by law. . . ." [16] He "has supreme command over all the armed forces of the Reich." [17] In Article 48 he is given the power of enforcing the National will against recalcitrant States and of temporarily suspending within the Reich or any part of it certain fundamental rights granted by the Constitution. Article 49 gives him the right of pardon for the Reich "with the exception of National amnesties" which "require a National law." But Article 50 states that "all orders and directions of the National President, including those concerning the armed forces, require for their validity the countersignature of the National Chancellor or of the appropriate National Minister"

[14] Articles 13, 15, 19, 48.

[15] Art. 45, Sect. 3: "Alliances and treaties with foreign States, relating to subjects within the legislative competency of the Reich, require the consent of the Reichstag."

[16] Art. 46.

[17] Art. 47.

who by their countersignature assume responsibility for the acts of the President to the Reichstag.

Reichstag and Bundesrat under the Monarchy. As everywhere, the division of the National legislature into two houses must in principle be construed as an attempt to place each in the position of an active check upon the other. But to arrive at the real meaning of the provisions regulating the relative positions of Reichstag and Reichsrat we must consider the rôle which the Bundesrat played in the Government of the North German Confederation and of the Empire of 1871.

In the first place, the members of the Bundesrat were, at least at the time of its creation and for some decades to follow, considered to be the representatives of the princes as the personal and sovereign rulers of the States forming the Empire. During this earlier period the princes were considered as sovereign rulers in the sense that they were not only the nominal bearers (*Träger*) but the actual possessors of Sovereignty. According to this view the members of the Bundesrat were held to be the personal representatives of the personal Sovereigns, the ruling princes of the States. Under the later juristic interpretation of the State the princes were no longer looked upon as the Sovereigns in the sense that they possessed Sovereignty. They merely exercised the Sovereignty belonging to the State or States, but they exercised this Sovereignty in their own right as the hereditary rulers or executive heads of the States. Under this construction the members of the Bundesrat were the representatives of the sovereign States, but they were still considered to be instructed emissaries of the princes as the hereditary rulers of the States. Thus, even within the juristic interpretation of the State, the Bundesrat still remained the official

and actual bulwark of the dynastic system and of hereditary monarchical government. Even under this construction the Bundesrat was, together with the Emperor, construed to be the representative of the Sovereign, this Sovereign being conceived as the totality of the Sovereignties of the States.[18] From this it follows that the Bundesrat was not an upper house in the strict interpretation of the term. That the Bundesrat was not intended and considered to be an upper house was clearly stated by Bismarck during the debates on the proposed constitution for the North German Confederation. Criticizing the proposal to establish a real upper house in addition to Reichstag and Bundesrat Bismarck stated that he considered it very difficult to conceive of an upper house to be placed between the Reichstag and the proposed Bundesrat whose existence, as he emphasized, was absolutely essential. Defining the position and character of the Bundesrat he said: "The Bundesrat represents up to a certain degree an upper house, in which His Majesty of Prussia is *primus inter pares* and in which those remnants of the high German nobility who have retained their Sovereignty find a place. But to complete this upper house by the inclusion of non-sovereign members, I consider from a practical point of view too difficult even to attempt. To lower the status of the members of this upper house, its President of course accepted, to the extent of making it like a House of Peers, which can be supplemented from below, I consider impossible. . . ." [19]

In the second place, the Bundesrat exercised a considerable degree of supremacy over the Reichstag in the field

[18] See Anschütz, p. 123; Seydel, I, p. 202; Laband, I, p. 233; and other authorities cited by Arndt, Verfassung des Deutschen Reichs, 1907, p. 111.

[19] Cited by Arndt, *ibid.*, p. 131.

of legislation. According to Article 5 of the Imperial Constitution, the legislative competency of the Empire was exercised by the Bundesrat and the Reichstag, and a majority of the votes of both bodies was necessary and sufficient for the passage of a law. But this apparent equality in the sharing of the National legislation by Reichstag and Bundesrat provided in Article 5 pertained only to the material aspect of legislation. On the formal side the Bundesrat held a position of distinct superiority over the Reichstag. For the actual participation of the Reichsrat in the act of legislation took the form of the sanctioning of, or the refusal to sanction, a law to be enacted or already passed by the Reichstag. This follows from the juristic interpretation of Article 7, Section 1, which stated that the Bundesrat was to take action upon the measures to be proposed to the Reichstag and the decisions reached by the same. As a matter of fact, however, the Bundesrat, transmitting all legislation to the National Chancellor for promulgation by the Emperor, could, by refusing to transmit an act passed by the Reichstag, withhold its sanction apparently without a formal vote defeating the law in question.[20] This supremacy of the Bundesrat over the Reichstag manifested itself also in the case of constitutional amendments inasmuch as Article 78, Section 1, provided that the Reichsrat, by a vote of 14 out of 58, could reject such an amendment passed in the Reichstag by the simple majority vote required by Article 5.

In the third place, there was the participation of the Bundesrat in the administrative or executive functions which manifested itself mainly (1) in its right to issue administrative ordinances and in making arrangements for the execution of National law as far as such a right

[20] *Ibid.*, p. 126.

did not rest with the Emperor,[21] (2) in taking action for the correction of defects in the execution of such legislation,[22] (3) in the advisory activities of its standing committees corresponding to the various branches of the National administrative service.[23]

As a court of arbitration the Bundesrat had the right and authority to decide controversies of a public law nature between States[24] and controversies relating to constitutional matters arising within a State in which there was no authority competent to act in such cases.[25]

As a fourth consideration there remains the fact that the Bundesrat as constituted under the Empire gave to Prussia a decided position of preponderance over the other States in the Union. Thus Prussia singly could by an adverse attitude prevent the sanction of legislation by the Bundesrat "with respect to laws concerning the army, or navy, or the taxes specified in Article 35 . . . if such vote of the *Praesidium*, i. e. of Prussia, be in favor of the maintenance of existing arrangements."[26] Again Prussia alone could by a negative vote frustrate the passage of a constitutional amendment under the provision of Article 78, Section 1, which stated that amendments to the Constitution were to be made by legislative enactment and that they should be considered as rejected when fourteen votes were cast against them in the Bundesrat. Of the 58 votes of the Bundesrat, Prussia alone controlled 17, i. e. three more than required to frustrate an amendment.

[21] Constitution of 1871, Art. 7, Sect. 2; Articles 17-18. The power of the Bundesrat to issue ordinances of a legislative character (*Rechtsverordnungen*) is considered in chapter XI, section: The Ordinance Power under the Constitution of the Empire.

[22] Art. 17, Sect. 3.

[23] Art. 8, Sect. 3. See also Dambitsch, pp. 255-256.

[24] Art. 76.

[25] *Ibid.*

[26] Art. 19, Sect. 2.

Reichstag and Reichsrat under the Republic. Coming now to the consideration of the relations of Reichstag and Reichsrat under the Republican Constitution we find that the Reichsrat, like its predecessor, the Bundesrat, is not a real upper house, i. e. a body to which the members representing their respective States, social class, or whatever it be, are as to the lower house elected or chosen for a definite period, but it is a body whose members represent a particular Government then in power in the States represented by them and only for the time during which such Government remains in power. The second Preuss draft of the National Constitution provided for the creation of a "Staatenhaus" arranged on the basis of an upper house.[27] Its membership was to consist of representatives of the Länder, to be elected by the State legislatures and to be free from instructions. To this the objection was raised by the critics of the draft that the proposed house would not be representative of the Länder but of the political parties, and that it was to be nothing but a miniature copy of the Reichstag.[28] Under pressure from the *Staatenausschuss* the second Government draft submitted to the National Assembly returned to a type of a Reichsrat more like the old Bundesrat as far as its composition was concerned. As finally accepted by the Assembly the National Constitution provides for a membership of the Reichsrat confined to representatives of the States or rather of the State Governments. "The Länder," says Article 63, Section 1, "will be represented in the Reichsrat by members of their Governments. . . ." Only in the case of Prussia was an exception made. For purely political reasons half of the Prussian votes were assigned to pro-

[27] Paragraphs 30, 32-39 (Triepel, Quellensammlung . . ., pp. 13-14).
[28] Hatschek, I, p. 703.

vincial representation.[29] Thus with the exception of the representatives of the Prussian provinces, the members of the Reichsrat are appointed and instructed by the State Governments. They depend for their continued membership in the Reichsrat upon the continuance in office of the Governments which they represent. In turn the tenure of office of these Governments depends upon the confidence of their respective legislatures. It is for this reason that the Reichsrat is at least formally qualified to constitute a basic element of democratic control in the affairs of the National Government.

It was natural that the anti-monarchical forces, bent upon the establishment of a strong lower house for the realization of the idea of popular Sovereignty as the source of all governmental power, should demand a correspondingly weak upper house, if we may apply that term to the Reichsrat. Hence all features of the former supremacy of the Bundesrat had to disappear in the make-up of the National Council. In fact, the demand that the Reichstag be given the position of supremacy in legislation was at least formally embodied in the provisions of the Constitution, and technically the Reichsrat shares in National legislation only in a negative way. According to Article 68, "bills are introduced by the National Cabinet or by members of the Reichstag" and "National laws are enacted by the Reichstag." To this Article 74 adds: "The Reichsrat has the right to object to laws passed by the Reichstag. The objection must be filed with the National Cabinet within two weeks after the final vote in the Reichstag and must be supported by reasons within two more weeks at the latest." The same article then states that: "When the Reichsrat objects to a law passed by the Reichs-

[29] National Constitution of 1919, Art. 63; see also note 48 and cor-

tag, the law is returned to the latter for reconsideration. If Reichstag and Reichsrat do not come to an agreement, the National President may, within three months, refer the law to a popular referendum. If the President fails to make use of this right, the law does not go into effect. If [in the reconsideration of a law objected to by the Reichsrat] the Reichstag reenacts the law by a two-thirds majority, the law must be promulgated by the President within three months or be referred to a referendum." In other words, a two-thirds vote in the Reichstag can in this instance practically override the objection of the Reichsrat.

A similar supremacy of the Reichstag has been established in the case of constitutional amendments. Under the provisions of Article 76, the Constitution may be amended by the process of legislation. But "decisions (*Beschlüsse*) of the Reichstag relating to the amendment of the Constitution are effective only if two-thirds of the legal membership are present, and at least two-thirds of those present give their assent. . . ." While the presence of two-thirds of the legal membership is demanded for the Reichstag, the same article, referring to the decision of the Reichsrat, merely says that ". . . decisions of the Reichsrat for the amendment of the Constitution (*Beschlüsse . . . auf Abänderung der Verfassung*) require a two-thirds majority of all votes cast." A comparison of this provision with the corresponding clause of Article 74, giving the Reichsrat the right of disapproval of ordinary legislation, may lead to the conclusion that the Reichsrat's participation in the enactment of constitutional amendments is an act of parallel legislation. But this conclusion is challenged by the following facts: Article 26 of the draft under discussion in the *Verfassungsausschuss* (Article 74 of the Constitution) as accepted in the first reading stipulated

that: "The Reichsrat has the right of disapproval of legislation enacted by the Reichstag. For the disapproval of constitutional amendments it suffices that more than one-third of the votes cast in the Reichsrat be registered for disapproval." The second clause of this provision was later attached to Article 54 (76 of the Constitution). It was finally eliminated because it was held superfluous.[30]

The meaning of Article 76, then, as far as it concerns us here, is that a two-thirds majority of all votes cast is required for decisions of the Reichsrat favoring the initiation and approving the enactment of a constitutional amendment by the Reichstag; and that a majority of more than one-third of all votes cast is required for a decision of disapproval of such enactment. In its restriction to the right of disapproval, this interpretation must be applied also to the clause of Article 76 which states that: "If the Reichstag adopts an amendment to the Constitution against the objection of the Reichsrat, the President must not promulgate this law, if the Reichsrat within two weeks demands a popular vote." The demand for a popular vote being construed as a second and last expression of disapproval of the amendment, a majority of more than one-third of the votes cast is required to uphold the objection in the form of the request for a popular vote.[31]

Though the right to introduce bills in the Reichstag is limited to individual or several members of the Reichstag and to the Reichsregierung, i. e. to the whole Cabinet, not the President or an individual Minister, the Reichsrat is nevertheless not entirely deprived of the initiative in legis-

[30] Verf. Ber. und Prot., pp. 158, 166, 453, 458.

[31] On this point see Anschütz, pp. 136-138, who gives the opinions agreeing and disagreeing with this reasoning. See also Hatschek, II, p. 17.

lation. Section 2 of Article 69 stipulates that "when the Reichsrat votes (*beschliesst*) in favor of a bill to which the National Cabinet does not assent, the latter must introduce the bill in the Reichstag together with a statement of its attitude." The vote in favor of such a bill by the Reichsrat here spoken of is, of course, one preceding the introduction of the bill in question in the Reichstag. In other words, the vote of the Reichsrat upon such a bill is real, though indirect, initiation of legislation. Rarely, however, does the Reichsrat actually vote upon a bill in this sense. As a rule, the Reichsrat confines itself to a motion requesting the Cabinet to introduce into the Reichstag the kind of legislation favored. This indirect method of initiating legislation has been resorted to exclusively in the case of the issuance of legislative ordinances.[82] The so-called laws for the simplified form of legislation of August 3, 1920, February 6, 1921, February 24, 1923, October 13, 1923, December 8, 1923, authorized the National Government to legislate by way of such ordinances for the time specified in these laws. With the exception of the last two all of these laws provided that the legislation by Cabinet orders authorized under these laws required the consent of the Reichsrat. The law of October 13, 1923, did not call for this assent but merely stated that prior to the enactment of these legislative ordinances the Reichsrat should be heard. The ordinances issued were to be immediately brought to the knowledge of both houses, but only the Reichstag had the right to demand their repeal. The law of December 8, 1923, confined the participation of the Reichsrat to the consultation of a committee of that body, but it gave to both the Reichstag and the Reichsrat

[82] See Poetzsch, Vom Staatsleben . . ., p. 199 ff. On the subject of legislative ordinances see chapter XI.

the right to request the repeal of the ordinances passed under the terms of the law.[33]

It must be remembered, however, that the laws establishing the simplified form of legislation were enacted only for a very limited period of exceptional National strain and stress, and that the participation of the Reichsrat in this kind of legislation was accordingly of a temporary nature. There is, nevertheless, another kind of ordinances which requires the consent of the Reichsrat as a regular practice. Article 77 states that "the National Cabinet issues the general administrative regulations necessary for the execution of the National laws so far as the laws do not otherwise provide. It must secure the assent of the Reichsrat if the execution of the National laws is assigned to the State authorities." According to the terms of this article the National laws in question may provide otherwise, i. e. they may authorize the National Government to proceed without the consent of the Reichsrat where the execution of the National laws in question is not assigned to the State authorities. But this is the exception to the rule. On the other hand, these administrative regulations required for the execution of National law frequently are legislative ordinances, i. e. ordinances directed not only to civil service officialdom but to the citizenry and partaking of the character of actual legislation with the limitation that they must remain within the original meaning and intent of the law whose general provisions they are intended to supplement or explain in detail.[34] Such legislative ordinances, however, cannot be issued by the Government without specific authorization by the Reichstag. In order to avoid the difficulty involved in the question

[33] Poetzsch, *ibid.* On the subject of simplified or Cabinet legislation see chapter XI.

[34] See chapter XI.

whether a particular ordinance is of a purely administrative character or partakes of the nature of the legislative ordinance, the Reichstag has established the rather general practice of including in the laws enacted a provision for the issuance by the National Cabinet, with the consent of the Reichsrat if need be, of the ordinances required for the execution of such laws.[35] In some instances the Cabinet has been authorized to change the terms of a legislative ordinance formerly established in agreement with the Reichsrat. Such was the case with regard to the toll fees charged for passage through the Kiel Kanal (Kaiser Wilhelm Kanal). In this instance the Cabinet was, however, held to submit the change made to the Reichsrat and to repeal the change if so directed by the latter.[36]

Finally the Reichsrat alone has been authorized by National law to issue legislative ordinances of the kind here under discussion. This has taken place in connection with certain phases of finance and taxation as far as they affect the mutual interests of the Reich and the States, such as the regulation of the road, amusement, luxury, and liquor monopoly taxes.[37]

As stated above, Article 69, Section 2, provides that "if the Reichsrat resolves upon a bill to which the National Cabinet does not assent, the latter must introduce the bill in the Reichstag with a statement of its attitude." Article 74 stipulates that: "The Reichsrat has the right to object to laws passed by the Reichstag. . . . In the case of objection, the law is returned to the Reichstag for reconsideration. If an agreement between Reichstag and Reichsrat is not reached, the National President may within three

[35] Poetzsch, Vom Staatsleben . . ., p. 200.

[36] Ordinance of March 28, 1924 (*Ibid.*)

[37] *Finanzausgleichgesetz* of June 23, 1923, Articles 12, 13, 16 (Poetzsch, Vom Staatsleben . . ., p. 200).

months refer the subject of dispute to the people. If the President makes no use of this right, the law does not go into effect. If the Reichstag disapproves by a two-thirds majority the objection of the Reichsrat, the President shall promulgate the law in the form enacted by the Reichstag within three months or refer it to the people." The Constitution nowhere provides for the right of the Reichsrat to be represented by committee or by individual members in the Reichstag's deliberations of such contested legislation. It is true, Article 33, Section 2, states that ". . . the Länder are entitled to send their plenipotentiaries to these sittings to submit the views of their Cabinets on matters under consideration." Section 3 continues that "at their request the representatives of the Cabinets shall be heard during the deliberations." It is also true that the logical representatives whom the State Cabinets would send to these deliberations are their instructed representatives constituting the membership of the Reichsrat. But the right to present the State Cabinet's views to the Reichstag accorded in Article 33 is one granted to members of the Reichsrat chosen for that purpose as representing the wishes of their respective State Cabinets and not the majority opinion of the Reichsrat. Nevertheless, the majority of the Reichsrat has in a number of cases actually requested the appointment of a member of the majority for the purpose of presenting its views to the Reichstag. The individual chosen for this task was appointed by the particular State whom he represented in the Reichsrat. This appointment, however, was made under the stipulations of Article 33, i. e. he was nominally directed to represent the views of the Cabinet of his State. Being admitted to the Reichstag under the stipulations of this appointment in accordance with Section 2 of Article 33, he proceeded to request permission to state to the

Reichstag the majority opinion of the Reichsrat on the subject in question.[38] This practice has been given legal validity in Articles 96 and 97 of the Rules of Procedure for the Reichstag.[39]

The Republican Reichsrat still shares in the administrative activities of the National Government. Article 60 of the National Republican Constitution specifically states that "a Reichsrat will be organized to represent the German Länder in National legislation and administration." The retention of this participation in the administration was, however, more of a concession to the Länder than an attempt to affect the relations of the two houses of the legislature. The main activity of the Reichsrat in the field of administration lies in the functions of its standing committees corresponding to the various administrative departments or activities of the National Government. According to Article 67 "the Reichsrat shall be kept informed by the National Departments of the conduct of the National business affairs. At deliberations on important subjects the appropriate committees of the Reichsrat shall be invited (*zugezogen*) by the National Departments."

The administrative supervision over the execution of National law by the State authorities formerly exercised by the Bundesrat has not been assigned to the Reichsrat, but to the National Cabinet. This apparently is a *quid pro quo* for the Reichsrat's right of supervision of the National administrative departments. The right given by Article 33, Section 2, to members of the Reichsrat, of representing their respective States in the Reichstag without a corresponding privilege on the part of the Reichstag is clearly a concession to the Länder rather than an attempt

[38] Two instances of this kind are cited by Poetzsch, *ibid.*, pp. 197-198.
[39] *Ibid.*

to establish an element of superiority of the Reichsrat over the Reichstag.

As the successor of the Bundesrat as well as in accordance with recent legislation the Reichsrat partakes of the National administration in numerous specific ways. Thus the Reichsrat passes upon the right of foreign associations or foundations to sue in German courts. The Reichsrat decides which securities are suitable as investments for minors. The Reichsrat may grant pensions to Civil Service employees in advance of the time of service required by the Civil Service Law. Other rather technical functions are assigned to the Reichsrat under the terms of the National laws regulating the administration of National customs, finances, taxation, monopolies, etc.[40] Indirectly the Reichsrat takes part in the National administration by requests directed to the National Cabinet for the undertaking of steps of an administrative character.[41]

The judicial functions formerly exercised by the Bundesrat in its capacity as arbiter in public law controversies arising in or between the States have been assigned to the National Supreme Courts of the Republic. The only judicial activity which the Reichsrat performs are such as may be assigned to it by special legislative provisions.[42] Thus the Reichsrat, acting as the successor of the Bundesrat, decides as a last instance under the terms of the Mortgage Law of July 13, 1899, and of the Citizenship Law of July 22, 1913. As stated in another connection, the Reichsrat decides under the terms of the *Finanzausgleichgesetz* of June 23, 1923, whether State or communal taxes are apt to impair the levying of National taxes and

[40] A detailed account of these administrative functions of the Reichsrat is found in Poetzsch, *ibid.*, p. 200 ff.

[41] Poetzsch, *ibid.*

[42] Hatschek, I, pp. 726-727.

whether preponderant interests of the National finances are opposed to the collection of such State and communal taxes. According to the stipulations of the same law the Reichsrat renders a decision in case of differences of opinion between the National Minister of Finance and the State authorities regarding the formulation of new State tax regulations.[43] Similar functions are assigned to the Reichsrat under the terms of the *Reichsabgabenordnung*, the Liquor Monopoly Law, the Domestic Labor Law, and other similar legislation.[44]

As the successor of the Bundesrat and under the stipulation of recent National legislation the Reichsrat has the right to appoint, nominate, and propose National civil officers, members of National commissions and administrative courts.[45]

The former predominance of Prussia in the Bundesrat has been made impossible in the Reichsrat. The number of votes which each State has still depends upon its size and importance as measured by its population. Each State has at least one vote, the larger ones having one vote for each 700,000 inhabitants and one additional vote for any excess above 350,000.[46] Thus the total membership of the Reichsrat and the respective number of votes of each State are not as static as they were in the Bundesrat because an adjustment of the number of votes must take place in accordance with each new census.

In order to prevent the control of the Reichsrat by any one State the Constitution originally provided that in the

[43] See chapter VI, note 27 and corresponding text.

[44] Poetzsch, Vom Staatsleben . . ., p. 202.

[45] *Ibid.*, p. 202 ff.

[46] By amendment of Article 61 originally giving an additional vote for each full million and one for any excess if such equalled the total number of the inhabitants of the smallest State (See chapter V, note 60 and corresponding text).

case of the larger States one vote was accorded for every million inhabitants, that any excess equal at least to the population of the smallest State was to be reckoned as equivalent to a full million, and that no one State should command more than two-fifths of the total votes of the entire Reichsrat. At that time there were still twenty-four Länder with a total of 63 votes. According to this early status the division of the votes was as follows: Prussia 25, Bavaria 7, Saxony 5, Württemberg 3, Baden 3, Hessen 2, all other States one each. By the subsequent amalgamation of the Thuringian States and the accession of Coburg to Bavaria, the number of States was reduced to eighteen and that of the votes to 55, with the following division of votes dating from May 1, 1920: Prussia 22, Bavaria 7, Saxony 5, Württemberg 3, Baden 3, Thuringia 2, Hessen 2, and the rest one each.

By a constitutional amendment of March 24, 1921, the provision of Article 61 was changed to the effect that each one of the larger States was to have one vote for every 700,000 inhabitants, that an excess of 350,000 was to be held equivalent to 700,000 and that as heretofore no State was to have more than two-fifths of the total votes. Applying the provision of the amended Article 61 to the result of the census of October 8, 1919, we come to the following division of votes:

States	*Population*	*Votes*	*Total*
Prussia	37,726,918	2/5 of total	26
Bavaria	7,140,333	10 + 0	10
Saxony	4,663,298	6 + 1	7
Württemberg	2,518,773	3 + 1	4
Baden	2,208,503	3 + 0	3
Thüringen	1,508,025	2 + 0	2
Hessen	1,290,988	1 + 1	2
Hamburg	1,050,359	1 + 1	2

States	*Population*	*Votes*	*Total*
Mecklenburg-Schwerin ...	658,943		1
Oldenburg	517,765		1
Braunschweig	480,599		1
Anhalt	331,258		1
Bremen	311,266		1
Lippe	154,318		1
Lübeck	120,568		1
Mecklenburg-Strelitz	106,394		1
Waldeck	66,432		1
Schaumburg-Lippe	46,357		1
Total.....	60,900,197		66 [47]

A further successful attempt to reduce Prussia's strength still more is found in the division of her votes, half to remain representative of the State, the other half to be assigned to represent her thirteen provinces. The result of this move has been, and will continue to be, that the votes held by the provinces have been and will be cast against those representing Prussia as a State unit whenever the interests of these provinces do not coincide with the general policy of the Prussian State.

This change was effected by the same National constitutional amendment of March 24, 1921, and by the Prussian State Law of July 3 of the same year. According to the provision of the latter the representatives of the Prussian provinces are to be chosen by the Provincial Committees elected by the Provincial Diets (*Provinziallandtage*) and for the City of Berlin by the magistracy. In consequence of every election of a new Provincial Committee new provincial representatives to the Reichsrat are to be elected. In the plenary meetings of the Reichsrat everyone of these

[47] Poetzsch, *ibid.*, p. 195 ff.

representatives enjoys his individual and free vote, "but the subjects on the *agenda* are to be discussed in advance in general meeting with a view to a unanimous vote of the appointed and elected members," i. e. the members representing the State, and those representing the provinces of Prussia.[48]

Executive and Legislature. In the consideration of the system of checks and of balances established to govern the relations of the executive and legislative departments, i. e. the National President and Cabinet on the one side, and the Reichstag on the other, we must take into account the division of powers between President and Cabinet as demonstrated in the first section of this chapter and must study separately the position of each in relation to the Reichstag.

The most important fact concerning the office of the President and the position of the Reichstag is that both are elected by the popular vote of the National electorate and that thus in principle both are independent of each other. According to Article 41 "the National President is chosen by the whole German people. Every German who has completed his thirty-fifth year is eligible for election. The details will be regulated by National law." [49]

President Ebert was unanimously elected by the National Assembly to function as provisional President under the Provisional Constitution of February 10, 1919. When the National Constitution was promulgated, the National

[48] For text of law see Poetzsch, *ibid.*, pp. 196-197.

[49] In the early part of 1920 an attempt was made and considered in Government circles of changing this election to one by the Reichstag. Strangely enough, this move was supported by the Socialist paper *Vorwärts*. The opposition of the Center party was largely responsible for the abandonment of the proposal (Poetzsch, *ibid.*, p. 132).

Assembly had not yet passed the proposed law which was to regulate the details for the election of the President. So it provided in the section of the Constitution containing the transitional provisions that: "Until the convening of the first Reichstag, the National Constituent Assembly will function as the Reichstag. Until the inauguration of the first National President the office will be filled by the National President elected by authority of the law creating the Provisional Government." [50] In May, 1920, the National Constituent Assembly passed the Law regulating the Election of the National President, as called for in Article 41 of the Constitution.[51] According to this law, the presidential candidate receiving more than one-half of all valid votes is elected. In case no such majority is received by any one candidate a second election is to take place in which the candidate receiving the greatest number of the valid votes is considered elected. In case of a tie vote the election is decided by the drawing of lots by the Supervisor of Election (*Reichswahlleiter*). The votes are counted in the election districts by the District Election Committees consisting of the District Supervisors of Election and four associates chosen by them from the electors. The election committees decide by majority vote. The result is to be communicated to the National Supervisor of Elections. The National Election Committee, consisting of the National Election Supervisor and six

[50] President Ebert repeatedly asked that since the remaining part of Upper Silesia was restored to German rule an election of a president by the people should take place. It was realized, however, that the internal political situation was not favorable for such a step. Consequently the President's term of office was fixed by National law to end on June 30, 1925. The Nationalists and Communists were opposed to this arrangement but were out-voted by 314 votes to 76 (Annual Register, 1922, p. 174).

[51] Reichsgesetzblatt, 1920, p. 849.

associates chosen by him from the electors, decides by majority vote and thus determines the result of the election for the Reich. The court created for the examination of the elections to the Reichstag is to examine the result of the election. In case the election is declared invalid a new election is to take place. This applies also to the second election. The President is elected for a term of seven years with the possibility of reelection.[52]

After the enactment of this law regulating the election, President Ebert expressed the personal wish for a presidential election by popular vote. However, internal disorders engendered by the League of Nations' unfavorable Silesia decision and by the crisis following the murder of Herr Rathenau, convinced the President and his friends of the inadvisibility of submitting the country to the agitation of a National presidential election campaign. As a matter of fact, the realization soon gained ground that the limitation of the tenure of office of President Ebert, implied in the transition clause of the Article 180 of the Constitution, would have to be altered. By the Law of October 27, 1922, Article 180 was amended to the effect that the tenure of office of Herr Ebert was to be extended to June 30, 1925. But before that time arrived President Ebert died.

Article 51 of the National Constitution stipulates: "The National President is represented temporarily in case of disability by the National Chancellor. If such disability seems likely to continue for any considerable period, he shall be represented as may be determined by a National law. The same procedure shall be followed in case of a premature vacancy of the presidency until the completion of the new election." The provision of the last sentence is

[52] National Constitution of 1919, Art. 43.

rather unclear. The procedure referred to could hardly be followed in the case of the premature vacancy of the presidency if such a vacancy was caused by death, by removal from office by popular referendum or by decision of the trial court, for in these instances there could be no question of the permanence of the vacancy as in the case of disability referred to in the first sentence of Article 51. What actually happened after President Ebert's death was that the National Chancellor assumed the duties of the presidential office until the Reichstag regulated the successorship. Announcement to this effect was made in the press of March 9 in the following statement:

Until the election of a new National President has taken place the *Präsidium* of the Reich will be assumed by the Chancellor. The election of the new National President will take place on the basis of the Law of March 6, 1924. The balloting will be direct and secret. The day of election is to be established by the Reichstag. It must be a Sunday or a public holiday. As already known March 29 has been chosen. The candidate receiving more than half of the valid votes secures the election. If no majority is obtained a second election is to take place. The candidate receiving the greatest number of valid votes will secure the election in the second voting. According to the National Constitution every German who has completed his thirty-fifth year is eligible.[53]

While the parties supporting the Luther Cabinet were thus content to let the Chancellor conduct the presidential office until the election of the new President, the Socialists and Democrats insisted upon the regulation of the interim successorship by National law on the plea that the first balloting was certain not to result in an election and that in order to follow the spirit of the provision of Article 51

[53] Osnabrücker Zeitung, Mar. 9, 1925.

of the National Constitution, the Reichstag should decide the question of the interim occupancy of the office. Yielding to the parties of the left, the Reichstag on March 10 decided upon "Dr. Simon, Chief Justice of the Reichsgericht as the interim representative (*Stellvertreter*) of the deceased President until the assumption of office by the new President." [54]

Precedent has thus been established for the temporary representation of the President, removed by death, in the following manner: The National Chancellor immediately assumed the *Präsidium* as stipulated in Article 51, Sentence 1. According to the meaning of Sentence 2 the Reichstag, under the influence of political pressure, chose by way of ordinary legislation the Chief Justice of the Reichsgericht to replace the Chancellor as temporary representative of the President until a new President was elected as provided in Sentence 3 of Article 51 of the Constitution.

The dates of the elections having been agreed upon between the Cabinet and the party leaders were accepted by the Reichstag in the law enacted on March 10. The first balloting was to take place on March 29, the second on April 26.[55] The first vote did not result in the election of any one of the seven official candidates.[56] For purely

[54] *Ibid.*, Mar. 6, 10, 11, 1925.

[55] *Ibid.*, Mar. 4, 10, 1925. The National Election Law applicable to presidential elections was amended to read: "In presidential elections the ballots must contain the names . . . of all officials (*zugelassenen*) candidates . . . in alphabetical order. They must further contain a blank space for the insertion by the voter of any other names if he [the voter] does not wish to give his vote to one of the official candidates" (Osnabrücker Zeitung, Mar. 18, 1925).

[56] According to the Berliner Tageblatt, Mar. 30, 1925, the result of the first balloting was as follows:

Braun (Socialist)	7,785,678
Held (Bavarian People's party)	1,002,278
Hellpach (Democrats)	1,565,136

political reasons Herr Jarres withdrew from his candidacy in favor of Hindenburg who after great hesitation consented to enter the presidential race as the only candidate holding any promise of winning the election for the so-called National parties (*Reichsblock*). Of the other six candidates only Marx and Thaelmann remained on the official list. According to the returns of the second election as ratified by the National Election Commission, Hindenburg, receiving 904,151 votes more than his next competitor, was elected. If Thaelmann, the candidate of the Communists, had followed the example of Held, Hellpach, Ludendorff, and Jarres, the second election might well have given the majority to Marx. As it was, Hindenburg was elected by a plurality lacking over half a million of the majority of valid votes cast in the second balloting.[57] As soon as the preliminary returns gave assurance of a successful election, Hindenburg was informed of this fact by the National Election Supervisor and was requested to declare his willingness to accept the presidential appointment. On May 5 the Election Committee confirmed the election from the final count. The election was protested by the Socialists on the ground of irregularities sufficiently large to jeopardize Hindenburg's alleged plurality of 904,151 votes. The protest was overruled by the Election

Jarres (German People's party)	10,387,523
Ludendorff (Extreme Nationalist)	284,471
Marx (Centrist)	3,883,676
Thaelmann (Communist)	1,869,553
Scattered votes	34,152
Total valid votes cast	26,812,537

[57] The official report of the Election Committee gives the following account of the voting: Hindenburg, 14,655,766; Marx, 13,751,615; Thaelmann, 1,931,151; scattered votes, 13,416; entitled to vote, 39,423,655; votes declared invalid, 216,051; total of valid votes, 30,351,948 (Vossische Zeitung, May 5, 1925).

Committee which on May 8 reaffirmed the official result.[58] The new President took the oath of office before the Reichstag on May 12 and entered upon the conduct of the duties of the National Government with the existing Cabinet, thus answering in the negative the question whether a change in the National presidency necessitated *per se* a change in the personnel of the Ministry and the Chancellor's office.[59]

Though the election of the National President by popular vote gives to his office a certain degree of independence, the Constitution grants to the Reichstag the right to employ the same popular vote for the removal of the particular occupant of the presidential office before the end of his term. The proposal of the Reichstag for such removal must be carried by a two-thirds vote. Upon the passage of a motion for removal by popular vote the President is suspended from the exercise of his functions until the proposal of the Reichstag has been decided one way or the other by the National electorate. But the Reichstag proposing the President's removal by a popular vote invites its own dissolution by a popular vote failing to uphold the Reichstag's request, the rejection of the Reichstag's proposal being equivalent to a reelection of the President and entailing the dissolution of the Reichstag. The President is thereby reelected for another full term of seven years and the dissolution of the Reichstag follows without formal decree of the President.[60] On the other hand, the Reichstag may, without incurring the pen-

[58] Osnabrücker Zeitung, April 29, May 6, 7, 9, 1925.

[59] The decision to remain in office was reached as the unanimous opinion of the Cabinet at a meeting which took place on April 28. This opinion was based on the ground that the election of a new President did not under the Constitution require the resignation of the Government (Osnabrücker Zeitung, April 29, 1925).

[60] National Constitution of 1919, Art. 43. See Anschütz, p. 102.

alty of self-effacement, impeach the National President as well as the Chancellor and the National Ministers before the Staatsgerichtshof for any culpable (*schuldbare*) violation of the Constitution or National law. The proposal to impeach must be signed by at least one hundred members of the Reichstag and must be carried by the majority required for a constitutional amendment, i. e. by a two-thirds vote of a quorum consisting of two-thirds of its actual membership.[61]

The relations of the National Cabinet and the Reichstag originate from and extend over the Cabinet's right to introduce legislative bills in the Reichstag, to issue the necessary ordinances for the execution of the laws enacted by the Reichstag, and to supervise the execution of these laws by the agencies appointed for such execution by the National Constitution. The relations between National Cabinet and Reichstag considered from these particular aspects have been and will be dealt with in the present work in the chapters and sections devoted to the specific functions or subjects enumerated. What interests us here is a relation of a more fundamental kind, namely the relation resulting from the stipulation of Article 54 of the National Constitution. As laid down in this article, "the National Chancellor and the National Ministers require for the administration of the affairs of their offices the confidence of the Reichstag. Each of them must resign if the Reichstag by formal resolution withdraws its confidence." The stipulations of this article contain the fundamental idea of parliamentary government, i. e. ministerial responsibility not to the executive, be this emperor, king, or president, but to the legislature. As shown in the closing section of Chapter I, a stipulation similar to Article 54 was grafted upon the old Constitution of the Empire by

[61] Art. 59.

the so-called Reform Acts of October 1918. But the amendment in that case merely stated that the National Chancellor required the confidence of the Reichstag, it did not demand his resignation upon the withdrawal of the Reichstag's confidence. Under the provision of Article 54 of the National Constitution of 1919 the National Chancellor and each one of the Ministers affected by the withdrawal of the confidence of the Reichstag must submit their resignation to the National President, the President in turn being in duty bound to accept these resignations. But as Anschütz correctly remarks in his commentary on Article 54, the Reichstag's withdrawal of confidence must be effected by the formal adoption of a definite resolution to that effect. No rejection of a bill or curtailment of the budget need be considered by the Cabinet as a withdrawal of confidence. According to Anschütz the stipulation of Article 54 implies the inhibition of a unilateral relinquishment of their offices by Chancellor and Ministers. The Reichstag's right to bring about by the withdrawal of its confidence the resignation of individual Cabinet Ministers follows from the provision of Article 56 that "the National Chancellor determines the general course of policy and assumes responsibility therefor to the Reichstag," but that "in accordance with this general policy each National Minister conducts independently the particular affairs intrusted to him and is held individually responsible to the Reichstag." The full meaning of this provision can be realized only if we consider that even under the amendments of the Reform Acts of 1918 the National Ministers of the Empire were to all purposes the creatures and subordinates of the Chancellor who alone was held responsible, until October 1918 to the Emperor, and from October to November 1918 to the Reichstag.

The members of the Reichstag are elected by universal,

direct, and secret vote on the basis of a complicated system of proportional representation embodied in the revision of the Election Law of December 21, 1920.[62] This system is very similar to the methods employed in the elections for the National Constituent Assembly on January 19, 1919, and for the Reichstag on June 6, 1920. Both have been described in some detail in McBain and Rogers, *The New Constitutions of Europe.*[63] Like most modern democratic organizations, the German National Constitution distinguishes between the so-called election period (*Wahl-* or *Legislaturperiode*) and legislative sessions (*Sitzungsperioden* or *Tagungen*). Under the Constitution of the Empire the election period had been three years until 1888[64] and since then five years. The various drafts for the Republican Constitution provided for a three years period which was accepted by the vote of the *Verfassungsausschuss.*[65] In its first two readings the National Assembly voted in favor of a five year period as an indication of its general tendency to strengthen the legislative rather than the executive department, but in the third reading a compromise was effected establishing the four year period.[66] Thus Article 23 of the Republican Constitution provides that "the Reichstag is elected for four years," that "new elections must take place at the latest on the sixtieth day after their [the four years] termination," and that the Reichstag convenes at the latest on the thirtieth day after the election. This constitutional provision definitely establishes the principle generally accepted in the constitutional jurisprudence of the Empire that the normal life of the

[62] Sartorius . . . 1921, pp. 571-598.

[63] McBain and Rogers, pp. 96-102.

[64] Art. 24 of the Constitution 1871 was amended by the National Law of March 19, 1888.

[65] Verf. Ber. und Prot., p. 246 ff.; p. 449.

[66] Heilfron, III, p. 633, 644 ff.; IV, p. 8; V, p. 362 ff.

Reichstag was to be measured not from the date of its first meeting to the date of its closure, but rather from the date of the general election to the last anniversary of the election. Under the Republican Constitution every newly elected Reichstag must meet for the first legislative session not later than on the thirtieth day after its election. The provision that it must meet not later than thirty days after the election implies the right to convene before that date. Article 23 having thus established the extreme date for the first meeting of a newly elected Reichstag, Article 24 proceeds to provide for the date of meeting of its later regular legislative sessions or *Tagungen*. "The Reichstag," so Article 24 reads, "convenes every year on the first Wednesday in November at the seat of the National Government." But the same article continues to state that "the President of the Reichstag must convene that body earlier if the National President or at least one-third of the members of the Reichstag so desire." This last provision contains the right of the Reichstag to decide on its own authority whether it wishes to convene on the latest date set by the Constitution or on a day prior to that date, as well as the corresponding duty of convening on an earlier date if called upon by the President of the Reich or by at least one-third of its own membership. Article 24 finally provides that "the Reichstag determines the close of its legislative session (*Tagung*) and the day of reassembling." This means that the Reichstag decides not only on short recesses, but also upon the closing day of its regular annual legislative sessions and, as the regular date of its reassembly is set for the first Wednesday in November each year, that the Reichstag may in full meeting decide to reconvene before the first Wednesday in November if it so desires.

The authority thus given to the Reichstag of convening

and adjourning in its own, i. e. its constitutional right, is an important departure from the practice of the Monarchy. Under the Constitution of 1871 the Emperor was given the right to "convene the Bundesrat and the Reichstag, and to open, adjourn, and close them." [67] Of these powers the Republican Constitution leaves to the National President only the right of requesting that the President of the Reichstag convene that body earlier than on the first Wednesday in November and that of dissolving the Reichstag, "but only once for the same cause." [68] In the matter of dissolution the President clearly has a power greater than that formerly possessed by the Emperor. While the Constitution of 1871 stipulated that the consent of the Bundesrat was required for the dissolution of the Reichstag by the Emperor,[69] dissolution of the lower house by the National President under the Republican Constitution requires only the countersignature of the National Chancellor. As in the case of the normal termination of the Reichstag on the fourth anniversary of its election, a new election must take place not later than sixty days after the Reichstag has been dissolved by the National President.[70]

The members of the Reichstag are according to Article 21 of the Constitution representative of the entire German people, not of their respective election districts. They are bound by their own conscience and not by instructions of the electorate.

Articles 36 and 37 extend the customary immunity of the members of the Reichstag to those of the assemblies of the Länder. According to Article 36 "no member of the Reichstag or of a State Assembly shall at any time what-

[67] Constitution of 1871, Art. 12.
[68] Art. 25.
[69] Art. 25, Sect. 1.
[70] National Constitution of 1919, Art. 25.

soever be subject to any judicial or disciplinary prosecution or be held responsible outside of the House to which he belongs on account of his vote or his opinions uttered in the performance of his duty." This means that immunity for the official activity of a member of the Reichstag or of a State Assembly extends beyond the time of such membership. As stipulated in Article 37: "No member of the Reichstag or of a State Assembly shall during the session, without the consent of the House to which he belongs, be subject to investigation or arrest on account of any punishable offense, unless he is caught in the act, or apprehended not later than the following day. Similar consent is required in the case of any other restraint of personal liberty which interferes with the performance by a delegate of his duties. Any criminal proceeding . . . and any arrest or other restraint of his personal liberty shall, at the demand of the House to which he belongs, be suspended for the duration of the session." This immunity for actions of a punishable character applies to the full legislative session and is not lifted for the period of shorter or longer recesses within the duration of a session.[71]

Organization and Procedure of the Reichstag. So far we have considered the question as to the manner in which the Reichstag, or rather the membership of a particular Reichstag, is to be elected, convened, and adjourned. We now shall examine the manner of its conduct and activity after it has been convoked and has actually convened. It is true, the Constitution provides that "the Reichstag chooses its President and Vice-President" and " it regulates its own procedure." [72] But the Constitution, never-

[71] Anschütz, pp. 77-78, 93. For articles concerned see text corresponding to notes 81-83.

[72] National Constitution of 1919, Art. 26.

theless, prescribes to a very large extent the fundamental principles which the Reichstag has to follow in the establishment of its own rules of procedure. Thus the Constitution explicitly stipulates as follows:

The President [of the Reichstag] administers the regulations and policies of the Reichstag building. The management of the building is subject to his direction; he controls its receipts and expenses in accordance with the provisions of the budget and represents the Reich in all legal affairs and in litigation arising during his administration.[73]

The proceedings of the Reichstag are public. At the request of fifty members the public may be excluded by a two-thirds vote.[74]

True and accurate reports of the proceedings in public sittings of the Reichstag, of a Landtag, or of their committees, are free from all [legal] liability (*sind von jeder Verantwortung frei*).[75]

An Electoral Commission to decide disputed elections will be organized in connection with the Reichstag. It will also decide whether a delegate has forfeited his seat.

The Electoral Commission consists of members of the Reichstag, chosen by the latter for the life of the Reichstag, and of members of the National Administrative Court, to be appointed by the President of the Reich on the nomination of the presidency of this court.

This Electoral Commission pronounces judgment after public hearings through a quorum of three members of the Reichstag and two judicial members.

Proceedings apart from the hearings before the Electoral

[73] Art. 28. Art. 27 states that: "During the interval between sessions, or while the elections are taking place, the President and Vice-President [of the Reichstag] of the preceding session conduct its [the Reichstag's] affairs."

[74] Art. 29.

[75] Art. 30.

Commission will be conducted by a National Commissioner appointed by the President of the Reich. In other respects the procedure will be regulated by the Electoral Commission.[76]

The Reichstag acts by majority vote unless otherwise provided in the Constitution. For the conduct of elections by the Reichstag the latter may, in its rules of procedure, make exceptions.

The quorum to do business will be regulated by the rules of procedure.[77]

The Reichstag and its committees may require the presence of the National Chancellor and of any National Minister.

The National Chancellor, the National Ministers, and Commissioners designated by them have the right to be present at the sittings of the Reichstag and of its committees. The Länder are entitled to send plenipotentiaries to these sittings to submit the views of their Cabinets on matters under consideration.

At their request the representatives of the Cabinets shall be heard during the deliberations, and the representatives of the National Cabinet shall be heard even outside the regular order of business.

They are subject to the authority of the presiding officer in matters of order.[78]

The Reichstag has the right and, on proposal of one-fifth of its members, the duty to appoint committees of investigation. These committees, in public sittings, inquire into the evidence which they, or the proponents, consider necessary. The public may be excluded by a two-thirds vote of the committee of investigation. The Rules of Procedure [of the Reichstag] regulate the proceedings of the committee and determine the number of its members.

The courts and administrative authorities are required to comply with requests by these committees for information, and

[76] Art. 31.
[77] Art. 32.
[78] Art. 33.

the records of the authorities shall on request be submitted to them.

The provisions of the Code of Criminal Procedure apply as far as is suitable to the inquiries of these committees and of the authorities assisting them, but the secrecy of letter and other post, telegraph, and telephone services will remain inviolate.[79]

The Reichstag appoints a Standing Committee on Foreign Affairs which may also act outside of the sittings of the Reichstag and after the latter's expiration or dissolution until a new Reichstag convenes. Its sittings are not public, unless the committee by a two-thirds vote otherwise provides.

The Reichstag also appoints a Standing Committee for the Protection of the Rights of the Representatives of the People against the National Cabinet during a recess and after the expiration of the term for which it [the Reichstag] was elected.

[79] Art. 34. The right to appoint investigating committees was unknown to the constitutional law of the Empire, though the Constitution of 1850 of the State of Prussia contained a similar provision known as the *Enquête-Recht*. According to Article 82 of the Prussian Constitution each one of the two chambers of the Assembly had the right to appoint information commissions charged with the investigation of facts. As these commissions were appointed by the vote of the majority of the house in question, they served as a parliamentary weapon directed against the Government. As such they may serve also under the provision of Article 34 of the National Constitution of the Republic. But inasmuch as they are no longer the creation of the majority, but of a minority of one-fifth of the total membership of the Reichstag, they are intended to serve and they actually serve as a protection of the minority against the majority, especially if that majority in support of the Government should refuse to interest itself in a matter promising unpleasant results for either the Government or the supporting majority itself. The fact that exclusion of the public is possible only by a two-thirds vote of the committees adds further to the element of control or balance inherent in these committees. The obligation on the part of the courts and administrative authorities provided in Article 34, Section 2, did not exist under the Prussian Constitution. Though the investigating committees of the Republican Reichstag thus assume the character of Government organs, their sphere of investigation is never-

These committees have the rights of committees of investigation.[80]

No member of the Reichstag or of a State Assembly (Landtag) shall at any time whatsoever be subject to any judicial or disciplinary prosecution or be held responsible outside of the house to which he belongs on account of his vote or his opinion uttered in the performance of his duty.[81]

No member of the Reichstag or of a Landtag shall during the session, without the consent of the house to which he belongs, be subject to investigation or arrest on account of any punishable offense, unless he is caught in the act, or apprehended not later than the following day.

Similar consent is required in the case of any other restraint of personal liberty which interferes with the performance by a delegate of his duties.

theless limited by the constitutional competence of the Reichstag itself. It was from this aspect that doubts arose concerning the constitutionality of the investigating committee appointed by the Reichstag on August 20, 1919, for the purpose of ascertaining certain events prior to and during the war (See Kaufmann, Untersuchungsausschuss und Staatsgerichtshof; *also* Warmuth, Staatsgerichtshof und parlamentarischer Untersuchungsausschuss). The provisions of Article 34 were in some cases taken over almost literally into the republican constitutions of a number of the German States (In this connection see chapter VII, section: Decisions of Controversies arising within a State).

Neither the National Republican Constitution nor the Rules of Procedure for the Reichstag contain any specific provisions for a mode of designating or choosing the members of such investigating committees. Under the circumstances their membership is established according to the general rules contained in Article 28 of the Rules of Procedure of the Reichstag. Accordingly the number of members of investigating committees to be appointed upon request of one-fifth of the total membership of the Reichstag is determined by the Reichstag *in toto*, the personnel being determined by the political parties represented in the Reichstag. For an account of investigating committees appointed by the Republican Reichstag see Poetzsch, Vom Staatsleben . . ., p. 121 ff.

[80] National Constitution of 1919, Art. 35.

[81] Art. 36.

Any criminal proceeding against a member of the Reichstag or of a Landtag, and any arrest or other restraint of his personal liberty shall, at the demand of the house to which he belongs, be suspended for the duration of the session.[82]

The members of the Reichstag and the Landtage are entitled to refuse to give evidence concerning persons who have given them information in their official capacity, or to whom they have given information in the performance of their official duties, or concerning the information itself. In regard to the seizure of papers their position is the same as that of persons who have by law the right to refuse to give evidence.

A search or seizure may be proceeded with in the precincts of the Reichstag or of a Landtag only with the consent of its President.[83]

Civil officers and members of the armed forces need no leave to perform their duties as members of the Reichstag or of a Landtag.

If they become candidates for election to these bodies, the necessary leave shall be granted them to prepare for their election.[84]

The members of the Reichstag shall have the right of free transportation over all German railroads, and also compensation as fixed by National law.[85]

The following summary from the most pertinent paragraphs of the Rules of Procedure of the Reichstag will illustrate the manner in which the Reichstag has elaborated and supplemented the preceding fundamental provisions:

The members of the Reichstag are under obligation to participate in the labors of the lower house.[86] Political parties (*Fraktionen*) must consist of at least fifteen mem-

[82] Art. 37.
[83] Art. 38.
[84] Art. 39.
[85] Art. 40.
[86] Rules of Procedure for the Reichstag, Art. 1.

bers. Membership in the Senior Council, (*Aeltestenrat*), the Presidium (*Vorstand*), and the committees . . . is assigned to political parties in proportion to their membership.[87] The Senior Council consists of the President of the Reichstag, his representatives, and twenty-one members nominated by the parties. The Senior Council assists the President of the Reichstag in the conduct of the affairs of the lower house. It is the special task of the Senior Council to establish agreement between the parties with regard to the work or the *agenda* of the Reichstag. The Senior Council assigns the chairmanships of the committees.[88] The Presidium (*Vorstand*) of the Reichstag consists of the President of the Reichstag, his representatives, and the secretaries. The Presidium is elected for the duration of the election period. The Presidium prepares the draft of the budget of the Reichstag. It arranges for the use of the rooms of the Reichstag and regulates traffic by way of house rules. It decides on the use of the library and of the documents of the Reichstag.[89]

The Reichstag elects Standing Committees for (1) the Protection of the Rights of the Representatives of the People (*Volksvertretung*); (2) Foreign Affairs; (3) Procedure; (4) Petitions; (5) the National Budget; (6) Questions of Taxation; (7) Bills (*Rechnungen*); (8) National Economics; (9) Social affairs; (10) Population; (11) Housing; (12) Education; (13) Justice; (14) the Civil Service; (15) Commerce and Traffic.[90] Other standing and special committees may be appointed. The members of these committees are elected by the political parties, the number of their membership being determined by the

[87] Articles 7-9.
[88] Articles 10-12.
[89] Articles 13-25.
[90] Articles 26-27.

Reichstag. The interested Cabinet Ministers and the Reichsrat must be informed of the date, hour, and location of the meeting of these committees. With the exceptions of Article 34 of the National Constitution these meetings are not public. Members of the Reichstag who have no membership in any committee may be present at such meetings. They may be excluded only by action of the Reichstag. The committees may exclude the representatives of the Press from part of the procedure or may withhold certain items of information.[91]

Drafts of legislation, budgets, and treaties are to be acted upon in three readings (*Beratungen*), all other proposals (*Vorlagen*) in one reading. In the first reading of legislative and treaty drafts only the fundamental principles of the draft are discussed. Amending proposals are admitted only for legislative drafts and not before the close of the reading. No such proposals are admissible in the case of treaty drafts. At the end of the first reading or consideration a proposed draft may be returned or referred to committee. It may thus be returned or referred in part or *in toto* before the vote on the last item has taken place.

The second reading begins with the oral reports of the committee if the draft in question had been referred to committee in the first reading.[92] Then follows the discussion in detail and the separate vote on the individual provisions of the draft. At the discretion of the Reichstag a detailed examination and vote may or may not be preceded by a general debate on the proposal as a whole. The Reichstag may decide to consider the detailed provisions of any draft in whatever order or combination it may see fit.

[91] Articles 28-34.

[92] Government drafts not requiring a vote, such as "Denkschriften, Nachweisungen," etc., may be referred to committee by the President of the Reichstag without being placed on the *agenda*.

Amendments to detailed provisions, submitted in writing and distributed in printed form, may be proposed as long as no vote has been taken on the particular detail to be amended. A vote taken on a proposed amendment before the proposal has been distributed in print must be repeated upon demand from the floor. The vote may be taken on several parts or on the whole of the draft. In the case of treaties the vote is taken on the entire draft. The form of the draft accepted by the vote in the second reading constitutes the foundation for the third reading. If the entire draft is rejected in the second reading, no third reading takes place.

The third and last reading begins with a general discussion of the principles of the draft and then proceeds to the detailed consideration of its special provisions. Proposals for amendments during the third reading require the support of fifteen members. In case amendments have been made and accepted in the third reading before they have been printed and distributed, such amendments must again be voted upon without debate prior to the final vote on the entire measure. At the end of the third reading a final or concluding vote (*Schlussabstimmung*) is taken on the whole draft. No *Schlussabstimmung* takes place at the end of the third reading of treaty drafts. The interval of at least one day between the first and the second readings provided for in Article 40 may be reduced. Three readings of the same draft may take place on the same day only if no member of the Reichstag objects. Budgetary drafts are as a rule voted upon only after they have been studied in committee and upon request of committee. They are submitted to the Standing Committee for the Budget unless the Reichstag decides otherwise.[93]

[93] Articles 36-47.

Interpellations of the Government must be submitted to the President of the Reichstag in writing and must be signed by thirty members of the Reichstag. They may be accompanied by brief motivations. The President transmits these interpellations to the Government and requests the latter to state whether and when it will answer them. If the Government declares its willingness to reply at a definite session, the interpellation is placed on the *agenda* of that session. One of the interpellants, i. e. one of the thirty signatories of the interpellation, is given the opportunity to state his reasons for the interpellation prior to the delivery of the Government's reply. When the interpellation has been answered by the Government a debate may take place if demanded by fifty of the members present. A motion offered during the debate must be supported by thirty members. At the request of thirty members an interpellation may for the sake of further investigation be referred to committee or the vote on the motion may be deferred to the next meeting. If the Government declines in principle or during the next two weeks to answer the interpellation, the Reichstag may place the question at issue on its *agenda.* In case interpellations are introduced in a number sufficiently large to jeopardize the regular business, the Reichstag may limit their consideration temporarily to a definite day in the week.[94]

Minor questions may be addressed to the Government by every member of the Reichstag. They must be submitted to the President of the Reichstag in writing and must be supported by fifteen members. Like the interpellations they are transmitted by the President of the Reichstag to the Government and if not answered in writing by the

[94] Articles 55-59.

latter within two weeks may be placed on the *agenda* of the Reichstag. The first hour of the weekly sessions may be reserved for their consideration. The Government's reply is not subject to discussion. Motions are not in place. Questions not disposed of on a particular day are thus eliminated unless their consideration is specifically requested by their author for the next meeting.[95]

Petitions to the Reichstag are referred to the competent committee to which the petitioner is admitted in advisory capacity (*mit beratender Stimme*), if he so desires. The reports of the committees on such petitions must conclude with a motion, (1) to submit the petition to the Government, (2) to table the petition, (3) to declare it superseded by way of a vote on another subject, or (4) to declare it unsuited for consideration in the Reichstag.[96]

Participation of Reichsregierung and President in Legislation. Article 52 of the National Constitution states that "the Reichsregierung consists of the National Chancellor and the National [Cabinet] Ministers." As Anschütz correctly states in his commentary on this provision: "In the wider sense of the term the National President does, of course, also belong to the Reichsregierung, but in the narrower sense the term 'Reichsregierung' denotes the totality of the superior officials politically responsible for the conduct of National affairs, i. e. the National Ministers [headed by the National Chancellor]." It is in this narrower sense, that the term "Reichsregierung" and its English equivalents "Government" and "Cabinet" are used in the present discussion.

Participation of the Reichsregierung, i. e. of Chancellor and Ministers in the process of legislation is formally re-

[95] Articles 60-62.
[96] Articles 63-68.

stricted to the introduction of bills and to participation by Cabinet Ministers in their discussion before the Reichstag. According to Article 68 "bills are introduced by the Reichsregierung or by members of the Reichstag." The presence of Cabinet Ministers in the Reichstag and their participation in the debates can, according to the provisions of Article 33, be either voluntary and obligatory. "The Reichstag and its committees can require the presence of the National Chancellor and of any National Minister." As stated in Article 95 of the Rules of Procedure of the Reichstag: "Every member of the Reichstag may submit a motion calling for the appearance of any one of the National Ministers. The motion is to be decided by vote of the Reichstag. Discussion on the motion will be opened when requested by thirty of the members present." On the other hand, "the National Chancellor, the National Ministers, and commissioners designated by them have the right to be present at the sittings of the Reichstag and of its committees. . . ." [97] At their own request these representatives of the National Cabinet (and also those of the Länder) shall be heard during the deliberations, and those of the National Cabinet even outside the regular order of business. But "they are subject to the authority of the presiding officer in matters of order." [98]

Participation of the National Government in the process of legislation is, however, not only a matter concerning the relations of Government and Reichstag. As shown in the section dealing with Reichstag and Reichsrat under the Republic, the Reichsrat, if not like the Bundesrat a decisive factor, is at least an important agency for the initiation of legislation. The Government's share in the legislative business of the Reich can therefore not be fully measured

[97] National Constitution of 1919, Art. 33.
[98] *Ibid.*

without a consideration of its relation to the Reichsrat from this particular point of view. Article 69 of the National Constitution, as pointed out in more detail above, stipulates that "the introduction of the bills by the Reichsregierung requires the concurrence of the Reichsrat." But what if the Reichsrat refuses to concur? "If an agreement between the Reichsregierung and the Reichsrat is not reached," Article 69 continues, "the Reichsregierung may nevertheless introduce the bill, but must state the dissent of the Reichsrat," thus leaving the Reichstag to decide the issue between Government and Reichsrat. If, on the other hand, "the Reichsrat resolves upon a bill to which the Reichsregierung does not assent, the latter must introduce the bill in the Reichstag, together with a statement of its attitude." [99]

From the point of view of this cooperation in the initiation of legislation between Government and Reichsrat it is quite interesting to note that the Reichsrat has not like the Reichstag the right to convene and to adjourn by its own free will or constitutional authority.[100] Very much as its predecessor, the imperial Bundesrat, it is convened and adjourned by the executive branch of the National Government; but while under the Empire the Bundesrat was in this respect subject to the will of the Emperor,[101] the Reichsrat of the Republic is subject to that of the National Cabinet and not that of the President. Considering that the Reichsrat, like the Bundesrat, participates in the administrative functions of the Reich and that its consent to the introduction of bills in the Reichstag by the National Cabinet is required, this dependence upon the Executive Department must seem logical. And since it is not the

[99] Art. 69.

[100] Giese, p. 209.

[101] See above, section: Reichstag and Bundestag.

President but the National Government (Reichsregierung), i. e. the Chancellor and the Cabinet Ministers, who are charged with the administrative functions and with the introduction of bills in the Reichstag, it is equally logical that it is not the President but the Reichsregierung which, under the Constitution of 1919, convenes and adjourns the Reichsrat. The Reichsregierung must convene the Reichsrat if one-third of the membership of that body demands it.[102] Another element of dependence of the Reichsrat upon the National Government is found in the provisions of Article 65. According to this article the chairmanship of the Reichsrat and of its committees is filled by members of the National Cabinet. This chairmanship constitutes a purely presidential position without membership and vote. The members of the National Cabinet have the right to take part in the proceedings of the Reichsrat and its committees. They must, at their request, be heard at any time during the deliberations. However, Article 65 adds to this right of participation on the part of the members of the Cabinet the corresponding duty of such participation if the Reichsrat so requests.[103]

The National President's participation in the process of legislation is confined by the provisions of the Constitution to the promulgation or refusal of promulgation of the National laws actually passed. After their enactment in the Reichstag the bills are transmitted by the President of that body to the competent National Cabinet Minister.[104] That Minister then either affixes or refuses his signature to the bill in question. If the bill is signed it is submitted to the National President to be formally proclaimed as the law of land. "The National President," says Article 70 of

[102] National Constitution of 1919, Art. 64.
[103] See above, section: Reichstag and Reichsrat.
[104] Rules of Procedure for the Reichstag, Art. 113.

the Constitution, "shall compile the laws which have been constitutionally enacted and within one month publish them in the official Gazette." [105] There are, however, various modifications of this provision. In the first place, the President, instead of promulgating a National law in accordance with Article 70 within one month from the date of its passage, may order its submission to a popular vote.[106] The decision on the part of the President as to which course to choose in this instance is clearly a discretionary one, based upon his oath of office implying a general guardianship over the Constitution, the laws, and the welfare of the Reich. Under the authority of this guardianship he may decide that a law passed by the Reichstag does not conform to the wishes of the electorate, or that it is injurious to the interests of the Nation. His order for the submission of such a law to a popular vote does, of course, require ministerial countersignature. In the second place, a minority in the Reichstag, i. e. one-third of the legal membership, may request that the promulgation of a properly enacted law be deferred for a period of two months. The President must heed this request unless a majority of the Reichstag and of the Reichsrat declare the law in question urgent.[107] In case such a law has thus been declared urgent, it is left to the discretion of the President to accept the view of the majority or of the minority, i. e. to promulgate the law within a month according to Article 70, or defer its promulgation for two months according to Article 72, Sentence 1. The President's discretionary power in this case, however, is limited if one-twentieth of the qualified voters of the National electorate request that the law whose promulgation is to be deferred

[105] On this subject see chapter XIII, text corresponding to note 32 ff.
[106] National Constitution of 1919, Art. 73, Section 1.
[107] Art. 72. See Giese, pp. 234-236.

at the request of one-third of the membership of the Reichstag be submitted to a popular referendum. If such demand is made by one-twentieth of the National electorate the President must refer the law to a popular vote.[108]

The participation of both President and Cabinet (Reichsregierung) in the legislative activities of the Reich by way of the so-called simplified process of legislation and by regular legislative ordinances will be dealt with in separate chapters. The same is to be said concerning the application of the popular referendum in matters of legislation. Practically unknown in the Constitution of 1871, this institution is a new venture in German constitutional theory and governmental practice and will be studied in more detail below.

National Economic Council (Reichswirtschaftsrat). Befitting its importance as a vital innovation not only in German constitutional practice, but in the general field of practical politics and government, the subject of the National Economic Council (Reichswirtschaftsrat) was originally intended to be treated in a chapter by itself. But Professor Finer's exhaustive and authoritative book on the German National Economic Council has rendered such a treatment of the subject unnecessary. For those who do not wish to follow Finer through the rather overwhelming array of historical and statistical data the short outline given below will offer the essentials necessary to the fundamental understanding of that body from the point of view of organization and functional relations to the other branches of the Government.[109] Supplementing

[108] Art. 73, Section 2.

[109] Finer's work contains an interesting account of Bismarck's attempt to create such "a second house for the Empire," of the idea of the Economic Council in English economic theory, and of the practical

Finer's description of the provisional Reichswirtschaftsrat there is added to this outline an analysis of the proposed organization of that body in its contemplated permanent form.

At the National Congress of Labor and Soldiers' Councils held in Berlin in December, 1918, a resolution was introduced which demanded that: "Under all circumstances the Council system should be maintained as the foundation of the Constitution of the Socialist Republic, to the extent that the supreme legislative and executive power of the Councils be recognized." [110] The resolution was defeated by a vote of 344 against 98. Introduced and supported by the radical Independent Socialist members of the Congress, the resolution must of course be taken as an attempt to dictate the future form of government which was to be worked out by the impending National Constituent Assembly. Its overwhelming defeat was therefore to be accepted as an unqualified expression on the part of the more moderate Socialist members of the Councils that the National Assembly should have a free hand in the determination of the form of government to be chosen for the National Republic. In addition to this vote of confidence in the coming National Assembly the Central Council, elected by the same Congress of Labor and Soldiers' Councils for the supervision and control of the National and Prussian Cabinets, later placed its assumed sovereign powers into the hands of the National Assembly and Herr Ebert, functioning as the head of the revolutionary *de facto* National Government, officially recognized the National

proposal of Mr. and Mrs. Webb (A Constitution for the Socialist Commonwealth of Great Britain, 1920) for the establishment of "the second, the Social Parliament in England."

[110] See chapter II, section: Labor and Soldiers' Councils.

Assembly as the representative of the sovereign German Nation.[111]

But while the National Constituent Assembly had thus without doubt been given a free hand in the choice of government from this point of view, it was nevertheless under a moral as well as a practical obligation to consider very seriously the demands of the Independent Socialists in its midst. It was undoubtedly clear from the start that the Assembly would muster a sufficient majority in favor of a moderately socialist or modern democratic form of government, but it was equally sure that a total disregard of the more radical demands for the nationalization of industries and for the direct participation of labor in the activities of government as advanced by all brands of Socialism, but especially by the Independents, would have seriously impeded the work of the Assembly and might well have engendered political disturbances outside the municipal limits of Weimar where the Assembly was deliberating.

The coming into power of the Councils during the early days of the Revolution must have appeared to the followers of Marx as the temporary realization or termination of the economic class struggle in favor of a proletarian dictatorship, a realization made possible by the Revolution as the political prelude to economic emancipation of labor. The National Assembly dealt with both the political and the economic cataclysms in the same fashion. Certain it was that they could not be ignored, for they were there in fact. The demand for the spontaneous and immediate participation of the multitude as a permanent element in the affairs of the State was met by its legalization in the form of the popular vote under the constitutionally recognized and defined function of the initiative, the referendum, and the

[111] *Ibid.*, section: National Constituent Assembly.

recall as regular and ordinary acts of government. The request for the recognition of the class interests of labor was heeded by the same method of purging the Labor and Soldiers' Council system of its revolutionary aspect and by transforming what was left of it from an economic into a social organization, i. e. by changing it from an instrument of class struggle to one of class cooperation under constitutional or legal protection. Thus the Constitution provides for two systems of Councils: first, the Workers' Councils (*Arbeiterräte*), consisting of the wage-earners and salaried employees, and second, the Economic Councils (*Wirtschaftsräte*). Article 165 of the National Constitution states that:

Wage earners and salaried employees are qualified to cooperate on equal terms with the employers in the regulation of wages and working conditions, as well as in the entire economic development of the productive forces. The organizations on both sides and the agreements between them will be recognized.

The wage earners and salaried employees are entitled to be represented in Local Workers' Councils, organized for each establishment in the locality, as well as in District Workers' Councils, organized for each economic area, and in a National Workers' Council, for the purpose of looking after their social and economic interests.

The District Workers' Councils and the National Workers' Council meet together with the representatives of the employers and with other interested classes of people in District Economic Councils and in a National Economic Council for the purpose of performing joint economic tasks and cooperating in the execution of the laws of socialization. The District Economic Councils and the National Economic Council shall be so constituted that all substantial vocational groups are represented therein according to their economic and social importance.

It is only the National Economic Council which has any direct and immediate relation to the legislative and executive branches of the National Government and which as such participates in the activities of the Government of the Reich. While "supervisory and administrative functions may be delegated to the Workers' Councils and to the Economic Councils within their respective areas," it is the National Economic Council alone which has the right to propose National legislation for enactment by the Reichstag. On this subject Article 165 continues to provide that "drafts of laws of fundamental importance relating to social and economic policy, before introduction [into the Reichstag], shall be submitted by the National Cabinet to the National Economic Council for consideration [i. e. for the expression of an opinion (*Begutachtung*)]." Like the Reichsrat, "the National Economic Council has the right to propose such measures for their enactment as law." Again as in the case of the Reichsrat, "if the National Cabinet does not approve them, it shall, nevertheless, introduce them into the Reichstag together with a statement of its own position," and "the National Economic Council may have its bill supported in the Reichstag by one of its members." [112]

The Constitution does not state in so many words to what extent the consent of the Reichswirtschaftsrat is essential to the enactment of National legislation. It merely says that prior to their introduction in the Reichstag drafts of legislation of a certain kind are to be submitted to the National Economic Council for the Council's consideration, i. e. the registering of its opinion (*Begutachtung*). Reference must here be made to the corresponding

[112] Concerning the right of the Reichsrat of sending representatives in defense of its measures in the Reichstag, see section: Reichstag and Reichsrat.

provisions with regard to the Reichsrat. The National Cabinet is held to submit drafts of legislation of all kinds to the Reichsrat, but in this instance it submits them not only for the Reichsrat's consideration or the expression of its opinion, but for its approval. It must have that approval before it can introduce them into the Reichstag and if it does not secure that approval, it must append a statement to that effect if it insists on introducing the bill at all. In the case of the Reichswirtschaftsrat the Constitution does not insist on making the introduction of a Government bill dependent upon the consent of the National Economic Council, it merely gives the Council an opportunity of expressing its opinion on the bill. Only in the case of bills originating with the Reichswirtschaftsrat is the situation analogous to that of the Reichsrat with regard to the Cabinet's duty of introducing a bill of which it disapproves.

The provisional Reichswirtschaftsrat was created by National ordinance of May 4, 1920, passed under the Enabling Act of April 17, 1919.[113] As stated by the National Constitution, both Workers' and Economic Councils were to be organized in Local District, and National Councils. The details of the organization of the Workers' Councils have been established for the lowest but most important order of the local or individual industries by the so-called *Betriebsrätegesetz* of February 4, 1920,[114] while the National ordinance of May 4, 1920, provides for the organization of the Economic Council of the highest, i. e. the National order. According to the terms of the ordinance the National Economic Council is constituted of a membership appointed by the classes interested. Thus the Provisional National Economic Council organized

[113] Poetzsch, Vom Staatsleben . . ., p. 209.

[114] RGBl., 1920, pp. 147, 175, 259, 563, 682, 902, 961, 1689.

under the stipulations of the ordinance had 326 representatives of the different vocations in the following proportion:

68—of Agriculture and Forestry
68—of Industry
6—of Horticulture and Fisheries
44—of Commerce, Banking, and Insurance
34—of Transportation and Public Undertakings (*Unternehmungen*)
36—of Handicrafts (*Handwerker*)
30—of Consumers
16—of the Free Professions
12—endowed with special knowledge of the various parts of the country
12—appointed at the discretion of the Reichsregierung in recognition of their essential advancement of German economic life [115]

The appointment of the twelve members of the last group is made by the Reichsregierung; that of the preceding group by the Reichsrat. In the case of all the other groups, nominations are made to the National Minister of Economics by the interests in question and appointment is then made by the Minister.

Further details of the organization and procedure of the Reichswirtschaftsrat and of its relation to the Reichstag and Government, are contained in the Joint Rules of Procedure of the National Ministries.[116] From the section dealing with the Provisional National Economic Council we gather in brief the following facts: The Reichswirtschaftsrat has two standing committees, one for economic and one for social questions. Other committees may be

[115] Hatschek, I, p. 131 ff.

[116] Gemeinsame Geschäftsordnung der Reichsministerien. Besonderer Teil (Poetzsch, Vom Staatsleben . . ., p. 180 ff.).

appointed when so desired. Drafts of legislation are submitted by the National Cabinet (Reichsregierung) to the Reichswirtschaftsrat or to one of its committees. The latter reports to the plenary meeting either directly, or, with the approval of the *Praesidium* of the Reichswirtschaftsrat, after consultation with the National Cabinet. The plenary meetings of the Reichswirtschaftsrat are public, those of its committees are secret. Representatives of the Reichsregierung appointed for that purpose have access to all meetings and must be accorded the floor. On the other hand, the Reichswirtschaftsrat has the right to request the presence of such representatives, the choice of whom is left to the Government. Interpellations and minor interrogations of the National Government of the kind emanating from the Reichstag are not permitted in the Reichswirtschaftsrat. Questions may be addressed to the Government only by one of the vocational or professional groups or by at least ten members. These questions are referred to a committee. The chairman of the committee calls upon the National Government to send a representative to discuss the matter. The committee decides whether or not to report the result of its deliberations for consideration in plenary session. A refusal on the part of the National Minister concerned to answer a question submitted is communicated by the latter not to the Chancellor, but directly to the Reichswirtschaftsrat.[117]

In October, 1925, the National Ministry of Economic Affairs (*Reichswirtschaftsministerium*) published two drafts for the eventual establishment of the permanent National Economic Council. The first of these drafts provides the framework, the second the details of organization and precedure, its relation to the other organs of

[117] *Ibid.*, Articles 8-12.

National Government, etc. The two drafts still have to be studied by the provisional Economic Council's Committee on the Constitution before they are ripe for consideration by the National Cabinet and the Governments of the Länder prior to their submission to the Reichstag.

The membership of the proposed permanent Reichswirtschaftsrat shows four main divisions instead of the nine groups of the present provisional Economic Council:

I. Representatives of the employers
II. Representatives of the workers
III. Representatives of organizations serving public interests (*Vertreter der nicht privatwirtschaftlichen Zwecken dienenden Körperschaften*)
IV. Persons chosen by the Reichsregierung and the Reichsrat, and representatives of the daily press.

The grouping of the divisions of the provisional National Economic Council is to be maintained for the permanent Council only in divisions I and III, while division II has a tentative total membership equal to that of division I. The divisions are to elect their presiding officers and to select the members of the Council's committees; in short, they are to be elevated almost to the importance of the parties of a real legislative assembly.

In the structure of the provisional National Economic Council there is discernible an attempt to bridge the difference and antagonism between employer and worker by the coordination of employers, workers, and neutrals in all divisions where such coordination is possible. Thus the first division of "Agriculture and Forestry" is composed of 25 employers, 25 workers, and 18 neutrals. A proportional coordination is provided in all other divisions where the relation of employer and worker prevails. Under the proposed plan for the permanent Council we find,

not coordination, but the juxta-, if not contra-position, of the two in different divisions, i. e. divisions I and II.

In the proposed drafts the attempt is made to reduce the permanent membership to 126 instead of 326 of the present Council. It should be remembered, however, that the original draft for the present provisional Council provided for a membership of not more than one hundred. In order to offset the disadvantages of a reduced membership it is proposed that for the consideration of special matters the committees of the Council may be augmented by the appointment of non-permanent voting members.

The changes contemplated in the two drafts for the mode of appointment or election are no less important than those affecting the personnel and character of membership. In principle the right of nomination remains with the vocational groups. But the proposed reduction of the total membership has created apprehension that the weaker groups will not be able to secure nominations. So the Reichsregierung is to be saddled with the more or less congenial task of effecting such nominations for groups too weak to produce candidates by their own exertion. Because of the reduced total membership it is further suggested that even more than at present several groups jointly exercise the right of nomination. Finally, in order to maintain the principle underlying the proposed apportionment of membership, the Reichsregierung is to be authorized, after consultation of the Reichsrat and with the consent of the appropriate committee of the Reichstag, to amend or change the mode of nomination by the groups at the expiration of every six years.

Article 165 of the National Constitution, as shown above, had provided for a National Economic Council based upon the systematic groundwork of Local, District, and National Councils of both employers and workers. The National

ordinance establishing the provisional Reichswirtschaftsrat failed to construct this complete groundwork at least as far as the Workers' Council system was concerned. The proposed permanent Reichswirtschaftsrat, if constructed on the plan of the two drafts, will rest on an even less regional foundation. The drafts propose a predominantly vocational basis, containing, however, clauses for the consideration of the regional interests of Industry, Commerce, and Agriculture by way of extending nominations to the personnel of the regionally organized Councils or Chambers of Agriculture, Commerce, Handicrafts, Industry, and Trade.

The drafts provide for the earlier participation of the Council in the preliminary work on legislation contemplated by the different National Ministries. But they also provide that this cooperation between Reichswirtschaftsrat and National Cabinet in the early stages of legislative drafts releases the Cabinet from the necessity of submitting such drafts to the National Economic Council immediately before their introduction in the Reichstag.

The most important change is found in the provisions guaranteeing to the future Reichswirtschaftsrat the full enjoyment of the right of initiation of legislation as defined in Article 165, Section 4, a right heretofore withheld by the National ordinance establishing the present provisional Reichswirtschaftsrat.[118]

[118] The preceding outline of the drafts for the permanent Reichswirtschaftsrat is based on Gesch, Der Reichswirtschaftsrat. Untersuchungen über seine Herkunft und Gestaltung . . . 1926, pp. 54-69. The "Entwurf eines Gesetzes über den Reichswirtschaftsrat und eines Gesetzes zur Ausführung des Gesetzes über den Reichswirtschaftsrat nebst Begründung (Sonderheft zur Deutschen Wirtschaftszeitung)," received after completion of the manuscript, seems to be a revised edition of the draft used by Gesch.

CHAPTER XI

The Ordinance Power of the National Government

Ordinances in General. For the purposes of the present examination we may begin with the usual classification of all ordinances as: 1. Administrative ordinances proper; 2. ordinances issued for the execution of legislative acts; 3. emergency ordinances.

Purely administrative ordinances are those issued by the supreme executive or by the heads of the various administrative departments and bureaus and directed to the subordinate functionaries in the public service for the regulation of their official relations and the definition of their respective duties. As such they have of course the force of law for those whom they concern. They are not directed to the private citizen and do not directly affect private rights established by existing law.

The second class of ordinances issued for the execution of a particular legislative act may be administrative ordinances in a formal sense in so far as they are issued by the President, Cabinet, King in Council, the head of an administrative department, or an official commission or board, and as far as they may be formally directed to some organ of the public service for the execution of a law passed by the legislature. But by way of supplementing or explaining in detail the general or abstract provisions of the law in question, these ordinances assume the material aspect of law or legislation. To that extent they are directed to, and legally binding upon, the private citizen,

but only within the original meaning and limitation of the law for the execution of which they are issued.

The third and last kind, i. e. the so-called emergency ordinances, are mostly ordinances issued by the executive or administrative branches of the Government, containing original or new legal norms directed to the general or a particular body of citizens. They are legally binding in the same sense and same degree in which legislative acts or statutes are binding. In actual practice the constitutional right to issue these legislative or emergency ordinances is usually restricted to occasions when action by the legislature is not feasible or when the legislature is not in session. The authorization to issue emergency ordinances is as a rule accompanied by the provision that they must be submitted to the legislature at its next session and that they must be revoked upon the latter's disapproval.

The full meaning of these definitions will become clear in the consideration of the exercise of the ordinance power in modern constitutional practice. Concerning the first type it may be said that the general authority to issue administrative ordinances proper is, with the exception of the United States[1] and England, held to be implied in the constitutional delegation of the executive power. Within the limitation given above this implied authorization is considered indispensable to the effective conduct and control of the administration. In English constitutional practice we must distinguish between royal and administrative ordinances, the latter being issued by the departments of the administrative service, the former by the King in Council. The royal ordinance power has its origin in the king's prerogative or duty of preserving the peace, the *Königsfrieden* or *Königsbann* of the early German consti-

[1] See section: The Ordinance Power from the American Viewpoint.

tutional systems in which the assembly form of tribal rule had given way to government by kings and the old *Volksfrieden* had become the *Königsfrieden,* i. e. the king's peace. Under the system of the *Königsfrieden* there arose the institution of the *Königsrecht* for the punishment of those violating the protection extended by the king to persons or corporate bodies, such as churches, monasteries and cities. It was under this prerogative of the *Königsfrieden* and the *Königsrecht* that the precedent for legislation by royal ordinances was established.[2] The same applies to the Anglo-Saxon system. At first these royal ordinances were issued without control and consent by the nobles. Not until the king's ordinance power was extended to the levying and collecting of taxes did the nobles, and later also the commons, assert their right of consent to or disapproval of royal legislation by ordinances.[3] After legislation by Parliament had been established, the king still retained the right to legislate by ordinances or, later, by proclamation. In fact, Parliament in 1539 by the Act 31 Henry VIII, formally empowered the king to legislate "for the time being, with the advice of his Council," by means of proclamations "which shall be observed as though they were made by Act of Parliament." But this Act was repealed in the reign of Edward VI.[4] While it lasted this Act established for England the distinction between parliamentary legislation, i. e. legislation in the strict sense, and royal or executive legislation by way of ordinances or proclamation. But "in 1610 . . . a solemn opinion or protest of the judges established the modern doctrine that

[2] See chapter I, section: Organization of the Earliest Political Units.

[3] See Gneist, Englische Verfassungsgeschichte . . . 1882, pp. 22-23, 148, 164, 205 ff; also Hatschek, Englische Verfassungsgeschichte . . . 1913, p. 204 ff.

[4] Dicey, The Law of the Constitution . . . 8. ed., 1920, p. 48.

royal proclamations . . . cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament." [5]

In modern practice authorization for ordinances of the second type, i. e. ordinances for the execution of legislative acts, may be effected in two different ways. In the first place, the Constitution may give to some particular organ of the executive branch the general right to issue the ordinances necessary for the execution of all legislative or parliamentary acts including the equally general right of explaining or itemizing the abstract provisions of such legislation by way of more specific legal norms within the meaning of the law in question. In the second place, when such general authorization does not exist, the legislature may in special cases embody such authorization in whatever act it wishes to have thus explained, in order to ensure its intelligent execution by the proper administrative functionaries.

Ordinances of this second type are called in English "statutory rules" ; by French writers they are referred to as "législation derivée et complémentaire" or "secondaire"; [6] to the Germans they are known as "Ausführungsverordnungen." [7] Even in the England of modern times Parliament has found it impossible to work out in detail the administrative and legislative particulars required for the execution of its legislation and, as Dicey states, it is for this reason that "the Acts of Parliament constantly contain provisions empowering the Privy Council, the judges, or some other body, to make rules under the Act

[5] *Ibid.*, p. 51.

[6] Esmein, Eléments de droit constitutionnel, 1896, p. 509 ff.; Berthélemy, Traité élémentaire de droit administrative, 1908, p. 101 ff.; Duguit, Traité de droit constitutionnel, 2. éd., 1921-1925, vol. IV, p. 661 ff.

[7] To be considered in detail below.

for the determination of details which cannot be settled by Parliament."[8] Thus England, and it may be added also the United States, follows the second mode of authorization, i. e. of delegating the right to issue co-legislative ordinances for the execution of statutory legislation, by or in the statute to be executed. In other words, in England and in the United States this right is granted only in the particular case where the legislature feels that it cannot itself specify the details of the law in question. In other countries, as for instance in France, the Constitution follows the first method, i. e. it implicitly grants to the executive or some specific organ of the Government, the general power to issue such co-legislative regulations for all law passed by the legislature. The difference between the English and continental exercise of the ordinance power as far as this second type of ordinances is concerned has been expressed by Dicey as follows:

> Under the English system elaborate and detailed statutes are passed, and the power to make rules under the statutes, e. g. by order in Council or otherwise, is introduced only in case where it is obvious that to embody the rules in the statutes is either highly inexpedient or practically impossible. Under the foreign, and especially the French system, the form of laws, or in other words, of statutes, is permanently affected by the knowledge of legislators and draftsmen that any law will be supplemented by decrees. English statutes attempt, and with very little success, to provide for the detailed execution of the laws enacted therein. Foreign laws are, what every law ought to be, statements of general principles.[9]

But since the middle of the nineteenth century the extent of the ordinance power of the English administra-

[8] Dicey, p. 50.

[9] *Ibid.* Concerning the French ordinance system in general, see Duguit, Traité du droit constitutionnel . . ., vol. IV, p. 661 ff.

tive departments has steadily grown. However, with the extent of this power has grown also the supervision and control over these ordinances by Parliament. In some instances the British Parliament has insisted that such ordinances after they have been issued be placed upon the table of both houses so that notice may be taken of them by the latter. Sometimes they were ordered to be placed upon the table of both houses for a certain period before they could take effect. Again at other times, in order to become effective such ordinances had to be approved by Parliament or at least it was held necessary that they should not meet with the disapproval of Parliament within a specified time. Since 1893 almost all of the so-called statutory rules which have to be submitted to Parliament must be held ready in draft for public criticism for forty days prior to their issuance. Announcement of the preparation of such a rule in draft must be made in the *London Gazette*. According to the *Rules Publication Act of 1893* the Lords Commissioners of the English Treasury and the Lord Chancellor in conjunction with the Speaker of the House of Commons were to decide which ordinances were to be considered statutory rules and which were to be held administrative ordinances under the provisions of Section 3 of the Act referred to above. They decided that "every exercise of a statutory power by a rule making authority which is of a legislative and not an executive character, shall be held to be a statutory rule within Section three of the Act. . . ." [10]

Since these co-legislative ordinances or statutory rules are issued only for the particularizing of a certain act of

[10] Hatschek, Englisches Staatsrecht . . . 1905, I, pp. 140-142; Courtenay Ilbert, Legislative Methods and Forms . . . 1901, chapter on subordinate legislation, pp. 36-42, and text of Rules of Publication Act of 1893.

legislation they must not, of course, contain any legal norms incompatible with the general terms of the law in question nor with the norms of any other law in force. The same applies—and this is an important factor for the present discussion—to the ordinances passed for the execution of any law in the other countries referred to by Dicey, as for instance in France, where some government organ is endowed with the general right of defining the general provisions of every legislative act passed by the legislature. These ordinances, too, must in each instance keep within the limitations of the particular law for which they are issued, and consequently, with this qualification, must not override any other existing law.

To be sharply distinguished from the second type, i. e. from the ordinances issued for the particularizing of general legislative acts, are the so-called emergency ordinances or "Notverordnungen" as they are called in German. As the name implies they are to be issued by the supreme executive or some executive organ in certain emergencies, usually rather well defined by constitutional provisions, and as a rule only when the legislature is not in session. It is probably safe to state that almost always, at least in modern times, the right to issue such emergency ordinances is limited by the provision that they must be submitted to the legislature and that upon the latter's disapproval they are automatically repealed or subject to formal revocation by the organ which has issued them.

In his *Commentaries on the Law of England* Blackstone states that in Great Britain the institution of the emergency ordinance exists only by special authorization of Parliament. Speaking of the suspension of the *habeas corpus* act he states that "sometimes, when the State is in real danger, even this may be a necessary measure." But according to Blackstone "it is the parliament only, or

legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing" just "as the senate of Rome was wont to have recourse to a dictator, a magistrate or absolute authority, when they judged the republic in any immediate danger. . . ." Blackstone calls attention to the fact that the decree of the Roman Senate preceding the appointment of the dictator was called "Senatus consultum ultimae necessitatis." [11]

Professor Hatschek, however, points out that Blackstone, writing between 1753 and 1765, failed to take into consideration the institution of the indemnity bill which even at that time followed the suspension of the *habeas corpus* act, and that Blackstone, of course, could not know of the interpretation which the indemnity bill was given in the debates of the House of Lords in 1766, an interpretation which still holds good in present day English constitutional law and practice. In 1766 the elder Pitt had, while Parliament was not in session, by means of a royal order in Council placed an inhibition upon the exportation of wheat. He had not secured parliamentary authorization for this order in Council. At the opening of Parliament the Crown attempted to justify the issuance of its ordinance upon the grounds that at the time Parliament was not in session, and that a famine was threatening and would certainly have resulted if the Government had waited for the convening of Parliament. The party in power proposed that the House recognize the legality of the particular ordinance and the general right of the Crown to issue such ordinances in cases of emergency when Parliament was not in session. But the House expressed and established as final the theory that the order in Coun-

[11] Blackstone, Commentaries . . ., by G. Chase . . . 1878, pp. 75-76.

cil subject to discussion was illegal, and that every emergency ordinance which transgresses existing English law is illegal and void regardless of whether it is issued by an individual, or by the Government or a Government official. The Government, as every individual, may take steps for the welfare of the State, but it does so at its own risk. A legal right to suspend the *habeas corpus* act, to exceed the budgetary provisions, or to undertake any other measure in case of danger threatening the State, does not exist. Good faith in the necessity of any such action in the case of danger does no more protect the Government against the legal consequences of an emergency ordinance than it saves the individual who has resorted to the use of arms or arrest on mere suspicion. Only an indemnity bill can protect the transgressor of existing objective law from the legal consequences of such transgression. But no obligation rests with Parliament to grant such an indemnity bill.[12] In other words, English constitutional law and practice do not recognize the general emergency ordinance power. Orders in Council, to be legal, can be issued only in consequence of special legislative authorization as for instance by the so-called Enabling Acts to be considered later.

A typical example of a constitutional grant of the general emergency power within the limitations mentioned above is found in Article VIII of the Japanese Constitution. This article provides that:

> The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not in session, Imperial ordinances in place of law.
>
> Such Imperial ordinances are to be laid before the Imperial

[12] Hatschek, Englische Verfassungsgeschichte, pp. 612-613.

Diet at its next session, and when the Diet does not approve the said ordinances, the Government shall declare them to be invalid for the future.

The system of the general emergency ordinances was found in many of the German States prior to the Revolution, though not in the constitutional law of the Empire. Under the influence of the German practice it was embodied in the Japanese Constitution. An excellent exposition showing the comparative application of the emergency ordinance in European and Japanese constitutional jurisprudence and practice is found in Nakano's study on *The Ordinance Power of the Japanese Emperor.*[18]

The Ordinance Power from the American Viewpoint. The system upon which the ordinance power of the American Government is built is more or less in a class by itself. The reason for this is to be found in three, one is inclined to say, fundamentally American concepts of government. In the first place, American constitutional theory and practice have from the beginning accepted the doctrine that the source of the executive power is to be sought not in some kind of original non-derivative executive prerogative, but rather in the plain and definable delegation of such powers from the so-called sovereign constitution-making authority. This means that under the American system the mere existence or establishment of an executive as distinguished from the judicial and legislative departments of government does not endow the executive branch with the authority to do anything and everything that an executive might legitimately be conceived of as doing under all possible circumstances. Applied to the question at issue it does not for instance mean that the executive can issue all kinds

[18] Nakano, The Ordinance Power of the Japanese Emperor . . . 1923.

of ordinances which he might consider necessary in his own discretion as had been the case for example under the widest interpretation of the original idea of the prerogative of the Crown of England before the days of Magna Carta and the introduction of parliamentary control and legislation. This older interpretation, though considerably modified, is still at the bottom of all systems maintaining the emergency ordinance power of the executive either as a general proposition or in times when the legislature is not in session.

Under the American conception the ordinance power of the President exists only so far as and to the extent to which the Constitution specifically instructs the executive as to the meaning and reach of his executive duties. In other words, the ordinance power of the American President is limited to the functions arising out of his capacity as the supreme head of the Army and Navy in so far as in that capacity the Constitution assigns to him the appointment of the officers and the power of direction of those branches of the public service. Even with regard to the other branches of the Government, and particularly under the law enforcement clause, the President's ordinance making power is clearly limited by the Constitution to the right of nomination, appointment, and removal as defined by the Constitution and as, in case of controversy, interpreted by the Supreme Court, and to the normal directive functions.

In the second place, any ordinance making power exercised by the President, not derived directly or by implication from a specific provision of the Constitution such as those mentioned above, must be delegated by a particular act of Congress. Delegations of this kind are contained in the so-called Overmann Act and in the numerous enabling acts of the war administration of Woodrow Wilson.

In the third and last place, the American Congress, realizing the utter hopelessness of concerning itself in a legislative way, and the inadvisability of regulating through presidential ordinances certain intricate and technical phases of our modern industrial and economic organization and activity, has wisely resigned and assigned that particular aspect of its own and the executive's function to special boards and commissions appointed by the executive. These boards and commissions are clothed by direct or indirect delegation with the right to issue ordinances as directed by the legislative act responsible for their creation. While the ordinance making power of the President has received expert treatment in the excellent study on the subject by James Hart,[14] the ordinance making power of this peculiar cross of legislative, administrative, and judicial boards and commissions, has apparently not yet found the mastering interest of the analytical scholar. There are, it is true, a number of special studies dealing with one phase or other of the activity and the extent or character of the functions of these new ventures in American Government, but a proper determination of their activity as administrative, legislative, or judicial and a clear definition and classification of their ordinances or decisions as legislation or adjudication is, as far as the author's knowledge of the subject goes, still wanting.[15]

Introductory to the consideration of the ordinance making powers of the President, Dr. Hart examines in a

[14] James Hart, The Ordinance Making Powers of the President of the United States . . . 1925.

[15] In this connection mention should be made of the studies by Freund, Substitution of Rule for Discretion in Public Law (American Political Science Review, vol. IX, p. 666 ff.); and Curtis, Judicial Review of Commission (Harvard Law Review, vol. xxxiv, p. 862 ff.). For other studies on this subject see bibliography at end of Hart's work.

general way the different acts by means of which the executive branch of the Government operates, such as proclamations, executive ordinances, rulings of the administrative officers of the departments, and others. Having in the course of this examination "set forth the meaning of the ordinance and distinguished it from several other products of the governmental process," Hart proceeds to "classify ordinances from selected points of view." His method of definition follows a four-fold approach. He examines all ordinances first from the point of view of "the source of the authority by which the ordinance making official acts" ; secondly from the aspect "of the relations which they (the ordinances) regulate" ; thirdly in regard to the question: "Does the ordinance under consideration consist of an independent regulation or does it merely complete or supplement the terms of the statute?" The fourth and final approach is based on the question "whether an ordinance is issued in connection with ordinary social and industrial problems or whether it is issued in connection with a special emergency." [16]

Concerning the first method of approach Hart concludes that there are only two sources of authority for executive ordinances in the American system, i. e. constitutional and statutory. In view of what has been stated above this conclusion requires no further elucidation.

From the point of view of the relations regulated by these ordinances Hart distinguishes what in German terminology are known as *Rechtsverordnungen* and *Verwaltungsverordnungen.* As stated by Hart:

> Of these classes the former comprises those ordinances which may be described as uniform rules of social conduct which the

[16] Hart, pp. 46-59.

state will enforce; the latter administrative regulations, or general rules, prescribing the manner in which government officials shall conduct their offices. . . . To put the matter somewhat differently, *Rechtsverordnungen* undertake to regulate relations between private persons and their fellows, or between private persons and the state. As such they include uniform rules of private law as well as uniform rules of criminal law, and uniform grants of privileges or franchises by the state to private individuals. On the other hand, *Verwaltungsverordnungen* control relations between the state and its agents in the administration of *Rechtsverordnungen*, or, in other terms, between the sovereign person and its governmental organs.

Speaking from the point of view of American practice and doctrine Hart is of course right in saying that "in actuality these two kinds of ordinances are inextricably interrelated" inasmuch as "the creation of private rights and duties inevitably gives specific content to the general duties which are assigned to administrative officials; while the regulation of official conduct necessarily affects at least indirectly the private interests which are made subject to that conduct. . . ."

Considering ordinances from the third aspect of approach Hart states that if the ordinance consists of an independent regulation, then "the process by which it is evolved is an exercise of full or almost full discretion in the premises"; if on the other hand, the ordinance merely completes or supplements the terms of a statute, then "the process involves discretion as to subordinate premises only." He explains that by "almost full discretion in the premises" is meant discretion which is limited only by general constitutional provisions, such as the prohibition of the taking of life, liberty, or property without due process of law, or the clause of the Constitution which

states that "all duties, imposts, and excises shall be uniform throughout the United States." As stated by Hart in the beginning of Chapter III:

> The American conception of the term law makes no distinction between material laws and material ordinances, but includes them all. It is furthermore in accord with American ideas on government for the enactment of both sorts of rules to be left to the legislative department. Thus the Constitution of the United States in effect gives to the Congress the power to pass the "necessary and proper" material ordinances as well as material laws. Congress has the power to pass acts organizing the executive departments as well as acts affecting private interests with respect to the subjects committed to its control. Both sorts of acts are technically "laws," and under the Constitution the law-making powers of the popular assembly cannot be delegated by it to the President or to any other authority.
>
> Yet, . . . Congress may delegate through its "laws" discretion as to the creation of subordinate rules. This is true whether Congress is enacting "laws" affecting personal and property interests of individuals, or "laws" respecting administrative operations. Thus, in the war with Germany, the national legislative body passed the Overmann Act as well as the Selective Draft Act, the Trading with the Enemy Act, and Food and Fuel Control Acts. Each of these authorized the Chief Magistrate or subordinates acting under his general control to issue ordinances, the first with respect to departmental organization, the others with reference both to administrative practice and procedure and private conduct.[17]

It is in reference to the American classification of all ordinances as "law" that Hart, dealing with the third mode of approach to the classification of ordinances, dis-

[17] *Ibid.*, pp. 44-45.

tinguishes between law and co-law and between legislative and co-legislative or completing ordinances. Thus he writes in Chapter III:

We have already described the two classes of ordinances which are under discussion as legislative and ordinance making (in the material sense) on the one side, and co-legislative and co-ordinance making on the other. Laws and ordinances . . . give manifestation to some original idea; while co-laws and co-ordinances are best described in the apt phrase of the French as *une législation sécondaire et dérivée*. The distinction is important both legally and politically; legally because Congress may delegate to the Executive co-legislative power but not legislative power without violating the principle *delegatus non potest delegare;* politically because one may justify the constitutional or statutory delegation of a power of issuing completing ordinances while condemning at the same time the practice of giving to the Executive the authority to issue self-contained legislative measures. The latter power may wisely be allowed the President only in emergencies, in connection with the organization and regulation of the administration, and in special cases. Yet it is ordinarily better to have the Executive supplement legislative abstractions by complementary regulations or by individual discretionary determinations than to have the legislature either attempt the detailed regulation of complex social and industrial problems or leave it to juries to give varying interpretations to statutory abstractions. . . .

Of completing ordinances there are several kinds, corresponding to the several elements involved in full discretion in the premises. In other words, supplementary ordinances vary in accordance with the nature of the element the abstract expression of which they concretize. In one class the Executive issues an order setting forth in concrete terms the circumstances under which the rule of law in question is to go into effect, or more frequently issues an order stating officially

that the circumstances anticipated in the legislative phraseology do now exist. Still another class consists of those ordinances which complete the statutory definitions of the rights and duties to be created, the class or classes of persons to whom they are to attach, or the penalties which are to be inflicted for their violation. Finally, a third class comprises the ordinances which prescribe the administrative and judicial processes for carrying out the ordinances and enforcing them in case of disobedience. German jurists distinguish the last two classes by the terms *Ergänzungsverordnungen* and *Ausführungsverordnungen,* respectively. The former are complementary to the contents of a statutory rule which prescribes in general terms, rights and duties; the latter either originally or in a supplementary fashion deal with the means of executing the said rule. . . .[18]

As to the fourth and last mode of approach to the definition or classification of ordinances, i. e. the approach from the question "whether an ordinance is issued in connection with ordinary social and industrial problems or whether it is issued in connection with a special emergency," Hart comes to the conclusion that ordinances of the latter type, *Notverordnungen* as the Germans call them, are in a class by themselves. On this subject he writes:

These [ordinances] are considered as a distinct category by reason of their political significance in relation to the preservation of security from external aggression and the safeguarding of internal order, as well as by reason of the special constitutional problems that are raised by governmental action in wartime or other times of crisis. With respect to ordinary ordinances the power is granted to the Executive because it is considered the proper sphere of the administration, or because the multiplicity and complexity of the prob-

[18] *Ibid.*, pp. 57-58.

lems of modern social and industrial life make it expedient or even necessary that at least the details be decided by a branch of government that is more efficient, more experienced, and better informed than a popular assembly can be. There the question is whether the Executive cannot deal with some matters more adequately or with readier adjustment than the legislature. But in the case of the *Notverordnungsrecht* the prime consideration is that the Executive can act more quickly than the legislature. The crisis may arise when the legislature is not in session, as happened at the outbreak of the War of Secession; or, if it be in session, its necessary slowness may cause a delay that will endanger the safety or vital interests of the state. In foreign relations, in war, and in internal crises of various sorts, the unpredictable character of the events and the necessity for quick action make it essential for the Executive to be given broad discretion and strong power to meet the many critical situations. Emergency power of this kind may be opposed to the ideal of democracy, but it is none the less inevitable.[19]

Hart's mode of definition and classification of executive ordinances, though conceived as a general and theoretical introduction to the consideration of the more practical question of the exercise and extent of the ordinance making powers of the American President, will serve to throw considerable light upon the problems involved in the succeeding study of the ordinance power in the German Empire of 1871 and of the present National Republic.

The Ordinance Power under the Constitution of 1871. German as well as French jurists distinguish between what they term formal and material law or legislation and between formal and material ordinances. Thus any act formally passed by the legislature, regardless of its con-

[19] *Ibid.*, pp. 59-60.

tent or of the parties affected by the law, is law in the formal sense or formal law. On the other hand, any general rule of social conduct directed to the body of citizens and issued in a constitutional manner is material law no matter which organ of the Government may be its author.[20] Applying this same differentiation to ordinances, Laband, like most German authorities, distinguishes between formal and material ordinances. Formal ordinances are those issued by some executive or administrative official or organ regardless of their content. They may as such regulate only the purely official affairs of the public service, or they may contain legal norms applicable to the private citizen. Material ordinances, however, are those which are directed to the functionaries of the public service only and limited in content to the regulation of the administrative activities of that service.[21]

This differentiation leads to the division of all ordinances into two large classes, namely: 1. Material or administrative ordinances proper; 2. formal ordinances which contain material law, i. e. legislative or co-legislative ordinances. Or applying the German terms, we distinguish between (1) *Verwaltungsverordnungen* and (2) *Rechtsverordnungen*. In his definition of these two classes of ordinances Professor Anschütz describes the first as follows:

Verwaltungsverordnungen are ordinances regulating the institutions and the activity of the State within the limitation of existing law. They concern the internal organization of the Government, create obligations of obedience of a purely official (*dienstlich*) nature between the lower and the higher

[20] Laband, Deutsches Reichsstaatsrecht . . . 1907, section 16.
[21] *Ibid.*

official organs. They do not infringe upon the liberty and property of the individual.[22]

In so far as the ordinance does neither formally . . . nor . . . materially represent anything different from, nor more than, an administrative act, the ordinance power requires no special constitutional or legislative authorization. The issuance of ordinances in the material sense, i. e. of administrative ordinances, is a function implied *per se* in the "executive power.". . . Thus the organs of the Government have the right to issue *Verwaltungsverordnungen* not only where such a right is specifically granted by the Constitution but also where constitution and legislation are silent on this subject.[23]

As *Verwaltungsverordnungen* Anschütz enumerates (1) *Organisationsverordnungen* (ordinances for the organization of the administrative branches of the Government); (2) *Anstaltsordnungen* (official rules and regulations concerning Government institutions of a special character, such as educational and scientific or art institutes); (3) *Dienstanweisungen* (administrative ordinances containing instructions from a superior to a subordinate official).

The second class, i. e. *Rechtsverordnungen,* he describes as "ordinances directed to the individual subjects as commands and inhibitions affecting the legal status of their liberty and property." These ordinances can be issued "only by virtue of legislative delegation," which latter "can be effected by constitutional provision or by ordinary legislation."[24] Under this category he enumerates (1) *Notverordnungen* (emergency ordinances); (2) *Polizeiverordnungen* (police ordinances); (3) *Ausführungsverordnungen* (ordinances for the execution of legislation).

[22] Anschütz, Deutsches Staatsrecht, p. 162.
[23] *Ibid.*
[24] *Ibid.*

Under the constitutional system of 1871, police ordinances were rules and regulations issued by the lower administrative organs of the States, not of the Empire. They contained commands and inhibitions under threat of penalties and were issued in the interest of public order and security or for the prevention of dangers to the commonwealth and individuals.[25] Disregarding the police ordinances as essentially a State and not a National affair we have left as the two classes of the *Rechtsverordnungen* the *Not-* and *Ausführungsverordnungen*.

Concerning the last of these two Anschütz says that the right to issue *Ausführungsverordnungen* in the sense of *Rechtsverordnungen* must be held to be implied in the provisions of the Constitution which authorize the executive to issue ordinances necessary for the execution of the laws passed by the legislature. Of course ordinances issued under this authorization and for the purpose here defined may in the first place be administrative ordinances proper, directed to the official organs charged with the execution of the law in question. But they may, in the second place, include also ordinances containing norms of law explanatory of, or supplementary to, the law subject to execution. As far as these norms of law are concerned the ordinances containing them are directed to the body of citizens affected by them. These explanatory or supplementary norms must not, of course, constitute an extension or limitation of the law for the execution of which the ordinances are issued. "They should will all that the law in question wills, no more and no less." [26]

Notverordnungen, to follow Anschütz's description,[27] are ordinances with the force of law, issued by the executive in

[25] *Ibid.*, pp. 164-165.
[26] *Ibid.*
[27] *Ibid.*, p. 164.

cases where action by the legislature is considered too slow to meet impending danger, or when immediate action is required while the legislature is not in session. They are material legislation in the form of ordinances and can be issued only by general constitutional delegation or authorization. The institution of the emergency ordinance was not part of the constitutional system of the Empire. Some of the State constitutions, as for instance those of Prussia [28] and Saxony,[29] recognized the emergency ordinance only in case the legislature was not in session. The National law regulating the constitutional status of Alsace-Lorraine gave the Emperor the right to pass emergency ordinances for the *Reichsland* under the same condition.[30]

We thus come back to the classification given at the beginning of the chapter, namely: 1. Administrative ordinances proper; 2. ordinances issued for the execution of legislation; 3. emergency ordinances. But this classification represents only the theoretical aspect of the constitutional status and meaning of the ordinance power in the German system of government under the Empire. In the attempt to apply this classification to the actualities of constitutional law and governmental practice we meet with one great difficulty. Anschütz, as we have seen, distinguishes between administrative ordinances proper and legislative ordinances. Defining and classifying the latter kind he divides them into emergency ordinances, police ordinances, and *Ausführungsverordnungen*. Describing the *Ausführungsverordnungen* he says that they may either be purely administrative in the material sense, i. e. be directed and confined to the public service only, or they

[28] Constitution of Prussia of 1850, Art. 63.

[29] Constitution of Saxony of 1831, Art. 88.

[30] National Law concerning the Constitution of Alsace-Lorraine, of May 31, 1911, Article II, section 23.

may be administrative ordinances only in a formal sense, containing material law by way of explaining or supplementing the general abstract provisions of the legislative act for the execution of which they are issued. Presented systematically Anschütz's classification appears as follows:

I. *Verwaltungsverordnungen* (administrative ordinances proper)
II. *Rechtsverordnungen*
    1. Emergency ordinances
    2. Police ordinances
    3. *Ausführungsverordnungen*
        a. *Verwaltungsverordnungen* (administrative ordinances proper)
        b. *Ausführungsverordnungen* (co-legislative ordinances)

This means that the *Verwaltungsverordnungen* which are given as the first of the two main classes of Anschütz's division, are included in the second of these two classes as a subdivision of the third type of the *Rechtsverordnungen*, i. e. as one kind of *Ausführungsverordnungen*.

A similar situation of overlapping or loose classification exists in the case of the use of the term *Verwaltungsvorschrift* in constitutional law and governmental practice. According to Article 7, Section 2, of the Imperial Constitution, "the Bundesrat decides upon the general administrative provisions (*Verwaltungsvorschriften*) and arrangements necessary for the execution (*Ausführung*) of National laws, so far as no other provision is made by law." The term here used in the language of the Constitution for the ordinances to be issued by the Bundesrat is a combination of the terms used by the constitutional theorists for the *Verwaltungs-* and the *Ausführungs-* ordinance. The Bundesrat may issue, so the Constitution says, adminis-

trative rules (*Vorschriften*) for the execution of National laws. According to juristic interpretation this may mean that the Bundesrat could issue only administrative ordinances proper, or that it could issue *Ausführungsverordnungen* as interpreted by Anschütz, i. e. *Ausführungsverordnungen* including administrative ordinances proper and *Ausführungsverordnungen* in the sense of co-legislative ordinances. The first view was that of Laband [31] and his school, the latter opinion was held by Arndt and his following.[32]

The literature which has grown up on the subject of the interpretation of Article 7, Section 2, is too extensive to be considered in this connection beyond the preceding reference to the interpretations of Laband and Arndt, and their disciples respectively. The few opinions rendered by the Reichsgericht or other competent courts, involving the question here under consideration, do not contribute to the settlement of the controversy. The Reichsgericht in a decision of February 16, 1904, pointed out that while administrative instructions directed only to the functionaries of the public service did not constitute legal norms, the use of the terms *Verwaltungsverordnung* and *Rechtsverordnung* for the different concepts involved had never been accepted in legislative and governmental practice. What was known in constitutional theory as *Verwaltungsverordnung* was in the official practice of the Reich and of Prussia called *Erlass, Instruktion, Reglement,* or *Verfügung.* According to the opinion of the Court the term *Rechtsverordnung* was unknown to governmental practice.

In two other decisions [33] involving the legality of co-

[31] Laband, Deutsches Reichsstaatsrecht, 1907, section 16.

[32] Arndt, Das Staatsrecht des Deutschen Reiches, 1901; Das selbständige Verordnungsrecht, 1902.

[33] As cited by Dambitsch, pp. 218-219: The first of November 25, 1897 (RGBl., vol. 40, p. 68 ff.); the second of March 26, 1901 (RGBl., vol. 48, p. 84 ff.).

legislative *Ausführungsverordnungen* of the Bundesrat issued in pursuance of the Civil Service Law of June 27, 1871, the Reichsgericht intentionally begged the question. This Civil Service Law specifically assigned to the Bundesrat the right to establish the general principles for the execution of certain phases of the law. In both cases the lower courts had declared the *Ausführungsverordnungen* of the Bundesrat illegal on the grounds that (1) these *Ausführungsverordnungen* contained legal norms; (2) that the Bundesrat had no authority to issue such ordinances under Article 7, Section 2, of the Constitution; (3) that it had no such authority under the special provision of the Civil Service Law in question. In other words, the lower courts followed the interpretation of Laband. In a decision of November 1897 the Reichsgericht declared that it did not oppose the view of the lower court which held that despite Article 7, Section 2, a special legislative authorization was necessary for the issuing of legally valid co-legislative *Ausführungsverordnungen.* But the Reichsgericht disagreed with the opinion of the lower court that the Civil Service Law of 1871 did not contain such special legislative authorization.

On the other hand the Berlin *Kammergericht,* acting as the court of appeal for the Prussian Province of Brandenburg and in certain cases for the whole State of Prussia, in an opinion rendered on September 24, 1900, stated that by *Verwaltungsvorschriften* (under Article 7, Section 2, of the Imperial Constitution) were meant ordinances in the usual sense of the word, i. e. *Rechtsverordnungen* containing legal norms for private citizens, and to that extent differing in no way from ordinary legislation.[84] In this opinion the *Kammergericht* followed the interpretation of Arndt.

[84] Cited *ibid.*, p. 220.

But while the opinions of the courts offered no criteria for the solution of the controversy, the practice of the Imperial Government itself favored unmistakably the wider interpretation of Arndt and his school. This fact was brought out in an interesting manner before the *Verfassungsausschuss* appointed by the National Constituent Assembly for the revision of the so-called second Government draft of the Republican Constitution. Speaking on behalf of the National Republican Government in favor of the wider, i. e. Arndt's interpretation of the ordinance power, Preuss, National Minister of the Interior, told the Committee that when he assumed his office he had intended to follow in practice the principles of constitutional theory or as he said, constitutional law, which distinguished between *Verwaltungsverordnungen* proper and co-legislative *Ausführungsverordnungen*. But when he advised his associates of his intention the gentlemen of the Department, relying upon the actual experience of many years, replied that in governmental practice the difference between *Verwaltungsverordnungen* and *Rechtsverordnungen* did not exist. The only ordinances with which the Government had been operating were *Ausführungsverordnungen* and under these were understood *Rechtsverordnungen*.[35]

Another element in favor of Arndt's, i. e. the wider interpretation, is found in the text of the Imperial Constitution. The term *Verwaltungsvorschriften* used in Article 38, Number 1, refers to ordinances issued by the Bundesrat for the regulation of tax rebates and reductions to be applied to the customs and excise taxes collected by the Empire from the States. However, ordinances regulating tax reductions or rebates certainly contain legal norms affecting the tax payers, i. e. they are co-legislative *Ausfüh-*

[35] Cited by Poetzsch, Verfassungsmässigkeit . . . p. 169.

rungsverordnungen. The same may be said of this term as used in the Customs Law of July 1, 1869.[36] Article 152 of this law states that: "A violation of the provisions of this law and of the ordinances (*Verwaltungsvorschriften*) issued in pursuance of this law, will be punished by a fine of fifty Taler, unless another penalty is provided." Any ordinances providing fines or penalties must perforce be *Rechtsverordnungen.*[37]

The Ordinance Power under the Republican Constitution. The so-called second Government draft of the National Republican Constitution contained two separate provisions for the regulation of the ordinance power of the National Republican Government. The first provision consisting of what was then Article 13 declared that "the Government issues the ordinances necessary for the execution of National laws"; the second, embodied in Article 27, Section 1, stipulated that "the National Government needs the consent of the Reichsrat for the issuance of *Ausführungsverordnungen.*" [38] The National Government was of the opinion expressed by its Minister of the Interior, Preuss, that the term *Ausführungsverordnungen* should be interpreted to include not only administrative ordinances proper but also *Rechtsverordnungen,* i. e. co-legislative ordinances. The consent of the Reichsrat provided for in Article 27, Section 1, would have to be obtained by the National Government only in the case of the last kind, i. e. *Ausführungsverordnungen* containing legal norms affecting the rights of private citizens.[39] The National Government apparently wished to establish in the new

[36] Dambitsch, p. 221.
[37] *Ibid.*
[38] Anschütz, p. 139.
[39] *Ibid.*, p. 140.

Constitution the governmental interpretation and practice of the Monarchy, which was in agreement with the so-called wider conception of Arndt. The *Verfassungsausschuss,* however, emphatically rejected the interpretation suggested by the National Government. It accepted the opposite opinion which had manifested itself to a considerable extent in the preliminary work of its members. According to this opinion *Ausführungsverordnungen* in the sense of Article 27, Section 1, were *Verwaltungsverordnungen* proper, and the right to issue *Rechtsverordnungen,* including those for the execution of legislation, required special legislative authorization. The *Verfassungsausschuss* accepted a resolution restricting the ordinance power of the Government to administrative ordinances proper. A resolution expressing the contrary opinion was rejected.[40] Thus the term "Ausführungsverordnungen" of Article 27, Section 1, was replaced by "Verwaltungsverordnungen for the execution of laws," and the consent of the Reichsrat was declared to be required where the execution of such laws was assigned to the authorities of the Länder.[41] In the second reading before the Committee on the Constitution the two separate provisions were combined and the term "Verwaltungsverordnungen" was apparently without any special intent replaced by the phraseology of the Imperial Constitution, i. e. "allgemeine Verwaltungsvorschriften." This provision was finally accepted by the National Assembly as Article 77 of the National Constitution in the following form:

The National Cabinet (Regierung)[42] issues the general administrative regulations (*Verwaltungsvorschriften*) for the

[40] *Ibid.*, p. 139.

[41] *Ibid.*, p. 140.

[42] The term Regierung is defined in Article 52 as "the National Cabinet consisting of the Chancellor and his Ministers." According to Anschütz (p. 140) and Jacobi (Archiv für öffentliches Recht, vol. 39,

execution of the National laws so far as the laws do not otherwise provide. It must secure the consent of the Reichsrat if the execution of the National law is assigned to the authorities of the Länder.

Despite the fact that the opinion of the framers of the Constitution was unquestionably in favor of the restriction of the National Government's ordinance power to the issuance of administrative ordinances proper, even though they were to be issued for the execution of National laws, juristic interpretation of Article 77 is again divided. On the basis of the similarity of the phraseology of Article 7, Section 2, of the Imperial Constitution, and of Article 77 of the Constitution of the Republic and especially the identity of the term "general administrative regulations for the execution of National laws," Arndt and his following insist that Article 77 gives the National Cabinet

p. 332) the Cabinet as a body, not the individual Ministers, issues these ordinances. This is denied by Triepel (Archiv für öffentliches Recht, vol. 39, p. 482), and Poetzsch, pp. 93-94. But while the jurists disagree, the Reichsgericht seems to be ready to decide the issue. An ordinance passed under the Enabling Act of October 13, 1923, by the National Cabinet provided for the settlement of certain financial claims against the Reich not by the ordinary courts but by a special procedure. The same Cabinet ordinance authorized the National Minister of Finance to decide whether a certain claim was thus to be disposed of or not. This regulation of the method of procedure in the case of the claims in question, by way of ministerial ordinances was declared unconstitutional by the Berlin *Kammergericht*. The *Kammergericht* held that such regulation was incompatible with the terms of the Enabling Act which, it assumed, had authorized the issue of ordinances not by an individual Minister but by the Reichsregierung. The case was taken to the Reichsgericht on appeal. Concerning the question before us the Reichsgericht stated: ". . . Constitutional legal practice of the past and present permit the material limited delegation by the Legislature to other organs (of the Government) of the right to issue *Rechtsverordnungen*. There can be no objection in principle to a further delegation of this authority with the same limitation. The

the general right to issue *Ausführungsverordnungen* in the sense of administrative ordinances proper and of co-legislative ordinances as well.[43]

Here again it must be stated that the literature which has grown up on this more recent issue is too prolific to be reviewed in detail. It seems safe to state, however, in this case, that Arndt and followers are considerably outnumbered by those holding to the opposite and narrower interpretation. Basing his opinion on the historical antecedents of Article 77, Anschütz, for instance, says that the interpretation prevailing under the Empire, i. e. the view of Arndt and his school, can no longer be accepted under the Republican Constitution. "The ordinances issued under Article 77," he asserts, "must remain within the category of purely administrative ordinances"; they must, in other words, "be instructions to the public officials, not legal norms binding upon the citizens."[44] General administrative regulations, Poetzsch holds, are not *Rechtsverordnungen.* The right to issue *Rechtsverordnungen,* must be granted in each individual case by the National legislature.[45] The practice of the National Republican Government seems to support this narrower interpretation.

Enabling Act cannot be construed as containing an inhibition of such delegation. Its object was to enable the National Government to accomplish certain definite tasks for the alleviation of the distress of the Reich. As the history of the Enabling Act shows, the authors clearly intended to authorize the National Cabinet to delegate the right to issue the necessary *Ausführungsverordnungen,* including *Rechtsverordnungen,* to the various Ministers as the heads of the Government departments . . ." (For the full statement of the Court see chapter XIII, text corresponding to note 69 ff.).

[43] Arndt, p. 137 ff.

[44] Anschütz, p. 140; Giese, p. 237; Poetzsch, p. 139; Jacobi, Das Verordnungsrecht . . ., p. 332; Hatschek, II, pp. 113 ff.

[45] Poetzsch, pp. 131-140.

Emergency Ordinances under Article 48 of the National Republican Constitution. Under the category of *Rechtsverordnungen* Anschütz enumerated (1) emergency ordinances; (2) police ordinances; (3) *Ausführungsverordnungen,* i. e. co-legislative ordinances for the execution of National laws.[46] According to the intention of the framers of the Constitution and the apparently prevailing opinion of the legal commentators of the Republican Constitution, the National Cabinet, or for that matter any other organ or official of the National Government, can claim the right to issue co-legislative ordinances for the execution of the National law only by virtue of special delegation of this right as embodied in the particular law to be executed.[47] As stated above, the general right to issue police ordinances belongs to the authorities of the Länder. A National police ordinance power can be assumed only under authority of constitutional amendment, or possibly under the emergency ordinance power of the President contained in Article 48.[48]

Thus we come to the consideration of the emergency ordinance. This institution, as has been pointed out before, was not known under the constitutional system of the Empire, but was found in the constitutions of many of the German States.[49] The right to issue emergency ordinances was in these cases generally restricted to occasions when the State legislatures were not in session. It was usually limited by the requirement that ordinances thus issued be submitted to the legislature at its next session, and that they be revoked upon the legislature's failure to approve.

[46] Anschütz, Deutsches Staatsrecht, p. 164.

[47] Concerning the opinion of the framers of the Constitution on the subject of the ordinance power of the Government see Verf. Ber. und Prot., pp. 41-43, 79, 117, 167, 340, 427-428, 469-470; Heilfron, II, p. 113 ff.; III, p. 241 ff.; IV, p. 100.

[48] See section: Interpretation of Article 48, Section 2.

[49] Anschütz, Deutsches Staatsrecht, p. 164; Meyer-Anschütz, p. 677.

Under these restrictions the Emperor had, as already mentioned, the right to issue emergency ordinances for Alsace-Lorraine. But the Constitution did not authorize the Emperor or any other executive organ to issue such emergency ordinances for the Empire.

This applies only to emergency ordinances considered from the point of view of a general emergency ordinance power granted by constitutional provision, as defined in the section of this chapter dealing with the general aspect of the ordinance power. As an example of this general emergency power we may quote once more Article VIII of the Japanese Constitution which provides that:

> The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not in session, Imperial ordinances in the place of law.
>
> Such Imperial ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said ordinances, the Government shall declare them to be invalid for the future.

When the question of the introduction of this general emergency power was discussed by the framers of the German National Constitution, Preuss, expressing the opinion and wishes of the National Government operating under the Provisional Constitution of February 10, 1919, declared that the Government did not desire the creation of such a general emergency power by the Republican Constitution. The Government's refusal to ask for the constitutional provision of such a general power was based on the fact mentioned by Preuss, that such a power had not existed under the Constitution of the Empire and had not been needed in view of the provision of Article 68 giving to the Emperor the right to declare martial law in

any part of the Empire "if public security within the federal territory is threatened. . . ." [50]

This reference to Article 68 of the Constitution of 1871 suggests a comparison with the corresponding Article of the Republican Constitution of 1919. Article 48, Sections 2-3, of the National Republican Constitution state:

> If public safety and order in the German Reich is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and order, and, if necessary, to intervene by force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153.
>
> The National President must immediately inform the Reichstag of all measures adopted by authority of Sections 1 or 2 of this Article. These measures shall be revoked at the demand of the Reichstag.

The provisions of these sections of Article 48 were without question intended to give to the President a power similar to that given by Article 68 of the Constitution of 1871 to the Emperor. The main difference, however, was that under Article 48 of the Constitution of 1919 the state of martial law had given way to what the commentators and some of the measures issued under this article call the *Ausnahmezustand.* By this is meant a condition under which some or all of the constitutional rights of the citizens as specified in Section 2 may be temporarily suspended. Poetzsch gives a list of 135 such ordinances passed from the time of the promulgation of the Constitution to the end of January, 1925.[51] The most important measures of this kind are the Ordinances for the Pro-

[50] See text corresponding to note 59.
[51] Poetzsch, Vom Staatsleben . . ., p. 141 ff.

tection of the Republic, later amended and enacted by the Reichstag as the Law for the Protection of the Republic,[52] and the National ordinance creating the *Ausnahmezustand* for the Reich, issued on September 26, 1923 on the occasion of the termination of passive resistance in the Ruhr, which, however, established military rule to a considerable extent.[53]

The precarious international position of the Reich, the failure of the Government to secure a dependable working majority in the Reichstag for the legislation necessary to balance the budget preparatory to the establishment of a foreign policy promising a settlement of the debt question, and the emergency needs created by the evacuation of the Ruhr, led to an extremely wide construction of Article 48, Section 2, and on the basis of this construction, to the issuance of ordinances of the type ordinarily issued under the general emergency power derived by constitutional authorization as described in the preceding pages. In other words, Article 48, Section 2, was interpreted by the National Government to authorize the President not only to take measures for the formal restoration or preservation of public order by way of the *Ausnahmezustand,* but to issue emergency ordinances in the general sense of the term, that is ordinances, containing new legislation, or as Hart puts it, implying discretion in the premises.[54]

Anticipating the passing of the Enabling Act of October 13, 1923, the President, a few days prior to the passing of the Act by the Reichstag, issued, with specific reference to Article 48, Section 2, a number of emergency ordinances containing material law for the regulation of the payment

[52] See chapter VIII, text corresponding to note 19 ff.

[53] *Ibid.*, text corresponding to note 32 ff.

[54] On this subject see Kronheimer, Der Streit um den Art. 48 der Reichsverfassung.

and collection of taxes and other financial matters.[55] Another ordinance of this kind, containing tax reforms, was issued under the authority of the useful Article 48 in November, 1924. These reforms provided for the lowering of the National sales and income taxes, of which the States received 20% and 90% respectively. As the reduction of these taxes would decrease their yield to the States, the latter were of course vitally interested not only in the content of this ordinance but also in the manner of its formulation and issue. It was evident that in order to command the recognition of the Länder for such an ordinance their consent had to be secured in advance, much in the same manner in which the consent of the Reichsrat is secured for Cabinet ordinances issued for the execution of National law subject to administration by the State authorities. The objection of the Länder to the use of Article 48 for the purpose of regulating the payment and collection of taxes and of lowering the sales and income taxes as proposed by this particular ordinance was overcome only with the greatest difficulty. The Länder consented to the ordinance under the condition that the National subventions for the period from December, 1924, to March, 1925, should not be lower than the average subventions for August and September, 1924.[56]

In December, 1924, Section 2 of Article 48 was resorted to for the purpose of ratifying by ordinance the commercial treaties with Austria and Switzerland and, what probably constitutes the most far-reaching action of this kind, to override a decision of the Court of Appeals concerning an issue arising out of the restoration of private debts.[57]

[55] For details of this ordinance see The Economist (London), Oct. 20, 1923.

[56] *Ibid.*, Nov. 15, 1924.

[57] *Ibid.*, Jan. 3, 1925.

Other ordinances of this kind have to do with the creation of special courts; the fixing of prices especially in the coal industry; the creation of the *Rentenmark;* the establishment of sick relief; the protection of wireless telegraphy; the inhibition of the closing down of essential industries, of strikes on the railroads, of speculation in foreign money, of the sale of German *Reichsmarken* abroad, and of the flight of capital and similar matters.[58]

Enabling Acts and Cabinet Legislation. While political considerations of a definite complexion forced upon the Government the kind of interpretation of Article 48, Section 2, which would enable it to legislate for emergency purposes by way of ordinances of the type described, political considerations of another sort demanded the utmost caution in the use of Article 48 for this purpose, and led finally to the demand for a method of emergency legislation which from the formal aspect was less subject to constitutional doubts and criticism. The solution proposed was three-fold. The first method offered an immediate alternative but was inconclusive with regard to the future, the other two methods were to be final with regard to the principle involved and for that very reason impossible of an early realization. The first method was the one known as Cabinet legislation by virtue of enabling acts, or in the German terminology "Vereinfachte Form der Gesetzgebung auf Grund der Ermächtigungsgesetze." Reference has already been made to the debates on the subject of the emergency ordinance power in the Committee on the Constitution appointed by the National Constituent Assembly for the consideration of the draft of the Constitution submitted by the National Government. In the course of

[58] Poetzsch, Vom Staatsleben . . ., p. 141 ff.

these debates the question was raised whether the National Government wished to introduce into the constitutional system of the National Republic the institution of the *Notverordnung*. As spokesman for the National Republican Government, Preuss answered that the Government did not wish to do so. Emergencies requiring special legislative action by the executive branch, so the Government held, should be met by legislative authorization in each individual case of need. The Empire, Preuss reminded his hearers, had no general emergency ordinance power and had done very well without it for nearly fifty years. A real need for such power did not exist. In ordinary times it would always be possible to convene the legislature in time to provide for an emergency. In case of special disturbances there had been under the Constitution of 1871 always the possibility for the Emperor to make use of the provisions of Article 68 for the protection of public order within the territory of the Reich. Considering the manner in which the rulers of the States had abused their general emergency ordinance power, the Reich had really been better off without such an institution. In extraordinary times, however, the legislature could always delegate for a specified time the right to issue ordinances, and Preuss very significantly advised the Committee on the Constitution that the Government was most likely to approach the National Assembly very soon with the request to grant this right under certain conditions for the period of transition from a war time to a peace time basis. A similar statement was made by Preuss before the National Assembly.[58]

The request here foreshadowed by Preuss was made and granted not only once but on various occasions. In answer to the first appeal of the Government for the right to issue

[58] Verf. Ber. und Prot., p. 42, 79; Heilfron, III, pp. 241-424.

legislative ordinances for a specified time the National Assembly passed the so-called Enabling Act (*Ermächtigungsgesetz*) of March 6, 1919.[60] As Professor Jacobi points out in an article on the National ordinance power since November 1918,[61] the Republican National Government in asking for the right to issue these ordinances, and the National Assembly in granting the request, were following the precedent set by the war-time Imperial Government and Reichstag.

By the Enabling Act of August 4, 1914, the Bundesrat had been empowered to issue for the period of the war the legal measures necessary for the alleviation of economic damage. However, these measures were to be brought to the knowledge of the Reichstag at its next session and to be repealed if the Reichstag so requested. With the consent of the Reichstag and the Reichsgericht, the Bundesrat applied the authority granted under the enabling act not only for the alleviation of damage which had actually been done, but also for the prevention of damage expected. Furthermore, though the enabling act in question specifically limited the power thus granted to the alleviation of economic damages, the Bundesrat extended its ordinance power to the field of criminal legislation and, by the issuance of retaliatory measures, also to the sphere of international law.[62] Jacobi shows, as does Poetzsch in his article on the constitutionality of the ordinances issued under the enabling acts,[63] how the Republican National Government attempted to meet the need for emergency

[60] Gesetz zur Durchführung der Waffenstillstandsbedingungen (Law for the execution of the conditions of the Armistice) RGBl., 1919, p. 286; see Poetzsch, Vom Staatsleben . . ., p. 206.

[61] Jacobi, Das Verordnungsrecht . . ., p. 273 ff.

[62] *Ibid.*, pp. 275-278.

[63] Poetzsch, Verfassungsmässigkeit . . ., p. 156 ff.

legislation in a manner similar to that applied by the Imperial Government during the war.

The first enabling act passed by the National Constituent Assembly was that of March 6, 1919, authorizing the National Government to take all measures necessary for the execution of the Armistice conditions.[64] The ordinances passed under the act were to be submitted to the National Assembly and were subject to repeal if the Assembly failed to approve them. There could be, however, no question of the fact that the transition from a war administration to a peace time government required the issuance of numerous legislative enactments or ordinances for the repeal or change of existing legal norms, especially of those which originated from the Bundesrat under the Enabling Act of August 4, 1914. But, as the National Government argued, it would be impossible to burden the National Assembly, occupied by its big task of constitution making, with such a mass of detailed but necessary legislative proposals. Thus the Government asked the National Assembly for the authority to issue, during its session, with the consent of the *Staatenausschuss* and that of a committee to be appointed by the National Assembly, those legal measures required for the transition from the war administration to a peace government, and those which for other pressing causes should be found necessary.[65] During the discussion of the Government's request Preuss contrasted this authorization asked for by the National Government with the general emergency ordinance power, coming to the conclusion that what was here demanded was a special, not a general ordinance power. This comparison of the enabling act with the general ordinance power which the National Government had refused

[64] See note 60.
[65] *Ibid.*

to secure as a constitutional provision led to a change of the wording in the title of the bill for the *Ermächtigungsgesetz*. The bill had been introduced as "A draft of a law enabling the National Government to issue ordinances (*Verordnungen*)." As the second of the enabling acts it was passed on April 17, under the title: ". . . A law for a simplified form of legislation to meet the requirements of the period of transition," (i. e. from a war time to a peace time government).[66] The Act enabled the National Government to issue the ordinances pertaining to the particular subject specified in the title, with the consent of the *Staatenausschuss* and of a committee of twenty-eight chosen from the members of the National Assembly. As in the case of the preceding enabling act, the ordinances had to be submitted to the Assembly and were to be repealed if the Assembly so ordered.

It was, of course, clear to every one that this authorization of the National Government to legislate by way of ordinances was an infringement of the Provisional Constitution of February 10, 1919, which assigned to the National Assembly the right to enact the law of the Constitution and other necessary legislation. Thus the enabling act requested by the Government was considered as a constitutional amendment. As such it required, however, only a simple majority vote in the National Assembly, the latter assuming and exercising the function of a constituent organ. Poetzsch gives a list of seventy-eight ordinances issued under the Enabling Act of April 17, 1919.[67]

After this second enabling act of the republican régime had ceased to be in force as a result of the termination of the National Assembly, the National Government, on June

[66] Gesetz über eine vereinfachte Form der Gesetzgebung für die Zwecke der Übergangswirtschaft (RGBl., 1919, p. 394).

[67] Poetzsch, Vom Staatsleben . . ., pp. 207-209.

8, 1920, placed before the Reichsrat a draft for a new enabling act which again was called "A law for a simplified form of legislation to meet the requirements of the period of transition." The Reichsrat approved the draft as a constitutional amendment in the form of the preceding Act. The question whether the new enabling act would or would not have to be considered as an amendment of the Constitution was left undecided in the Reichstag. The enactment of the draft was strongly opposed by the Independent Socialists as a violation of the rights of the Reichstag and the sovereign people. Nevertheless, it was passed by the majority required for a constitutional amendment, so that the formal constitutionality of the ten ordinances passed under its authority was not placed in doubt.[68] The Act was promulgated on August 3, 1920, and according to its own provision terminated on November 1 of the same year.

But the National Government did not feel able to get along without the right of legislation by ordinance after the expiration of this third enabling act. On October 30, 1920, it approached the Reichstag with a request for the continuation of the existing Act to April 1, 1921. In order to allay the opposition and criticism which the preceding attempt had met with in connection with the question of its constitutionality the term "simplified legislation" was abandoned in favor of the term "ordinances." Nevertheless, the Reichsrat insisted, as it had done before, on the passing of this enabling act as a constitutional amendment. In the Reichstag the bill was referred to a legal committee which reported a difference of opinion concerning the constitutionality of the proposed draft and advised its passage by the majority required for a constitutional

[68] RGBl., 1920, p. 1493. See Poetzsch, Verfassungsmässigkeit . . ., p. 160, also p. 210 of work cited in note 67.

amendment. On the one hand, it was held that the Act implied the delegation to a non-legislative body of the right to legislate which by the Constitution was given to the Reichstag. On the other hand, it was argued that the Act meant no more than the delegation to a particular committee of the right to issue the necessary *Rechtsverordnungen,* and not real legislative acts such as the Reichstag alone was competent to produce.[69] In this controversy both sides, however, missed the real point at issue. For the question was not whether the Act was to delegate the right of legislation which in Article 68, Section 2, is assigned to the Reichstag, or whether it was to authorize some governmental body to issue ordinances containing legal norms affecting the rights and liberties of the citizen. The essential fact was that both forms of delegation involve the right to issue legal norms binding with the force of statutory law upon the citizens affected by them, and that in both forms such delegation can be affected only by constitutional amendment.[70] In the Reichstag the opinion prevailed that though the title of the enabling act contained the term "ordinances" instead of "simplified form of legislation," the rules and regulations to be issued under the proposed act were intended to be material law. In agreement with the recommendation of the legal committee the fourth enabling act, like its predecessors, was passed as a constitutional amendment and promulgated on February 6, 1921.[71]

The Enabling Act of March 6, 1919, the first under the Republican era, was granted for the purpose of empower-

[69] Poetzsch, Verfassungsmässigkeit . . ., pp. 160-161; Vom Staatsleben . . ., pp. 210-211.

[70] *Ibid.*

[71] RGBl., 1921, p. 139. There were only four ordinances passed under this Act (Poetzsch, Vom Staatsleben . . ., p. 211).

ing the Government to issue the measures necessary for the execution of the terms of the Armistice. The authority granted by the other three *Ermächtigungsgesetze* was limited to the issuance of ordinances necessary for the transition from a war time to a peace time status. During the discussion of the Government's request for the Enabling Act of February 6, 1921, attention was called to the possibility that in times of political stress the Reichstag might grant to some non-legislative body the right to regulate purely political matters by way of simplified legislation, or that the right to legislate by ordinance on subjects of a politico-economic nature might violate the rights of the National Economic Council, the *Reichswirtschaftsrat.* The possibility here referred to became a reality in the fall of 1923. From April 1, 1921, to the beginning of 1923, the National Government managed the affairs of the Reich without the issuance of legislative ordinances, or rather without any enabling acts. However, the invasion of the Ruhr and the ensuing passive resistance brought with it the urgent need of new legislative powers by way of Cabinet ordinances. In February of the same year (1923) the Government asked the Reichstag for the so-called Emergency Law (*Notgesetz*). This enabling act as passed was specific in the limitation of the subjects over which the Government was given the right to legislate. Certain of the ordinances issued had to be submitted for the consent of the Reichsrat. All had to be brought to the knowledge of the Reichstag and repealed if the latter so directed. The *Notgesetz* was enacted for the period of February 24, 1923, to June 1 of the same year, but by National law of May 25, it was extended to October 31, 1923.[72]

At the end of July it was generally realized that the con-

[72] RGBl., 1923, I, pp. 147, 299. Poetzsch, *ibid.*, pp. 211-212. Under this Act 15 ordinances were issued (Poetzsch, *ibid.*).

tinuance of passive resistance in the Ruhr was no longer advisable. The financial policy of the non-partisan Cuno Cabinet had led to the complete collapse of the *Mark*. Both Nationalists and Communists were preaching a fight of despair as the only way of salvation from an untenable situation. In Saxony and Thuringia the Communists influenced the Government and organized in proletarian hundreds. In Bavaria, Hitler and his National Socialists prepared for a Nationalist revolution. As a last hope the Cuno Cabinet submitted to the Reichstag new tax proposals, such as discounts for prompt payment, the income tax, a Rhine-Ruhr offering, the motor tax, and a bill for a fixed-value loan. However, in parliamentary circles a change of Government was deemed advisable, especially since the Socialists showed a willingness to participate in a Coalition Government which should embrace all parties from Majority Socialists of the left to the German People's party of the right, provided that the industrial interests should not exercise an undue influence. Stresemann was offered the Chancellorship as the only man qualified under the conditions made. The so-called Grand Coalition Cabinet was formed as outlined. Cuno's tax proposals, augmented by a tax on business, were accepted by the Reichstag.

But the real task confronting Stresemann's Coalition Cabinet was to discontinue passive resistance in the Ruhr. As a result of the Government's announcement to that effect,[73] Bavaria issued her ordinance creating the *Ausnahmezustand* within her territory. The consequences resulting from this action led to the difficulties between the National and Bavarian Governments described above. The Communist campaign of organized terrorism in Thu-

[73] September 26, 1923. See chapter VIII, note 32.

ringia and Saxony became more alarming. In the occupied territory the separatist movement threatened to succeed under French protection.[74] In the midst of these political disturbances, the German People's party, alarmed over the power which the Socialists were able to exert, and especially over the activities of Herr Hilferding, Minister of Finance, who was an ardent advocate of nationalization of public resources and utilities, proposed legislation for the increase of production entailing the practical abandonment of an eight-hour day. Realizing the hopelessness of securing such legislation from the Reichstag against the opposition of the Socialists, the German People's party demanded an enabling act which was to endow the Cabinet with the right to legislate by way of ordinances, hoping thus to enforce its program. To the granting of such an enabling act the Socialists violently objected. The ensuing parliamentary crisis resulted in the resignation of the Chancellor. In order to facilitate a compromise between the opposing attitude of the People's party and the Socialists concerning the powers to be delegated to the Cabinet by the proposed enabling act, and in order to make possible the reconstruction of the Cabinet on the basis of the former coalition, Herr Hilferding, Minister of Finance, deserted by the Socialists, and Herr von Raumer, Minister of Commerce, disagreeing with his political colleagues of the German People's party, resigned from the Cabinet. An agreement was reached between the opposing parties that the proposed enabling act should not attempt to change the eight hour day, and that this subject should be dealt with only by ordinary legislation enacted by the Reichstag. As a further condition of their consent to the enabling act

[74] Osnabrücker Zeitung, Oct. 8, 1923; Annual Register, 1923: Germany; Stresemann's speech of October 6, 1923 (Osnabrücker Zeitung, Oct. 8, 1923).

the Socialists insisted that any legislative enactment by the Reichstag should not violate the principle of the eight hour day.[75] On the strength of this agreement Stresemann at the request of President Ebert reconstructed the Cabinet on the basis of the former Grand Coalition. In his introductory speech of October 6 he told the Reichstag that his negotiations with the party leaders for a working agreement enabling the new Cabinet to assume the responsibilities of the Government was not to be construed to mean that the Cabinet had resigned leadership to the Reichstag. To do so, that is to resign leadership to the legislature, would, according to Stresemann, manifest a totally false interpretation of parliamentarism and democracy. On the contrary, he said, "we come before the Reichstag with the request for an enabling act by which the Reichstag will for a considerable time renounce its constitutional rights, and by which it will give to the Cabinet powers far exceeding any ever possessed by any Cabinet." [76]

The enabling act was approved by the Reichsrat by a vote of 46 against 17. It was opposed by Bavaria, Mecklenburg-Strelitz, and several Prussian provinces. Thuringia abstained from voting. But it was doubtful whether a constitutional majority of a two-thirds vote of two-thirds of the total membership could be gained for the Act in the Reichstag, and this in spite of the apparent agreement which had been reached not only concerning the general principles upon which the ordinance legislation should proceed, but also on the practical aims to be achieved.[77] In order to put an end to repeated delays in the vote or to the failure to reach the majority required for a constitu-

[75] Osnabrücker Zeitung, Oct. 8, 1923, and following issues.
[76] *Ibid.*
[77] Stresemann's speech, see note 74.

tional amendment, the Government decided to bring the Reichstag to the realization of its firm intention to force the issue. For that purpose President Ebert, anticipating the regulation of some of the most urgent financial matters embodied in the program to be carried out under the proposed enabling act, resorted to the emergency ordinance power assumed by the Government under the provision of Article 48, Section 2, of the Constitution. On the authority of this provision President Ebert issued a number of ordinances for the stablization of the value of taxes paid in paper marks and for the simplified method of collecting taxes, etc.[78] The determination of the Government was finally brought home to the German People's party and to a minority of the Socialists who both intended to abstain from voting, by the official announcement of October 11 that the President had authorized the Chancellor to dissolve the Reichstag if the enabling act should fail of the constitutional majority required for its passage. On October 13 the enabling act was passed by a vote of 316 against 24, seven abstaining from voting.[79] Under the terms of the Act the Government was empowered to legislate on financial, economic, and social subjects to the extent of "deviating from the fundamental rights (*Grundrechte*) of the Constitution." All ordinances had to be submitted to the Reichstag and Reichsrat and were to be revoked upon request of the former. The Act was to remain in force not later than March 31, 1924, or until a change in the Cabinet would occur prior to that date.

As a result of the internal difficulties of a political nature Stresemann's new compromise coalition Cabinet was not of long duration. On September 26, the National

[78] Osnabrücker Zeitung, Oct. 12, 15, 1923.

[79] *Ibid.*, Oct. 12. Also Poetzsch, Vom Staatsleben . . ., pp. 212-214; RGBl., 1923, I, p. 943. There were 36 ordinances issued under this Act.

Government had announced its decision of abandoning passive resistance. Both the Nationalists and Communists were opposed to this step and threatened to endanger the success of the National Government's measures for the enforcement of its new policy. On the same day Bavaria issued a ministerial ordinance declaring the *Ausnahmezustand* for her territory and placing all civil authority in the hands of Herr von Kahr as Commissary General. A few hours later the National President issued a similar ordinance for the entire Reich. Under this decree the exercise of the civil authority was transferred to the Minister of the *Reichswehr* to be exercised by the divisional heads of the Army together with Civil Commissaries to be appointed in agreement with the Minister of the Interior. Serious conflicts arose over the interpretation of the powers of these divisional heads in Saxony and Bavaria. The situation was still further complicated by the demand of the Socialists in the Reichstag that the National ordinance establishing the *Ausnahmezustand* for the Reich be repealed, and that the National Cabinet deal impartially with the radical Government of Saxony and the Nationalist Government of Bavaria. As the National Government could not satisfy the Socialists in regard to these two demands the Socialist members of the Cabinet resigned. Thus the Enabling Act of October 13 ceased to be in force. The Cabinet vacancies were filled by members of the parties of the middle and right.[80] A vote of confidence demanded by the Government parties was defeated in the Reichstag on November 22. A week elapsed and the Stresemann Government resigned before a new Cabinet was formed. On December 1 the leader of the Center party, Dr. Marx, succeeded in the construction of a "middle class Cabinet"

[80] Herr Jarres of the German People's party was made Minister of the Interior (Annual Register, 1923, pp. 188-189).

comprising all the parties of the Stresemann Cabinet with the exception of the Socialists. Stresemann remained in the Cabinet as Minister for Foreign Affairs. A new enabling act was demanded and was granted by the Reichstag on December 6. The Reichsrat, approving the new grant of legislative power to the Cabinet, made the condition that the ordinances to be issued under this authorization be subject to revocation not only at the request of the Reichstag but also of the Reichsrat. The demand for revocation in the Reichstag had to be made by two successive votes. The Act was to remain in force until February 15, 1924. But there was another and more vital difference between this and the preceding empowering act. Under the *Ermächtigungsgesetz* granted the Stresemann Cabinet, the Government's powers were limited in regard to subject matter to finance, economics, and social questions. Within the sphere of these topics, however, it could pass ordinances "deviating from the fundamental rights of the Constitution." The new act did not convey any authority to change the law of the Constitution. On the other hand, it contained no limitation in regard to the matter subject to legislation by Cabinet or ministerial ordinances.[81] As the condition of their support of this latest enabling act the Socialists had demanded the insertion of a provision to the effect that all ordinances must, prior to their promulgation, be submitted to a Reichstag committee of fifteen. However, since this committee was given no veto power over the ordinances submitted, the

[81] RGBl., 1923, I, p. 1179. Annual Register, *ibid.*; The Economist (London) Dec. 8, 15, 1923; Osnabrücker Zeitung, Dec. 5, 1923; Poetzsch, Vom Staatsleben . . ., p. 214 ff. Under this Act 68 ordinances were issued, bringing the number of all ordinances of a legislative character issued for the period of two years and five months, i. e. the actual time during which the six Enabling Acts issued from February 15, 1919, to February 15, 1924, were in operation, up to a total of 211.

restriction involved in the provision was of little concern to the Government.[82]

Public opinion concerning the significance of what in many quarters was called this self-effacement of the Reichstag, was of course divided. The extreme left was certain that the surrender of the constitutional right of legislation to a Cabinet constituted chiefly of the middle classes was a betrayal of the sovereign rights of the people. "The Enabling Act [of October 13, 1923]," said representative Froelich, the Communist, "signifies the end of the *Scheindemokratie*. . . . The Government will use its power for the enslavement of the people. This dictatorship will lead to civil war against the laboring classes and is the advance guard of a monarchical dictatorship." [83] According to the point of view of the extreme right, as expressed by their representatives in the Reichstag, the passing of the enabling acts meant the elimination of the legislature in favor of a dictatorship of mediocrity.[84] It was held to be an admission of the utter failure of the parliamentary system properly and effectively to conduct the affairs which the German people had placed in its care.[85]

On the other hand, defenders of the temporary delegation of the legislative powers to the National Cabinet were not lacking. Socialist Representative Müller stated that he could not consider the recent happening as a breakdown of the parliamentary system.[86] Representative André of the Center party denied the charge that the enabling acts conferred upon the Cabinet the powers of a dicta-

[82] *Ibid.*

[83] Osnabrücker Zeitung, Oct. 15, 1923.

[84] Representative Wulle of the Deutsche Völkische Partei (Osnabrücker Zeitung, Oct. 12, 1923).

[85] Representative Schulz, German Nationalist (*ibid.*).

[86] Osnabrücker Zeitung, Oct. 12, 1923.

torship. These powers, he said, were a means for the breaking of the dictatorship exercised by the capitalists and trusts.[87] In its editorial discussion of the passage of the Enabling Act of October 13, 1923, one of the North German dailies, claiming to be politically independent, but exhibiting unmistakable evidence of moderate Nationalist leanings, expressed its opinion as follows: On Saturday the Reichstag had a really great day inasmuch as it proved itself equal to its task. Parliamentarism was held properly subject to severe criticism, but not with respect to the one decision of extreme importance which was reached so quickly on Saturday. The delegation of extraordinary powers to the Government was by no means a resignation of parliamentarism, but an authorization of the Government to produce swift and decisive action in a time of extreme distress. Granting this authorization in a constitutional manner, the Reichstag had manifested the realization of the needs of the situation and had acted accordingly. In other countries Parliament had acted in the same manner under similar situations, thereby increasing rather than lowering their credit. The same would be the result of the action of the German National Parliament. The editorial concluded by saying that by the manner in which the Reichstag had made possible swift political action by executive decision, it had regained much of the esteem lost in recent times.[88]

Juristic opinion concerning the constitutionality of emergency or Cabinet legislation by virtue of enabling acts may be summarized to the effect that though this process preserves the decorum of an apparent legal procedure, it nevertheless violates the spirit, or rather the intention of the framers, of the Constitution. In an inter-

[87] *Ibid.*

[88] *Ibid.*, Oct. 15, 1923.

esting article on the evasion of the Constitution, Carl Bilfinger devotes one chapter to what he calls the *Durchbrechung der Verfassung* (Method of breaking through the Constitution).[89] His criticism of the subject in question deserves to be quoted to some extent. Under the heading "Enabling Legislation and Dictatorship," Bilfinger writes:

The criticism of the process of "simplified legislation" like the question of the admissibility and limitations of the *Rechtsverordnung* in general, is based upon the now accepted conception that in the making of law the State must as a matter of principle follow the procedure of formal legislation and that there is no independent right of issuing *Rechtsverordnungen.* Thus the Reichstag can delegate its own legislative authority, derived from Article 68 of the Constitution, to the National Government by way of a total revision of the Constitution, but not by way of a so-called *Ermächtigungsgesetz.* Presupposing the retention of the legislative power by the Reichstag, the enabling act can merely delegate the temporary exercise of that power. The intention to do more than that would mean, according to the formal or material point of view, either an unconstitutional act or an evasion of the Constitution. The grant of a delegation universal in character or unlimited with regard to time, or the realization of what Triepel calls the tendency to establish as an indefinite rule what was intended as a passing exception, would be an evasion of the Constitution and in case of recognition and acceptance of such an illegal procedure as creating law (*rechtserzeugend*) would amount to a change of the Constitution on a large scale (*Verfassungswandlung grossen Stiles*), i. e. a *coup d'état* (*Staatsstreich*). One could speak in such a case of an evasion of the Constitution in so far as . . . the method of breaking through the Constitution by means of the enabling act is intended to

[89] Bilfinger, Verfassungsumgehung . . ., pp. 163-191.

maintain the appearance of a non-violation of the written law of the Constitution as laid down in the formal document.

It is true, this combination has so far not exceeded the status of certain incipient attempts. But even the practice of the individual enabling act containing a universal delegation, limited in time, such as the Enabling Acts of October 13, and December 8, 1923, is equivalent to an evasion of the Constitution. Such laws signify from the point of view of their content a program or system of evasion inasmuch as the ordinary mode of legislation is excluded in advance for an indefinite series of legal norms which, under the normal limitation of the process of *Rechtsverordnungen,* require enactment by the ordinary process of legislation, and since in the place of the ordinary process of legislation the evasion is legalized by a general breach of the Constitution. An aggravating element is found in the fact that this constitutes a departure from the will of the creators of the Constitution, who did not wish to introduce a general emergency ordinance right into the Constitution on account of the danger of abuse, and who desired to differentiate their own constitutional creation as good compared with other constitutions for the very reason that it was not saddled with the general emergency power. . . .[90]

Interpretation of Article 48, Section 2. On the other hand, the two more effective, but for that reason more difficult, methods suggested as a substitute for the evil of emergency legislation by virtue of Article 48, Section 2, and by special authorization under the enabling acts, were (1) the Government's change of front concerning the desirability of the constitutional grant of the general emergency power and (2) the constantly growing demand of the interested parties for the definition of the President's

[90] The demand for the early enactment of the "Ausführungsgesetz" had for instance been made in the meeting of German jurists at Jena in April 1924, and on the occasion of the German *Juristentag* in Heidelberg in September of the same year (Kronheimer, p. 32).

powers under Article 48, as provided in Section 5 of that article which states that "the details will be regulated by National law."

Concerning the Government's change of attitude in the question of the general emergency power it can be stated that in 1925 the National Government submitted to the Reichstag a bill for the amendment of the Constitution asking for the general emergency power formerly rejected by the framers of the Constitution. The Government's argument in favor of the change was as follows:

> The Constitution gives to the National Government no emergency ordinance power beyond that of the President contained in Article 48, Section 2, and intended for the reestablishment of public order and peace. The situation of the post-war period, especially the difficult economic condition resulting from the Versailles Treaty, however, shows that such an emergency ordinance power is an urgent need of the Reich. Article 48 was primarily intended for measures of a police and military character as an extreme expedient. It is for this reason that the National Government proposes, for the time when the Reichstag is not in session, the granting of the general emergency ordinance power for the elimination of exceptional emergencies. The emergency power asked for is not to be made dependent upon the consent of the Reichsrat nor of the Reichstag's Committee for the Preservation of the Rights of the Assembly. But the ordinances passed under the proposed power are to be submitted to the Reichstag when the latter convenes and they are to be repealed by the National Government if the Reichstag so demands.

This bill was considered by the legal committee of the Reichstag on November 6, 1925, but so far no further action seems to have been taken.[91]

[91] Osnabrücker Zeitung, June 17, Aug. 26, Sept. 1, Nov. 7, 1925.

As already stated, the concluding section of Article 48 provides that "the details are to be regulated by National law," i. e. by a so-called *Ausführungsgesetz*. Seven years after the enactment of the Constitution this National law for the specialization of Article 48 is now in a fair way of becoming a reality. As reported in the German press the Government is ready to submit to the Reichstag and Reichsrat the draft of a law which will specify the powers of the President under Article 48. The main features of the draft are given as follows:

Ordinances issued by the President or those commissioned by him under the authority of Article 48 are to have the validity of National law. In the event of a controversy concerning the repeal of an ordinance issued under Article 48 by the President or by one of the Länder, the Staatsgerichtshof shall render the decision. In the exercise of his functions arising under Article 48 the President is limited by the Constitution and by the provisions covering legislation. Where and when the *Ausnahmezustand* has been declared for a particular territory, there shall be, beyond the suspension of the provisions of the Constitution as stipulated in Article 48, no deviation from the National Constitution which cannot be effected by a non-amending, i. e. an ordinary National law. In case the military *Ausnahmezustand* is declared, the President shall appoint a civil commissary whose objections shall be heeded by the military commander. All regulations issued under the *Ausnahmezustand* are subject to remonstrances, which latter are to be directed to the National Ministers of the Interior or Defense respectively, or in case the regulation is issued by the Government of one of the Länder, to the Government of the State concerned.[92]

[92] *Ibid.*, Oct. 19, 1926 (citing Vossische Zeitung).

CHAPTER XII

Direct Government by Popular Election, Initiative, Referendum, and Recall

Origin, Meaning, and Use of the Term Plebiscite. In their common application the terms plebiscite and referendum are generally used as the equivalent of the principle of popular consent. For practical purposes this is not incorrect. To the popular mind the terms referendum, plebiscite, and popular consent are indeed identical. Technically speaking, however, the principle of popular consent represents an end in itself, i. e. the right of the people to decide, by simple or larger majority vote, matters of government or State, while the terms referendum or plebiscite denote merely the mode of expressing or withholding such popular approval of each measure submitted. This difference between principle or function and mode of procedure will become clear by a brief historical reference to the origins of the terms plebiscite and referendum.[1]

The term plebiscite is of Roman origin. The reign of oppression and extortion, practiced at the end of the sixth and the beginning of the fifth centuries B. C. by the patricians after the expulsion of the kings, forced the plebeian population to seek ways and means of bettering their political and economic conditions. Assemblies of the plebs and plebiscites passed by them in the form of resolutions and decrees were the result. With the creation of the office of the *tribuni plebis* in the year 494 these assem-

[1] The preceding paragraph and the following historical outline are based on the author's "The Employment of the Plebiscite . . .," p. 11 ff.

blies seem to have gained official recognition and stability in so far as their convocation was made one of the duties and rights of the newly created *tribuni plebis.*

The Roman *plebiscitum* then was the result of the attempt by the Roman plebs to secure for itself a voice in public matters in opposition to the ruling patricians represented by the Senate with its exercise of the *auctoritas patrum.* It served at the same time as the means for making this voice heard more often and more audibly until finally the Senate, weary of being compelled by force of popular threats to yield to these revolutionary plebiscites, decided by the acceptance of the *lex Valeria-Horatia* of 449, to give the *plebiscitum* the validity of law binding upon all Roman citizens, provided that the *plebiscitum,* with the consent of the Senate, was laid before and adopted by the *comitia centuriata,* and then given the *auctoritas* in the Senate. Thus it was after all the *post festum* ratification by the Senate which made the *plebiscitum* law for all Romans. Various other attempts were made to check the legislative right thus secured by the plebs. By the *lex Publilia Philonis* of 339 it was stipulated that the *tribuni plebis* must henceforth solicit the consent of the Senate before they submit any proposed law to the vote of the plebs. But in course of time the plebs refused to abide by this restriction. If and when the Senate refused its *auctoritas* in advance, the plebs did not hesitate to enforce its will by means of extra-legal plebiscites. When, finally, on the eve of the second Samnite war the Senate refused to approve the popular demand expressed by a plebiscite for the distribution of land and cancellation of debts, the plebs left the city for Mount Janiculus, and the result was that in the same year, i. e. 287, the *lex Hortensia* was passed, providing that "what the plebs ordered shall be binding for all Romans."

Roman jurists have thus come to distinguish between statute and plebiscite. "A statute," says Gaius, "is a command and ordinance of the people; a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians." As rendered by another translator: "A *lex* is a law enacted and established by the whole body of the people; a plebiscite one enacted and established by its plebian members. . . ." [2]

This distinction between *lex* and *plebiscitum* is not one of principle but one of method and procedure. Both *lex* and *plebiscitum* were legally binding for all Romans, but the procedure of creating the two kinds of law was different. It is this aspect of a new or special kind of procedure which is still attached to the term, although in modern usage the method under which the plebiscite is employed has been modified to the extent that at least in principle no particular stratum of the people is excluded from the vote as a class. Nevertheless, the popular notion that the plebiscite is identical with universal suffrage is not based upon historical facts. Restrictions of the right to vote in the cases where plebiscites have been held have been frequent, though there is an evident tendency in the direction of the unrestricted use of the franchise.

In the Greek city States, especially in Sparta and Athens, the right of the people to vote on matters of government and law was not, as was the case in Rome, secured by the threats and application of force, but rather by the established process of constitutional method and procedure. It was, however, in the Greek city States as well as in

[2] With the fall of the Republic the Roman plebs surrendered its hard-fought-for rights to the Emperor and the Senate.

Rome, the result of a political struggle between the ruled and ruling.

In Sparta, two centuries of civil strife between the kings and the aristocracy were ended by the laws of Lycurgus, which carried into effect the answer given by the Delphian oracle, commanding Lycurgus to establish a Senate of thirty members, to call the Assembly (*apella*) from time to time and there to introduce and rescind measures, but to give to the people the deciding voice and power. Thus the laws of Lycurgus ended the strife between kings and aristocracy by giving to the people the very power over which the former had been in dispute.

In Athens the hereditary kingdom, passing through the stages of government by aristocracy and tyrants, developed into a pure democracy. The people, assembling in the market place (*agora*) or in the theatre (*theatron*) decided on peace or war, received ambassadors, fixed taxes, disposed of public revenues, appointed and recalled magistrates, lodged indictments, granted pardons, in short, exercised directly in primary assembly all the functions of government. There was only one thing the people in the assembly could not do, at least not until the last century of their freedom; they could not override the existing written law known as *nomos*. Neither a decree of the Senate nor one of the people could override this existing law. However, such a fundamental distinction between the law and the decree of the popular assembly was bound to disappear in the course of progressive democratization. By and by the decree of the assembly (*psēphisma*) came at least in fact to take the place of the written law (*nomos*) and the will of the "sovereign" people was the law in the last century of Greek independence and under Macedonian hegemony. In Sparta the opinion or will of the *apella* was expressed by acclamation or murmur, in the public

gatherings of Athens by the personal marking and casting of the voting stone (*ostrakon*).

In Rome the plebiscite was the expression of the will of the plebeian population. Since 449 it had the force of law for all Roman citizens including the patricians, and of course, for all non-freemen. Also in the Greek city States the popular vote was limited to one stratum of the population, but here the privilege favored the ruling class represented by all freemen, for only the latter were entitled to the vote, not the slaves, nor the conquered natives and their descendants in Sparta and the domiciled foreigners in Athens. To appreciate the significance of this restriction of the unfree one need only consider that in the year 309 B. C. the population of Attica included 21,000 citizens, 10,000 *metoikoi* or domiciled strangers, and 400,000 slaves. The figures for the citizens and the *metoikoi* include only the major males.[3]

Origin, Meaning, and Use of the Term Referendum. The use of the term referendum is of Swiss, or rather German-Swiss, origin. In the first century of the Christian era Tacitus, describing the land and customs of the Germanic tribes, told his fellow Romans among other things that:

> . . . On affairs of smaller moment, the chiefs consult; on those of greater importance, the whole community. Yet with this circumstance, that what is referred to the decision of the people, is first maturely discussed by the chiefs. They [the people, i. e. the armed freemen] assemble, unless upon some sudden emergency, on stated days. . . . An inconvenience produced by their liberty is, that they do not all assemble at a stated time, as if it were in obedience to a command, but two

[3] Borgeaud, Histoire du plébiscite . . . 1887, pp. 7, 174.

or three days are lost in the delays of convening. When they all think fit, they sit down armed. . . . Then the king, or chief, and such others as are conspicuous for age, birth, military renown, or eloquence are heard, and gain attention rather from their ability to persuade than their authority to command. If a proposal displease, the assembly reject it by an inarticulate murmur; if it prove agreeable, they clash their javelins. . . .[4]

The turbulent times of the German migrations and the development of feudalism in the remaining German tribes practically eliminated from their political life these popular gatherings of all the armed freemen. The primary assembly gave way to the Reichstag of the Frankenreich which, though in theory an organ representative of the freemen, was in practice nothing but an assembly of the dignitaries of the Church and of the most powerful notables and vassals of the king. Even the so-called free institutions of England do not show anything to compare with the plebiscite of the old Romans or Greeks, or with the popular deliberations of the German tribes. The nearest approach ever made in England to the recognition of an authority capable of self-expression higher than the legislature was the "Agreement of the People" of Cromwell's time, which was not, however, put into practice. This "Agreement," framed by the Council of Cromwell's army in 1647 as the basis for an adjustment with the King and Parliament, declared itself to be an expression of the will of the people and made the meaning of this declaration clear by providing that every individual who was included in the people should sign that document.[5]

[4] Tacitus, Germania (The Works. . . . Oxford translation, vol. II).

[5] Dunning, History of Political Theory from Luther to Montesquieu, 1916, pp. 238-239.

The only place in Europe where the old popular gatherings and expressions of the popular will in such primary assemblies had not entirely gone out of existence was Switzerland. When in the fifth century the Alemanni and Burgundi invaded Celtic-Roman Helvetia, they introduced and continued their system of communal self-government with its popular deliberations and decisions of public affairs of importance until temporarily at least the growth of feudalism centered the right and power of making and administering the law in the hands of the feudal lords, the lesser nobles, and the clergy. But with the first sign of reaction against this feudal overlordship, "the communal organism and the municipal spirit were revived and gradually developed in those same localities where they flourished previous to the feudal period." [6] The progress of this movement finally led everywhere back to the forefathers' way of direct government by popular vote.

In some of the rural communities of Uri, Schwyz, Unterwalden, Appenzell, Zug, and Glarus the people have in fact never ceased to legislate for themselves and to vote their own taxes, from the thirteenth century down. In other cantons, however, the communes sent their representatives to the general cantonal assembly. This was the case in the Canton Wallis which contained twelve communes whose delegates, convened in the general cantonal assembly, discussed and adopted resolutions for prospective legislation and then submitted these resolutions to the people of their respective communes. It was by popular communal vote that these resolutions of the general representative assembly were either rejected or approved and thus given the force of law. This act or process of submitting the resolutions of the general assembly to the

[6] Cherbuliez, De la démocratie en Suisse . . . 1843, I, pp. 13-17.

popular vote of the communes was called by a term borrowed from the technical language of diplomacy, i. e. *ad referendum.* A similar situation existed in the Canton Graubünden. This method of expressing the popular will gradually gained ground so that at the beginning of the eighteenth century it was advocated also in Bern.[7]

The aim of the referendum was the same as that of the plebiscite, i. e. the expression of the popular will, but the method was different. At the time which we are here considering the terms referendum and plebiscite signified therefore not the principle of consulting or expressing the popular will, but the particular method by which that expression was secured. It was in the form here described as the referendum that the popular approval of constitutional amendments was required under the Constitution of Massachusetts of 1780. Article 7 of this Constitution states that: "Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor or private interest of any man, family, or class of men; therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it." According to Poore, "this constitution (one adopted by the general court in 1778 having been rejected by the people) was framed by a convention which met at Boston September 1, 1779, and, after several adjournments, completed its labors March 2, 1780. It was submitted to the people, and ratified by more than two-thirds of those who voted." [8]

The French Republican Constitution of 1793 was fol-

[7] See Hatschek, I, p. 273 ff.

[8] Poore, The Federal and State Constitutions: Massachusetts Constitution 1780. See also Hatschek, I, p. 274.

lowed by a decree regulating the voting in the primary assemblies to which the constitution was to be referred for approval, and by which it was accepted with a large majority, though it was never put into practice.[9] The principle of voting in primary assembly on proposals submitted by the representative National Assembly was embodied also in the French Constitution of the year III (1795).[10] The Constitution itself was adopted or rather approved in this manner by a vote of 914,853 for and 41,892 against ratification.[11] It was in this form also that the referendum found a place in the Federal Swiss Constitution of 1798. Article 106 ff. of the so-called "Helvetic" stipulated that all future amendments to the constitution should be approved by, i. e. referred to, primary popular assemblies.

But the ancient Roman and Greek method of expressing the people's will in general or primary assembly, though advocated in theory by Rousseau and still applied in practice in some of the cantons of Switzerland, could not be employed in the large modern State with the same simplicity with which it had been worked two thousand or more years ago. The affairs of the modern State were no longer a matter of interest of a single locality or a number of cities. Nor was it still possible to call the freemen of a country together at a certain date and place as did the German tribes at the time of which Tacitus wrote. The vote now had to be taken wherever people lived and the results had to be communicated to a central place, the seat of government, or, according to the system advocated by Moore in the *Utopia,* the people had to send their chosen representatives to voice their opinion and will through

[9] See the author's "The Employment of the Plebiscite . . .," p. 25.
[10] Article 20.
[11] Larousse, Grand Dictionnaire: Constitution [of France] 1795.

them and, if necessary, pass final judgment of approval or rejection by popular vote on the decisions reached by their representatives.[12] It was in consequence of this realization that Harrington, leading us back not only to the principle of popular Sovereignty of the ancients, but also to their methods of giving voice and life to this principle, stressed the importance of the secret ballot as the device through which the absolute freedom of the individual voter was to be achieved.[13]

Use of the Terms in Modern Practice. It was in France that the plebiscite in the modern form found its first application. In 1799 Napoleon Bonaparte, by the coup d'état of the 18 brumaire, replaced the *Directoire* by the *Consulat provisoire.* As *Premier Consul* he offered the French people a new constitution, known as that of the year VIII, to be accepted by popular vote. The system under which the voting was to take place admitted all free citizens, but they were forced to vote in public. By the Law of the 23 frimaire it was decreed that public registers were to be opened in each commune, one for acceptance and one for rejection. Each citizen had to enter his "oui" in one, or his "non" in the other. The historian Aulard refers to this plebiscite as the one which brought the term "le suffrage universal" into usage. He cites Mallet du Pan, writing in London on the Constitution of the year VIII, as the first to use the term in the *Mercure britannique* of January, 1800, and he judges that it was Mallet who introduced the term "universal suffrage" into English phraseology.[14] With this vote on the Constitution of the year

[12] In chapter on the magistracy.

[13] See note 5.

[14] Aulard, Histoire politique de la Révolution française . . . 1901, pp. 706, 710-711.

VIII there began in France the era of the plebiscites, or as Aulard expresses it, "thus was founded in France the République plébiscitaire." [15] In 1802 another plebiscite was held by "oui" and "non," making Napoleon "Consul for life." By the plebiscite of 1804 the Consul for life was made Emperor of the French. From 1848 to 1852 France was the scene of three plebiscites, which in their consequences made the third Napoleon Emperor of the French.

As a result of the publicity which the institution of the plebiscite had thus received the Italian statesman Cavour decided to apply this method of popular expression for the purpose of justifying and strengthening his attempted merger of the separate Italian States into a National union. The use of the plebiscite for this purpose was strongly opposed by Napoleon III and most of the European statesmen and rulers. The principle that popular consent was required for annexations or changes of territory, no matter under what form, was held to be a revolutionary doctrine which was to be opposed by all means. Cavour was reminded in the officially inspired *Constitutionnel* of March 30, 1860, that "universal suffrage can be applied only in the interior of a country," and that "it can not serve to modify the exercise of sovereignty in the relations with the outside nor for an extension of territory."

France herself, however, had actually set the precedent for the application of the plebiscite in the sense in which Cavour proposed to use it. For in 1790 and 1791 revolutionary France had employed the plebiscite to regain the territories of Avignon and Venaissin, which for over four hundred years had formed part of the Papal States, but by ties of nature belonged to France. In 1792 the plebiscite was applied for the annexation to France of the bishopric of Basel, and of Savoy and Nice, at the time

[15] See note 1.

part of the principality of Piedmont. In 1793 a plebiscite was supposed to have been held to cover the annexation by France of the Rhenish territory situated to the left of the Rhine between Landau and Bingen, including Mainz, Worms, and Speier. About the same time local plebiscites organized by French revolutionary clubs in Belgium were resorted to in order to aid in the intended annexation of Belgium. In fact, when Napoleon III was offered, as the price for his consent to Italian union, the return of Savoy and Nice which France had been forced to surrender in 1815, he no longer objected to the use of the plebiscite as intended by Cavour. On the contrary, Napoleon himself employed the plebiscite in order to establish the will of the people of Savoy and Nice to be reannexed to France in 1860. Furthermore, Napoleon insisted on the inclusion in the Treaty of Prague of 1866, concluded between Austria and Prussia, of a provision for the holding of a plebiscite in the northern part of Schleswig which under this treaty became part of Prussia.

It was thus that ground was gained for the doctrine which claimed that the consent of the inhabitants was necessary for the transfer of territory from one Sovereignty to another and that, consequently the system securing this consent, known as the plebiscite, was applied in at least a number of cases of such transfers. However, the difference made in the *Constitutionnel* of March 30, 1860, between the consultation of the population in internal affairs of government and such consultation in the affairs affecting the relation of the population to the State from the point of view of international law, has been maintained to the extent that, except in France, the mode of registering popular approval or disapproval in internal affairs of government has come to be known as popular or general election, universal suffrage, and referendum, using

the word in the generic sense, while the term plebiscite is employed almost exclusively in reference to popular votes on the question of territorial changes. It should be remembered, however, that the term plebiscite, now practically confined to the sphere of international law and practice, still signifies not a principle but a method of procedure. The consideration of the consent of the population as an essential element in the transfer of territory constitutes the principle, the plebiscite is merely the method by which this principle is applied in practice. The expression of approval or disapproval by the people is a function, the plebiscite the form under which this function takes place.

With this development in the application of the plebiscite, the use of the referendum was extended from approval or rejection of proposed legislation to rejection or recall of laws already passed and to the initiation of legislation. By this extension the term referendum, formerly signifying the method or procedure by means of which popular consent to legislative proposals was secured, now became one of the various functions designed for the purpose of establishing popular control over the legislative activities of representative assemblies and over the actions of governments in the sphere of administration and jurisdiction. Thus the referendum in modern constitutional practice is one of the three or more functions of direct popular government, such other functions being the initiative and recall of legislation, the election of representatives, and the election and recall of executive, judicial, or other public officials. The method or procedure by which any or all of these functions are accomplished may differ. It may follow the older principle of calling for a vote in primary assemblies, as for instance in the case of the approval of constitutional amendments by the town meetings under the Massachusetts Constitution of 1780,

and as it is still practiced in some of the cantons of present day Switzerland. It may follow the system of securing popular consent by the vote in State or local representative assemblies, as for instance in the United States where such consent is required for constitutional amendments of the Federal Constitution and where it has been practiced for the ratification of many of the State constitutions. Or, finally the system of procedure may be that of a general universal direct vote of either the male or the male and female voters of the whole country. It is this last form under which the system has been introduced in the National Republican Constitution of Germany.

Direct Government and Popular Sovereignty. In addition to the checks and controls by which the system of the balance of power is secured in the German Republican Constitution between the executive and legislative departments, between President and Cabinet, and Reichstag and Reichsrat, there is found in the National Constitution the fundamental principle of control taken over from the third standard form of popular government, the immediate republic. This third type has been defined as one in which the people, not through representatives but directly in popular assemblies, perform the most important functions of government, particularly that of legislation.

Many of the framers of the new German Constitution, holding to the literal interpretation of the political doctrine of the Sovereignty of the people, naturally looked upon this form of popular government as the ideal. They realized, of course, that this system was impossible of complete realization in modern Germany. Nevertheless, the recognition of the principle of immediate participation of the "sovereign" people in the affairs of government by way of the popular vote by ballot seemed to them not only logical but undeniable. The second Preuss draft provided

for the application of the principle of direct government under the following forms:

1. The election by popular vote of the representatives of the Reichstag (Article 31, Section 2).
2. The election by popular vote of the National President (Article 58, Section 1).
3. The approval or disapproval by popular referendum of all constitutional amendments to be passed after the constitution proposed has been in effect for five years (Article 51, Section 2).
4. A decision by popular referendum in the case of a failure of Reichstag and Reichsrat to agree on legislative proposals (Article 60, Section 2).
5. An expression by way of a plebiscite of the wishes of the people directly affected by proposed changes in the territorial status of the Länder (Article 11, Section 3).[16]

Of these five forms of immediate participation of the electorate in the affairs of government only the election by popular vote of representatives to the Reichstag was found in the constitutional system of the Empire. Of the remaining four the third and the fourth belong in the category of the referendum, using the term in the strict or technical sense. The initiative and the recall are not represented.

According to Preuss, direct government, i. e. government by the people themselves, must be admitted to be a postulate of democracy, but its general application is practical only in smaller States and under less complicated conditions.[17] In his criticism of Preuss' argument against the extended use of the referendum in Germany, the Socialist representative Quarck denied the correctness of the asser-

[16] For text of the second Preuss draft see Heilfron, II, p. 513 ff.
[17] *Ibid.*, IV, p. 116.

tion that the referendum was practicable only for smaller or minor States. The referendum, he said, was employed not only in Switzerland but also in Australia and in America. He was interrupted by a remark from the Government table to the effect that this was true only of the member States. Accepting the correction, Representative Quarck insisted that the referendum was in use in almost all or at least half of the States of the American Union and had thus for a long time been successfully applied in large territories.[18] It was chiefly under pressure from the Socialist groups that the very limited application of the referendum of the Preuss plan was gradually extended in the later drafts. In consequence of numerous proposals submitted and most stubbornly defended by the Socialist members of the National Assembly and the *Verfassungsausschuss,* the Constitution as finally accepted, provides not only for the referendum proper, but contains important provisions for the employment of the initiative and recall as well.[19]

That the revolutionary Socialist parties should prove themselves to be the most insistent agitators for the widest possible extent of direct government was only a natural consequence of their literal interpretation and acceptance of the doctrine of popular Sovereignty. Another equally natural corollary of this fact was their belief that the National electorate thus participating directly in the affairs of government was acting in its sovereign capacity, i. e. it was acting as the Sovereign of the Commonwealth. This view was expressed repeatedly by the Socialist representatives on the floor of the Assembly, as for instance in connection with the Nationalists' opposition to the adop-

[18] *Ibid.*, p. 122.

[19] See remarks of Representative Quarck, *ibid.*

tion of the initiative. Direct popular initiation of legislation had been attacked by the Nationalist speaker, Delbrück,[20] on the ground that such initiative would take place only as the result of active agitation on the part of some political party and would in the last analysis depend upon financial backing. Defending their demand for the initiative, the Socialists replied that in reality the National Cabinet and the members of the Reichstag would always be the actual organs for the initiation of legislation. In addition to these organs, however, the Sovereignty of the people should be given an opportunity to assert itself to the extent of creating law without the representative legislative body if or when the legislature itself should refuse to recognize a strong demand in this direction existing among the masses.[21] The theory of the sovereign character of these acts of direct government was shared by some of the so-called middle parties. Speaking for the German Democrats, for instance, Herr Haussmann stated that in the *Volksabstimmung* to be introduced into the German constitutional system, "the people . . . exercise their legislative functions not through representatives but themselves as the Sovereign from whom the Staatsgewalt emanates." [22]

As the literal interpretation of the doctrine of popular Sovereignty has been shown to be untenable from the point of view of modern constitutional law,[23] so the definition of the referendum as a sovereign act of the electorate, or

[20] Also by Herr Heintze (German People's party), Heilfron, IV, pp. 111-113.

[21] *Ibid.*, p. 115.

[22] *Ibid.*, III, p. 536. See also his statement that the Sovereignty of the people is manifested in the fact that the President is not elected by the Reichstag, but by the people (*ibid.*, V, p. 344).

[23] See chapter III, section: Location and Exercise of Sovereignty. Also the author's "Concepts of State, Sovereignty, and International Law," chapter III.

rather as direct participation in the government by the sovereign people, must be rejected. As a political doctrine the theory of popular Sovereignty is, of course, the natural antithesis of the erroneous view that under the Constitution of 1871 the Emperor or the rulers of the individual States were the Sovereigns of Reich and States. It has already been pointed out [24] that German juristic opinion under the Empire had accepted as the only rational and satisfactory conception the theory which considers the State as a juristic personality and Sovereignty as the State's legal will. Under this theory Sovereignty conceived as the legal will of the State cannot be possessed by any one particular person or group of persons. Any persons participating in the governing of the State act merely as the State's officers and in accordance with the norms laid down for such government in a written constitution or in a system of politically and legally binding conventions. This applies to the popular electorate or voters as well as to emperors, kings, and princes. As far as the electorate acts in conformity with these norms it expresses the will of the State. However, the people organized as the electorate participate in the government, not in any sovereign capacity, but as an organ of government acting as the agent of the State which latter alone is sovereign. Wherever therefore in a popular government the electorate by way of popular elections, initiative, referendum, or recall participates in the act of governing, it must be held to do so as an agent of the State or organ of government and not as the Sovereign, for such participation by the people, or rather by the electorate, is but a function of government.

The Views of Brunet, Hatschek, and Others. The opinion that direct government as here considered constitutes

a sovereign act of the sovereign people is shared also by some of the commentators on the German National Constitution. Under the heading "Direct Government," Brunet, as translated by Gollomb, says:

> Universal suffrage is the means by which the sovereign people manifests its will in a democracy. Once the election is over it leaves to the representatives it has elected the freedom of directing in its name the affairs of the state. This is the system of representative government. At the same time the people give their representatives only limited powers, and they reserve the right themselves to decide on certain particularly important affairs. In such a case there is direct government. . .
>
> The National Assembly has admitted without any difficulty the principle of direct government into the Constitution. . . .
>
> The people express themselves not only on the text of a law. They are also the great political judges, the supreme arbiters to whom must be submitted all difficulties of vital importance to the nation. The people give to the organs chosen by them the right to legislate and to govern; but if a discord arises between these organs or if these organs once nominated do not bend to the people's will, they intervene themselves on the appeal of one of the organs or of their own accord. Direct government expresses itself, therefore, when a conflict arises between the organs of national representation, or between this representation and the nation itself. In these two cases it is the people who decide the conflict.[25]

These statements contain a serious ambiguity which must be removed before they can be accepted. In the first place Brunet speaks of "the people," "the sovereign people," and of "the nation," using these terms sometimes as synonyms and sometimes as different concepts. Under the modern juristic conception of the State, democratic

[25] Brunet, pp. 118-120.

or other, there can be no differentiation between sovereign people and Nation. The sovereign people are the people conceived and organized as a Nation, i. e. as a State. Where Brunet uses the term "people" as differentiated from the "Nation" he can mean only that part of the Nation actually participating in the government by way of general elections or universal suffrage. In other words, when we use the term "sovereign people" we mean the Nation or State, and when we use the term "people" in connection with direct government we can mean only the electorate or part of the electorate as the case may be. In the second place, the statement that "universal suffrage is the means by which the sovereign people manifests its will in a democracy" is at least incorrect. Assuming that by sovereign people he means the Nation as a State, universal suffrage is only one of many means by which the Nation, organized as a democratic State, manifests its will. For every constitutionally legal act of the Legislature, of the Executive, and of the Judiciary is an expression of the will of the State or the Nation. In the third place, it is not correct, as held by Brunet, that "the people"—in this instance he clearly means the electorate—"give to the organs chosen by them the right to legislate and govern." Brunet here fails to distinguish between the right to legislate and to govern as a general constitutional function, and the particular right of individuals to act as representatives, executive, or judges. The people, i. e. the electorate, does not delegate the right to legislate or to govern, but it delegates or chooses certain individuals to exercise the right of legislation and government. The right to legislate and govern is established by the Constitution, the same Constitution which established the right of the people, in this case the electorate, to choose its representatives and governors, i. e. the personnel of its

government. In the fourth place, When Brunet, or for that matter any other authority, speaks of the people expressing its will by way of direct participation in government, they can mean only that the electorate or a particular section of the electorate thus participating in direct government expresses its will, not as the Nation, but as a constitutionally appointed organ of government for the Nation. The will of the electorate thus expressed is no more valid, no more sovereign, than that of any other governing agency, one or number.

In his recent work on the German Constitution, Edmund Vermeil, like Brunet, holds to the theory of the absolute Sovereignty of the people and the contractual character of all government. Speaking of the ideas of government and Sovereignty under the so-called three standard forms of democracy he states that "in each one of these three systems, there is a power which acts as an entity and which, without being absolutely sovereign, retains (*détient*) the greater (or greatest, *la plus grande*) part of Sovereignty." [26] The Germany of 1919, he continues, "also admits that the people is the absolute Sovereign. One should then in theory not blame her for not entrusting this Sovereignty to a single organ of the Reich."

This confusion of the terms: sovereign people, Nation, people in the sense of elèctorate or voters, and the characterization of the popular participation in government as a sovereign act, or as an act of the sovereign people, has its basis in the fact that the authorities in question fail to distinguish between State and Government and between extraconstitutional acts of the people conceived as the sovereign Nation and constitutional functions performed by the organs of government acting for the Nation. In

[26] Vermeil, La Constitution de Weimar et le principe de la démocratie allemande, 1923, p. 338.

order to establish for the present discussion the difference between State and Government and between extraconstitutional acts and constitutional functions of government, we may start with the consideration of a revolutionary act. In the process of a revolution a people, conscious and desirous of being and acting as a political unit, does in principle what we assume every Nation or State did when it created its first constitution or organization for political control. It appoints or accepts, by a right or duty derived from no other authority than its consciousness of solidarity and community interests, some individual or group of individuals to act or govern as an actual *de facto* magistracy for the implicit or express purpose of enforcing upon the individual members what is more or less clearly realized as the will of the group.

Immediately or sometime later the same group—small communities in primary assemblies, larger societies by some organization acting as a *de facto* representative assembly—sets about to establish more definite rules of conduct for all the members of the group. As far as these rules regulate the conduct of the citizens to one another we call them private law or civil and criminal legislation. As far as they contain norms for the conduct of those acting as the agents or officers of the Nation, i. e. as organs of government, we speak of them as the constitution or public law. In modern times these original *de facto* representative assemblies are concerned as a rule with the establishment of rules of conduct for the governing agents of the Nation. They are so-called constitutional or constituent conventions or assemblies and the rules which they establish are the constitution or the fundamental law of the land.

Once definite rules of procedure for those charged with the public business of the Nation have thus been set down,

all acts of government are considered to be no longer *de facto,* but *de jure,* i. e. in accordance with the constitution, and all persons or organs acting in accordance with the provisions of this public law, called the Constitution, act for the Nation as agents of the State and organs of the Government. But it is quite conceivable that at some time the Nation which created this public law may want to change it. Either the public law itself provides for the mode of change or it does not. As a rule modern constitutions contain a provision for their own amendment. If the change is made in accordance with the process prescribed, we say it is made in a legal or constitutional manner as constitutional legislation. If it is made in a manner not in accordance with the provisions of the constitution, we say it is made in an illegal, that is a revolutionary, manner. If, on the other hand, there is no provision in the constitution for any such change, then the change can be effected only by an extra-legal or extra-constitutional process.

Objection, however, may be made that the terms illegal and extra-legal are here used from the one-sided aspect of the constitutionalist or legalist. The action changing the public law in a manner not in agreement with the constitution, it must be admitted, is essentially the same kind which created the constitution in the first place. If that action could originally make the now existing constitution the prevailing law of the land, then it must be conceded that the same kind of action can now dispose of its original creation and set up another in its place. Hence it may be argued that there is no more illegality involved in the act of replacing one constitution by another than there is to be found in the setting up of a first constitution where there has been none before. To speak of this action as illegal would therefore be wrong for the simple reason that

an act which is potentially law-making cannot be termed illegal, but at the most, unconstitutional. Nevertheless, the realities of political life somewhat dogmatically decree that this argument be accepted as valid only where and when this action succeeds. If or when it fails to dispose of the old and to set up a new fundamental law, then that action remains not only unconstitutional, but also at least formally illegal.

The same argument applies to the case where such action is taken when the constitution does not provide for any method of amendment. Here objection may be made to the term extra-legal for the same reason given above. In this case the same action may be said to be merely unconstitutional or rather extra-constitutional. But this again prevailing standards of political morality will concede only when the action in question succeeds in making the change at which it aims. If or when it fails it remains at least formally extra-legal.

It was the demand for the recognition or legalization of this primary, revolutionary, or sovereign action as a regular and practiced method of control over the ordinary organs of government which led to the introduction of the initiative, referendum, and recall into the constitutional structure of the German Republic. The National Assembly, realizing that the organs in actual control might oppose what is called the popular will as differentiated from the will of the functioning magistracy, and that the repeated application of revolutionary action would finally endanger the existence of the Nation as a body politic, sought and found a way by which the essence of primary or popular action was clothed in a legal form. Thus it declared that in future or as a rule direct action should take place as direct participation in the government by a definite body of voters which by the law of the Constitution is

given the right to act just as the Legislature, the Executive, and the Judiciary are given the right to function for the Nation as the organs of government or magistracy of the State.

Examining the German commentators of the National Constitution we find that some seem to agree with Brunet that on general principles the people participating directly in the government do so in their capacity as the Sovereign of the State. Thus Stier-Somlo states that under the new German Constitution the people, elevated to the position of the Sovereign, elect the President and create the representative assembly. In cases of conflict between the National Government and Parliament it is the people who decide the issue.[27] But the majority of the German legal authorities definitely state that those directly participating in the government, in the election of the President, or in the initiative, referendum, and recall, do so as organs of the State or National Government. They seem to insist, however, that it is the German people as a National unit, i. e. the Nation itself which constitutes this organ. Under the heading "The people as State or National organ" Hatschek, for instance, states: "The German people acts as organ of the Reich (1) in order to elect the National President (Article 41); (2) in order to recall him (Article 43, Section 2); (3) in order to express its will as the National will through the referendum and initiative (Article 73).[28] From what has been said above it is patently nothing short of a contradiction in terms to state that the German people can act as the organ of the State. The German people in the constitutional legal sense is the German people organized as the Nation forming the State. The Nation or State cannot act as its own organ. The

[27] Stier-Somlo . . ., p. 86.
[28] Hatschek, I, p. 271.

State acts through a magistracy created and appointed according to the Constitution. Furthermore, the statement that the German people acts in these particular cases as the organ of the Reich is not in agreement with the phraseology of the provisions of the Constitution regulating the functions here discussed. It is true that in Article 41 the Constitution says that the National President is elected by the whole German people. But the Law of May 4, 1920, establishing the mode of election states that "those are entitled to vote for the National President, who have the right to vote for representatives of the Reichstag." [29] As the history of Article 41 of the National Republican Constitution shows, the phrase "the National President is elected by the whole German people" was chosen to emphasize the general opposition to an election by the Reichstag.[30] Article 43, providing for the recall of the President, states that this can be brought about under certain conditions by popular vote (*Volksabstimmung*). In a similar fashion Article 74 speaks of the *Volksentscheid* and the *Volksbegehren,* i. e. decision by the people or popular decision, initiation by the people, or popular initiative, in the same sense in which we speak of popular vote or popular election. Defining the particular method of the *Volksentscheid* and *Volksbegehren* the articles in question speak of "those entitled to vote" (*die Stimmberechtigten*). It seems clear then that what the Constitution means to say is that in certain cases it is not the legislature which shall act for the Nation or State, but a limited and well defined body of electors. Because their participation in the functions of government is a direct action by what we call the popular vote, their participation is referred to as *Volksentscheid* and *Volksbegehren.* But those actually partici-

[29] Art. 1.

[30] Verf. Ber. und Prot., p. 232 ff.; Heilfron, V, p. 343 ff.

pating as voters, while acting for the State and the Nation, are not the Nation or the whole German people. They are a particular body designated by the Constitution to act as an organ of government just as the Legislature, or the Executive, or the Courts are appointed and act as organs of the Nation or State.

With regard to the real meaning of Hatschek's statement on this subject, it is rather significant that he excludes from the enumeration of the cases in which the German people are supposed to act as organ of the State or Reich the election of representatives to the Reichstag. In this case, Hatschek argues, the electoral unit is not the Reich, but the individual election district. Hence it is not the people of the Reich as a National or juristic unit which elects the representatives, but the people voting in the election districts. However, this exception seems to be based upon a differentiation without difference. In the first place, the argument on the basis of electoral districts implies the admission that we are not dealing with the German people but with the National electorate. In the second place, the division of the National electoral unit into electoral districts is only a convenience, not an essential. This becomes clear when we consider that these districts do not even strictly coincide with the territorial divisions of the Reich by its component States.[81] Furthermore, according to Article 21 of the Constitution the delegates thus elected are not the representatives of the districts but "of the whole people." Accepting as the only cases where the German people act as organ of the National State or Reich the election of the President and what he later terms the various forms of the referendum, Hatschek is confronted by the fact that Article 73, dealing

[81] Hatschek, (I, p. 271-272) cites Jellinek and others as opposing his view on this subject.

with the various forms of the referendum, provides for certain action in which only a fraction of the National electorate functions. This difficulty he meets with the ingenious explanation that in these cases the fraction concerned is supposed to set in motion either the whole people, as in the *Volksentscheid,* or the Reichstag, i. e. a National State organ. Wherever this is not the case, or where this does not necessarily follow, we are, according to Hatschek, not dealing with an effective expression of the will of an organ of the Reich. "The Reichstag," he writes, "can override the *Volksentscheid,* i. e. a decision by a fraction of the German people, and where this is the case this fraction does not speak as the whole people (*Gesamtvolk*) which alone is sovereign." [32] It is on the basis of such reasoning that Hatschek comes to the conclusion that "among the expressions of the will of the State in which the people as a juristic unit is concerned, the referendum plays an important rôle." [33] It is on the basis of this same argument that he defines what he terms the referendum as "an expression of the will of the State, by the organized people or by a part of the people, in consequence of which legislative or administrative acts of State are initiated, prevented, or repealed." [34]

The fundamental error of Hatschek's argument concerning the constitutional provisions for the functioning of a fraction of the electorate lies in the fact that he constantly confuses people and electorate. The Constitution in the articles in question does not say that the fraction of the electorate is to set in motion the whole people, as Hatschek asserts, but the whole electorate, which is quite a different thing. Furthermore, the Reichstag can override

[32] *Ibid.*, p. 272.
[33] *Ibid.*, p. 273
[34] *Ibid.*, p. 277.

the fraction of the electorate, not because this fraction does not speak as the whole sovereign people, but because the Constitution authorizes the Reichstag to do so. In short, the Reichstag, the whole electorate, or part of it, acts as an organ of the Government or of the State. There is no provision in the Constitution for the whole German people to act except through the electorate. It is the electorate or part of it, voting in accordance with the Constitution or with National laws passed by virtue of constitutional provision, by which any and all of the referenda are effected.

The interpretation of Hatschek seems to be shared by Giese, Stier-Somlo, and Wittmayer, though none of these authorities go to any length to expound their views. Thus Giese merely states that "in the democratic Republic all sovereign power (Staatsgewalt) emanates from the people. . . . For the purpose of exercising its political power, the Nation (*Staatsvolk*) makes use of a representative organ, the representative legislature. . . . But there are cases where the people itself as a primary State organ performs functions of State, namely in the election and in the *Volksabstimmung*. . . . Finally the totality of the people can take part in legislation by delegating to a constitutionally assigned fraction of the people the right to initiate acts of legislation. . . ." [35] According to Stier-Somlo, "the German people elevated to the position of the Sovereign elect the President and create the representative assembly" and "in cases of conflict between the National Government and Parliament it is the people who decide the issue." [36] Wittmayer merely states that Hasbach and occasionally also Otto Mayer overlook the fact that the new National Constitution . . . is not a purely representative constitu-

[35] Giese, pp. 226-227.
[36] Stier-Somlo, p. 86.

tion, but that in it the citizens of the democratic Republic through the *Volksentscheid* stand out as the Sovereign.[37]

On the other hand, Anschütz, Arndt, and Poetzsch, though speaking of the people (*Volk*) as directly participating in the legislative and other functions of the State, leave no doubt that they use the term not as the Sovereign but as the constitutionally assigned body of the electorate or voters. "In the referendum," says Anschütz, "the people immediately participate in legislation." But he adds: "Laws passed or approved by the referendum have as such no higher legal validity to the extent that they can be altered only by the recall. They can, like any other National law, be changed or repealed by action of the Reichstag." [38] According to Arndt "the Staatsgewalt rests with the people, the whole people, not with one class, and not with the laboring class. It is exercised in an extraordinary way by the immediate referendum (*Volksentscheid*), regularly by the Reichstag." [39] Poetzsch discusses the provisions of Article 73 in the terms of the Constitution, thus avoiding the term *Volk* altogether. In his comment on Article 41 providing for the election of the National President by the whole German people, he correctly remarks that this signifies "an immediate election by the people, as contrasted to an election by the Reichstag." [40]

Different Functions of Direct Government. There are various points of view from which we may consider the different forms under which direct government takes place. Brunet, as we have seen, holds that the sovereign people give to the organs of government the right to legislate and

[37] Wittmayer, p. 66.
[38] Anschütz, pp. 132-133.
[39] Arndt, pp. 44, 131.
[40] Poetzsch, pp. 94, 135 ff.

to govern, but reserve for themselves the right of intervention if or when these organs fail to bend to the popular will. Thus he concludes that "direct government expresses itself, therefore, when a conflict arises either between the organs of National representation, or between this representation and the nation itself. In these cases it is the people who decide the conflict." [41] Looking upon the people as the dispensers and guardians of Sovereignty and as a kind of superior arbiter over and between its own creatures, the organs of government, Brunet enumerates and discusses the different cases in which the people through the referendum are supposed to act in this capacity (of a supreme judge). He introduces his discussion of the initiative with the statement that "finally legislative initiative by the people has been included in the Constitution . . . but under certain conditions. He includes in this category the expression of the wishes of the inhabitants by the plebiscite in the case of proposed changes in the territorial status of the Länder.[42] As pointed out above, Hatschek agrees with Brunet to the extent of holding that in this immediate participation in the government by the organized people or part of the people, i. e. by the whole body of voters or a certain number, the whole people (*Gesamtvolk*) "which alone is sovereign," speaks and acts as the organ of the State and Reich.[43] But he excludes from these acts of direct government by the whole sovereign people the election of representatives to the Reichstag, because, as he says, it is not the whole German people acting as an organ of the State which elects these representatives, but the voters of the individual election districts. He then proceeds to state that among the func-

[41] See note 25 and quotation in corresponding text.
[42] Brunet, pp. 124-126.
[43] Hatschek, I, pp. 271-272.

tions of direct government the referendum plays the chief rôle. Using the term referendum in the generic sense he includes under the different kinds of referenda, the initiative, the referendum proper, and the recall, or to use his own terminology: the *Volksbegehren* (initiative) and *Volksentscheid* (referendum proper and recall).

Considering the body of voters thus participating in direct government as they ought to be considered, namely as an agent of the State and an organ of government, we may arrange and study the different forms under which they function from the aspect of the so-called division of powers, i. e. as legislative, administrative, and judicial acts. Or we may simply enumerate and analyze them one by one with the object of finding some sort of arrangement or classification afterwards.

The first mode of approach is unsatisfactory for two reasons. In the first place, the so-called division of powers does not exist under the National Republican Constitution. In the second place, it is in some cases practically impossible to say to which one of the kinds of power, i. e. legislative, administrative, or judicial, a particular act of direct government is to be assigned. Following the second mode of approach we find that the German National Constitution of 1919 provides for the immediate participation of a definite body of voters in the following instances:

1. All men and women over twenty years of age, in accordance with the principles of proportional representation elect the delegates to the Reichstag (Article 22). The details have been regulated by the National Election Law of April 27 and December 21, 1920.[44] This action of electing representatives to the Reichstag may be termed an

[44] *Reichswahlgesetz vom 27. April 1920, Reichswahlverordnung vom 21. Dezember 1920,* and *Allgemeine Reichstimmordnung vom 14. März 1924* (R.G.Bl., 1920, pp. 627 ff., 2122 ff., 2171 ff.; 1924, I, p. 173).

administrative function, or legislative in so far as it is auxiliary to legislation.

2. The whole German people choose the National President (Article 41). The details have been regulated by the National law of May 4, 1920.[45] According to this law the term "the whole German people" means all those entitled to vote for the delegates to the Reichstag (Article 1). This action too is administrative in character.

3. A law already passed by the Reichstag is to be referred to the voters (submitted to the *Volksentschcid*) before its promulgation, if the National President so orders within a month (Article 73, Section 1). In this case the people, i. e. the voters, apply the referendum in the strict or technical sense, they participate in legislation.

4. A law whose promulgation is deferred for two months at the demand of at least one-third of the Reichstag is to be submitted to the people, i. e. the voters, if one-twentieth of the qualified voters so petition (Article 72, Article 73, Section 2). Here again we have before us the application of the referendum in the technical sense, for the petition by the one-twentieth of the voters is not one for the initiation of the law, but for the right to pass on the law by way of the referendum. The voters in this instance perform a legislative function.

5. A popular vote is resorted to on a measure initiated by the people if one-tenth of the qualified voters so petition, and if the proposed bill is not passed unamended by the Reichstag (Article 73, Section 3). There are two distinct functions involved in this provision. In the first place the measure to be voted on by popular vote must be one initiated by the people. This initiation is effected by a

[45] *Gesetz über die Wahl des Reichspresidenten vom 4. Mai 1920* and later amendments (R.G.Bl., 1920, p. 849; 1921, pp. 482, 801; 1924, I, pp. 172, 198).

petition signed by one-tenth of all legally entitled to vote.[46] Thus the petition is one for the submission of the proposed bill by the Cabinet to the Reichstag. The petition must, the Constitution states, be accompanied by a fully elaborated bill and the National Cabinet must lay the bill together with a statement of its attitude before the Reichstag. In other words, the petition constitutes an act of initiation of legislation. If, on the other hand, the Reichstag rejects the bill submitted in consequence of this initiation, or if it passes the bill with an amendment, the bill thus rejected or the law thus amended is referred to decision by popular vote. This vote does not take place if the Reichstag passes the bill unamended. The decision by popular vote here involved is clearly one by referendum. Thus Article 72, Section 3, provides for the application of both the referendum and the initiative. The action of the voters in both instances constitutes part of the legislative procedure.

6. A popular vote takes place when the Reichstag and Reichsrat fail to agree upon a law passed by the former and the National President orders the law referred to the decision of the voters (Article 74, Section 3). This clearly is a case of the referendum in which the voters legislate. It is of course true in this as well as in the next case that the body of voters act to some extent as arbiters between the Reichstag and the Reichsrat and that from this point of view their action may be said to partake of the administrative or the judicial. However, the main object of the referendum in these cases is that of securing or rejecting legislation where the regular legislative branches have failed.

7. A popular vote takes place when the Reichstag, against the objection of the Reichsrat, has passed an

[46] Law of June 27, 1921, Articles 26, 33 ff.

amendment to the Constitution and when the Reichsrat within two weeks requests a decision by popular vote (Article 76, Section 2). This, too, is a case of decision by referendum. What has been said concerning this referendum as a legislative act under the preceding provision applies here also. The voters decide an issue between the Reichstag and Reichsrat, but the object of the issue is legislation, nothing else.

8. A decision by popular vote takes place when the Reichstag by a two-thirds majority has requested the removal from office of the National President. A refusal by the people to remove the President has the effect of a new election of the President and entails the dissolution of the Reichstag (Article 43, Section 2). This provision contains the possibility of three different functions of direct government by the electorate. In the first instance, if the voters sustain the request of the Reichstag for the removal of the President, the voters exercise the function of the recall. If on the other hand they reject the request of the Reichstag, they reelect the President for a new term of seven years and by the same act dissolve the Reichstag. In the case of the reelection of the President the voters act in an administrative or executive capacity. In dissolving the Reichstag they perform an executive function. Finally, if we look upon the decision in question as a judgment by the voters upon the demand of the Reichstag for the President's removal, we may say that the action of the *Volksentscheid* in this case is a judicial function.

This enumeration and analysis justifies without doubt the statement made above that it is impractical and even impossible to classify these acts of direct government on the basis of the so-called division of powers. On the other hand it suggests the arrangement under: 1. Election and recall of officials, i. e. election of the President and repre-

sentatives to the Reichstag and recall of the President. 2. Initiative and referendum in the matter of legislation. The first class, that of the election of representatives and the election and recall of the President has been considered in the chapters dealing with the relations of Executive and Legislature.[47] What remains to be given final attention is the theory and practice of the referendum and initiative in legislation as part of the system of checks and controls in the governmental structure of the German National Republic.

Referendum and Initiative in Legislation. As a general principle the employment of the referendum is made contingent upon the definite request or decision of some one or more persons acting in an official capacity specified in the Constitution. Thus Article 73, Section 1, states that "a law enacted by the Reichstag shall be referred to the people before its promulgation, if the National President so orders within a month." This means ordinary legislation as well as constitutional amendments. The President may refuse to promulgate or he may decide to refer to the popular vote a law which in his discretion has not been passed in the formal manner prescribed by the Constitution,[48] or if in his opinion the law is in its material aspect detrimental to the interests of the Reich.[49] The President may or may not, as he sees fit, submit to a popular vote such National laws if the latter have been protested by the Reichsrat and if a reconsideration by the Reichstag fails to bring about an agreement between the two houses.[50] On

[47] See chapter X.

[48] Art. 70.

[49] The right to apply the referendum in this instance must be deduced from the general duties of the National President assumed by him in his oath of office (Article 42).

[50] Art. 74.

the other hand, the Constitution definitely stipulates that the President is bound to order or request a referendum when the promulgation of a law is deferred at the demand of at least one-third of the Reichstag and when one-twentieth of the qualified voters so petition.[51]

It is in the case of the initiative (*Volksbegehren*) that the voters have the formal right of original action under the provisions of Article 73, Section 3. When a legislative measure is thus initiated, i. e. when one-tenth of the qualified voters so petition and when a fully elaborated bill accompanies the petition, the National Cabinet shall lay both petition and bill with a statement of its own attitude before the Reichstag. If the Reichstag refuses to pass the bill, or if it enacts the bill but not in the exact form in which it was submitted, the law thus rejected or amended by the Reichstag must be submitted by the President to the decision of the whole body of voters. But Article 73 contains the important restriction that "a popular vote may be taken on the budget, tax laws, and laws relating to the classification and payment of public officers only by authority of the National President." [52]

In the early debates of the National Assembly, Preuss, representing the National Republican Government as Minister of the Interior, spoke of the application of the *Volksabstimmung* in the form of the referendum as an *ultimum remedium* to be employed in case all other means of arbitration should fail to bring about an agreement between certain official organs involved in a controversy over some question arising under the provisions of the Constitution. The subject of the disagreement in this instance was assumed to be the mode of effecting changes of the territorial status of the Länder. Article 15 of the

[51] Art. 73, Sect. 2.
[52] Art. 73, Sect. 4.

constitutional draft submitted to the National Assembly [53] proposed to regulate such territorial changes by means of negotiations and agreements between the Länder concerned. In case an agreement was not reached in the manner proposed, the Länder should call for the mediation of the National Government, and, as the article continued, "if such mediation remains without result, the matter may, at the request of the parties involved, be settled by a National law amending the Constitution." Defending the provisions of Article 15 against the claim that it was apt to offend the States rights sentiment of the Länder, Preuss pointed out that the article contained nothing that could be alarming to them. In practically all of the cases of the kind here considered, he argued, Prussia would be involved. According to Articles 23 and 54 of the proposed draft constitutional amendments were to be effected by a two-thirds majority of two-thirds of the legal membership of the Reichstag and a two-thirds majority of the Reichsrat.[54] According to Article 19 of the same draft no one State could have more than one-third of all the votes of the Reichsrat.[55] In order to enact the proposed amendment changing the territorial status of Prussia all the other States would have to vote together in the Reichsrat in order to secure the two-thirds majority required. This, Preuss thought, would hardly happen. Hence, even if the Reichstag should produce the number of votes required for the amendment in question, there would still be the Reichs-

[53] Heilfron, II, p. 524.

[54] According to the final provisions of the Constitution the Reichsrat has the right of approval or disapproval of legislation passed by the Reichstag. In the case of constitutional amendments the disapproval of the Reichsrat requires a vote of one more than one-third of the votes cast. See chapter X, section: Reichstag and Reichsrat.

[55] According to the final provisions of the Constitution this figure has been fixed at two-fifths (Article 61).

rat where this would be difficult to achieve. Preuss concluded that Article 15 did not even go far enough to provide for an unfailing settlement of a controversy between the parties concerned over proposed changes of the territorial status of the Länder. The only method which could and should in such a case be relied upon to bring about a final solution would be submission of the question to a popular referendum as the ultimate remedy. Preuss expressed the belief, however, that the mere presence in the Constitution of a provision for such a referendum would be more likely to make its application unnecessary than to encourage its actual application.[50]

The provision for the referendum as here proposed by Preuss was not accepted by the National Assembly. The Constitution as finally adopted provides in Article 18 that "the division of the Reich into States (Länder) shall serve the highest economic and cultural interests of the people after the most thorough consideration of the wishes of the population affected," and that "State boundaries may be altered and new States may be created within the Reich by the process of constitutional amendment." There is in this article no special provision for a National referendum in the case of a disagreement between Reichstag and Reichsrat and the consequent inability of the Reichstag to pass the constitutional amendment as visioned by Preuss in the event of Prussia's involvement in the territorial change proposed. In fact, there was no need for a special provision covering such a contingency because a popular referendum for the settlement of controversies between the Reichstag and the Reichsrat over legislation including constitutional amendments is provided by the Constitution in Articles 74 and 76. Furthermore, the contingency assumed

[50] Heilfron, II, p. 46.

by Preuss is not likely to occur under the final provisions of the Constitution. Under the respective articles of the constitutional draft discussed by Preuss a two-thirds majority was required in the Reichstag and in the Reichsrat to pass an amendment to the Constitution. According to Article 76 of the Constitution as now in force a vote of one more than one-third of the votes cast is required for the Reichsrat's objection to an amendment.[57] Prussia as a State, however, controls only one-half of her votes, i. e. at the most only one-fifth of the entire legal vote of the Reichsrat.[58]

Article 18 does provide for a popular vote, but this vote is limited to the territory immediately concerned in the proposed change. According to Sections 2 and 3, "it requires only an ordinary National law to affect territorial changes when the consent of the States directly concerned is obtained," and "an ordinary National law will suffice also, if one of the States affected does not consent, provided the change of boundaries or the creation of a new State is desired by the population concerned and is also required by a preponderant National interest." For the consultation of the wishes of the population under the above emergency Section 4 provides that "the wishes of the population shall be ascertained by a referendum," and that "the National Cabinet shall order a referendum on demand of one-third of the inhabitants qualified to vote for the National Assembly in the territory to be cut off." [59] This referendum, however, serves rather as a local plebiscite to

[57] See note 54.

[58] See chapter X, section: Reichstag and Reichsrat, text corresponding to note 46 ff.

[59] Concerning the application of this provision in the case of the proposed change of the status of Hanover and Upper Silesia see chapter V, section: Determination of State Boundaries by National Law, text corresponding to note 70 ff.

establish the willingness or unwillingness of the population concerned to change its State adhesion. It serves solely to prepare the way for a National law which alone, under Section 3 of Article 18, can change the status of the territory in question.

It is of course true that the initiative and referendum as employed under the provisions of Articles 73 and 74 act as a last remedy in the instance where certain organs of government fail to function with the necessary consistency and finality. Nevertheless, the characterization of these forms of direct government as *ultimum remedium* does not at all do justice to their value and importance as a part of the constitutional machinery of the National Government. After all, their value and importance lies primarily in their effectiveness as an additional item in the general system of checks and balances concerning the organs affected. The effectiveness of the referendum from this point of view was discussed in the National Assembly, for instance, by representative Koch of the Democratic party. As a Democrat by conviction he could not, he said, accept the identity of democracy and parliamentarism. He considered it necessary that guarantees be given to the effect that the Government, especially Parliament, would respect the actual will and wishes of the people (i. e. the Nation) and that a system of control be established which would enforce such respect if necessary. The ideal system of such a control he thought would be, aside from a strong President, the resort to the popular vote in the form of the initiative and referendum. As a system of control he considered the referendum far superior and more effective than a second house, such as the Economic Council (*Wirtschaftsrat*) which the extreme left wished to force upon the constitutional structure.[60] On a later occasion he repeated this

[60] Heilfron, III, p. 581.

same view with still greater emphasis in reply to Preuss, who, as Minister of the Interior, had spoken against the application of the popular vote for the recall of legislation,[61] and who had approvingly referred to Dr. Heintze's criticism of the constant expressions of distrust of the standard organs of government and the corresponding demands for control. Koch agreed with the National Government speaking through Preuss, in the rejection of the use of the referendum for the recall of legislation. But he made it clear that the German Democratic party wished to establish a truly democratic control of the National Legislature. Such control, he held, was not sufficient if only placed in the hands of the President. The President might prove as unable as the Legislature might be unwilling to realize the true popular will. On the other hand, however, he expressed the belief that resort to the referendum, though inevitable in serious cases, would not often be necessary, for the reason that its actual application was a rather complicated affair which no party would be anxious to invite for a trivial cause.[62]

The opinion voiced by Preuss in connection with the referendum proposed by him for the settlement of conflicts between the Reichstag and Reichsrat over changes of the territorial status of the Länder and as seconded by Koch was expressed also by other speakers of the Democratic party and especially by the Socialists. The referendum, it was held, far from acting as a disturbing factor in the life and government of the democratic State was more apt to have a quieting and stabilizing effect upon the struggles of

[61] See text corresponding to note 65 ff.

[62] Heilfron, IV, pp. 116-119. Representative Quarck, Socialist, said: "The initiative by its mere presence in the Constitution has a salutory effect upon the Government" (Heilfron, IV, p. 125). See also *ibid.*, p. 123 ff. and remarks by Koch, *ibid.*, p. 97 ff.

the more than twenty parties of the German Republic. In most cases the supporters of the referendum sought to substantiate their views by references to the example of Switzerland and the writings of political scientists who quote the experiences of Switzerland on this point.[63]

There is a provision in the German National Constitution for the recall of legislation by popular vote but only in a restricted sense. This form of direct government Hatschek calls the veto-referendum by means of which law properly enacted and duly published and promulgated is to be repealed.[64] Popular participation in the process of legislation in the form of this veto-referendum has practically given way to the more effective and surer method of preventing the actual publication or promulgation of a law enacted by Parliament in defiance of a well established public opinion. The difference then between the recall and the referendum in matters of legislation is that by the recall the voters repeal a formal law already in effect, while by the referendum they prevent a piece of legislation from becoming a formal law.

A provision for a modified form of the recall or veto-referendum as Hatschek calls it, is still found in the Constitution of the Swiss Half-Canton of Obwalden. According to this constitutional provision the cantonal Assembly may under certain conditions delegate to the cantonal

[63] Thus Representative Katzenstein of the Socialist party referred to Curti's work dealing with the subject. Curti, so the speaker pointed out, proves without doubt the educational value of direct government by popular vote in the making of legislation. He refers, for instance, to the fact that the Swiss voters at the beginning of the century rejected by a great majority a law for the introduction of proportional representation, and that in the third vote, twelve years later, the same law was accepted by an equally large majority in its favor (Heilfron, IV, pp. 113-114).

[64] Hatschek, I, p. 277.

Council the right to legislate. But within two months after the publication of the law four hundred citizens entitled to the vote may request that the law be submitted to the Assembly for its rejection or approval. The effect of such a request is that the law in question is suspended until the Assembly has passed upon it.[65] The introduction of the recall of legislation into the German constitutional system was requested by the Socialists. Their request was opposed by the National Government and by the majority opinion of the National Assembly. It would be illogical, Representative Koch of the German Democratic party said, first to promulgate a law and then to subject this same law to a recall by popular vote. Furthermore, the introduction of the recall into the Constitution was held to be superfluous since a law already in force can always be amended or eliminated by the *Volksbegehren,* i. e. the initiative in favor of another or better law.[66] As finally embodied in the Constitution the provision for the recall of legislation reads: "An act (*Beschluss*) of the Reichstag may be annulled by a popular vote (*Volksentscheid*) only if a majority of those qualified take part in the vote." The full meaning of the restriction implied in this phrase becomes clear only if we realize that an act of the Reichstag is not law until promulgated by the President and that Article 75 applies to such an act before, not after, such promulgation.

Direct Government in Practical Application. It is too early to estimate the actual influence which the provisions for the application of direct government as embodied in the German National Constitution will exert on the gov-

[65] *Ibid.*

[66] Heilfron, IV, p. 117.

ernmental procedure and the political life of the Reich. All that can be done at this time is to examine briefly the instances in which direct government in the form here discussed has been practiced.

It will be remembered that during the debates on the subject in the National Assembly and in the Committee on the Constitution some of the speakers ventured the prediction that the mere presence of these provisions in the Constitution would obviate the necessity for their actual application. The inference was, of course, that the National Government, the Reichstag, or the Reichsrat, fearing an adverse decision by popular vote, would be solicitous of a settlement of the issues in question in a manner satisfactory to public opinion as manifested in the demand for the application of the principles of direct government by way of the initiative, the referendum, or the recall.[67] This assumption on the part of the framers of the Constitution has so far not been borne out.

Oddly enough, the first demand for the application of the initiative (*Volksbegehren*) and the subsequent referendum (*Volksentscheid*) arose over the question of the expropriation, without indemnification, of the properties of the former reigning houses. Preliminary settlements of the question of property rights of the former rulers had been effected by the Governments of a number of the individual Länder. But in many cases the uncompromising attitude of either the original property holders or the forces pressing for total expropriation led to the realization that a final settlement of the problem could be effected only by National action. The question was what form this National action should take. The parties of the Middle (*Bürgerparteien*) and of the Right (*Nationalen*) natural-

[67] See text corresponding to notes 56 and 62.

ly stood for a settlement by the National Supreme Court, i. e. by way of legal procedure, or by National legislation leading to such procedure. The parties of the Left and extreme Left, Socialists and Communists, insisted upon expropriation, if necessary by way of the popular vote of the *Volksbegehren* and *Volksentscheid.*

Article 153 of the National Constitution stipulates:

> The right of private property is guaranteed by the Constitution. Its nature and limits are defined by law.
>
> Expropriation may be proceeded with only for the benefit of the community and by due process of law. There shall be just compensation in so far as is not otherwise provided by National law. If there is a dispute over the amount of the compensation, there shall be a right of appeal to the ordinary courts, in so far as not otherwise provided by National law. The property of the States (Länder), municipalities, and associations of public utility may be taken by the Reich only upon payment of compensation.
>
> Property rights imply property duties. Exercise thereof shall at the same time serve the general welfare.

There was no doubt that the property of the former princes subject to controversy was private property within the definition of the Constitution. The settlement of any question pertaining to the possession or dispossession of such property was therefore, in the first place, subject to adjudication in the ordinary courts, there being so far no other provision by National law. In case of opposition to that process the next possibility was a settlement of the issue by National legislation, and, if the Reichstag refused to settle the question in accordance with the demand of public opinion voiced in a manner prescribed by the Constitution, the third and last mode of action would be the application of the *Volksbegehren* and finally the *Volksentscheid.*

Fearing the effect which even a negative result of a *Volksbegehren* and *Volksentscheid* might have upon the still unstable inner political situation of the Reich, the Government parties and the National Government strenuously sought to effect a settlement by court action and, that attempt failing, by National legislation. But popular agitation for more direct action by the *Volksbegehren* proceeded to the extent of forcing the National Government to recognize the demand and to set the date for the registration of the signatures to the petition for expropriation without indemnification. On January 7, 1926, the Legal Committee of the Reichstag considered three proposals on the subject. The first proposal came from the Democratic party, suggesting final regulation of the issue by the Länder by way of legislation. The other two proposals from the Communists requested immediate expropriation and settlement of all legal questions by subsequent National law. As a result of the Committee's deliberations the Democrats submitted a new proposal according to which the settlement of the claims of the princes was to be left to the Reichsgericht or a special court to be created for that purpose. In a proposal submitted to the Legal Committee on February 3, it was agreed that such a special court should be established. This form of settlement had the support of the Government parties and the Länder, the latter being anxious to shift the burden of the whole affair to the Reich.

In the meantime representatives of the "Committee for Expropriation without Indemnity" appealed to the National Minister of the Interior for the setting of the date for the registration of the signatories favoring the application of the *Volksbegehren* on the question. On February 18 the Legal Committee of the Reichstag rejected the

original Communist proposal for expropriation without indemnification and continued its deliberation on the proposals of February 3. During the following week National and State Governments laid their plans for the holding of the *Volksbegehren.* In the early days of March the compromise proposal of February 3 was considered by the Ministry of Justice. Discussions between the National Chancellor and the Government parties were held and finally the Democratic party advised its members to abstain from participation in the *Volksbegehren* which was to take place on Saturday and Sunday, March 13 and 14.

In order to understand the portent of the struggle for the settlement of the issue between the advocates of legislation in favor of adjudication by a special National Court and those favoring expropriation by virtue of National legislation obtained in consequence of the *Volksbegehren,* we must for a moment consider the provisions of the Constitution concerning the initiative and referendum as here discussed. Sections 3 and 5 of Article 73 of the National Constitution state:

> A popular vote (*Volksentscheid*) shall . . . be resorted to on a measure initiated by the people if one-tenth of the qualified voters so petition. A fully elaborated bill must accompany such petition (*Volksbegehren*). The National Cabinet shall lay the bill together with a statement of its attitude before the Reichstag. The popular vote (*Volksentscheid*) does not take place if the desired bill is enacted without amendment by the Reichstag. The popular vote does not take place if the desired bill is enacted without amendment by the Reichstag. . .
>
> The procedure in connection with the popular referendum and initiative will be regulated by National law.

The preceding paragraphs deal with two distinct processes, though in the inverse order from the point of time.

To begin with the first act, Article 73 says that one-tenth of the qualified voters may petition the National Cabinet to lay before the Reichstag the bill subject to petition. This process of petitioning is called the *Volksbegehren.* If the Reichstag accepts the bill without amendment, the *Volksbegehren* has been effective in enforcing the legislation desired by its supporters. But Article 73 also provides that if the Reichstag rejects the bill accompanying the petition, or if it enacts the same with amendments, then the same bill is to be submitted to another popular act of voting, i. e. a referendum. The act of voting on a bill thus rejected or amended by the Reichstag is called the *Volksentscheid.* In the successful *Volksentscheid* the deciding vote must be one of a simple majority, provided more than one half of those entitled to vote participate in the voting. If the bill in question contains a constitutional amendment it is not enough that more than half of those entitled to vote participate in the voting, but more than half of those entitled to vote must actually cast the ballot for the amendment in order to enact the same as law.[68]

According to this explanation of Article 73 it will be understood that the *Volksbegehren,* held as stated above on March 13 and 14, was merely an official or public act by which at least one-tenth of those entitled to vote[69] registered or signed in favor of the introduction in the Reichstag of a bill embodying their ideas concerning the settlement of the question at issue. The bill in this case demanded the expropriation of the property of the former princes without indemnification. On April 14 the National Election Committee under the chairmanship of the Na-

[68] Art. 75, also Giese, p. 233, Anschütz, p. 139; Art. 76, also Giese, p. 236.

[69] This means one-tenth of the voters counted on the basis of the preceding general election or referendum (See Giese, p. 227).

tional Election Supervisor met to announce the preliminary result of the *Volksbegehren.* The votes registered in the Reich, excluding the Saar territory, were 12,523,939, a figure so large that an examination of the findings of the regional election committees was considered unnecessary.

The National Cabinet was now forced to submit to the Reichstag the bill thus voted. This done, the Reichstag opened the debate on the bill. The National Government thus stated its opposition as expressed by Dr. Külz, Minister of the Interior:

> The National Government has from the beginning announced its failure to agree with the expropriation bill demanded by the *Volksbegehren.* Even the Socialist Governments of the (early) Republican period have always opposed expropriation without indemnification. The Revolution fell short of the solution of a revolutionary settlement with the princes. Too exorbitant claims on the part of the representatives of the princes are now forcing the issue. It would be desirable under the parliamentary régime that the problem be solved not by a popular vote but by parliamentary procedure. Under their advocacy of the *Volksentscheid* the Communists hide other motives which the Government cannot possibly approve. The Government will not give up the hope that the parties of the Reichstag may find it possible to agree upon a favorable solution (*gedeihliche Lösung*) of the problem.

On May 6 the Reichstag rejected the expropriation bill of the *Volksbegehren* by a vote of 236 against and 142, the Socialists and Communists having voted in the affirmative.[70] The Government now was forced to submit the bill rejected by the Reichstag to the final judgment of a popular vote in the form of the referendum (*Volksent-*

[70] Osnabrücker Zeitung, 1926: January 8, 18; February 4, 14, 19, 28; March 7, 15; April 14, 29; May 7.

scheid). On May 21 it issued instructions for the holding of the referendum, setting June 20 as the date of the voting. The Center party announced on May 20 that, as it had been opposed to the enactment of the expropriation bill by the Reichstag, so it now expected its members not to vote for the bill in the coming referendum. The Democratic party refused to take a definite stand on the subject and left the decision to the discretion of its members. The German People's party requested its members to refrain from voting. On June 21 the preliminary official result of the referendum was announced as follows: Total of those entitled to vote 39,686,848; total votes cast 15,584,821; votes declared invalid 559,370; total of valid votes 15,025,-451; votes in favor of the rejected bill 14,440,779; against the bill 584,673. The total of 15,584,821 actual votes cast being less than one half of the 39,686,848 entitled to vote, the bill was lost and the result of both *Volksbegehren* and *Volksentscheid* a negative one.[71]

The Government was now free to proceed with the settlement of the problem according to its own views, a course which it had been following simultaneously with its preparation for and the holding of the referendum. This course interests us here only with regard to the Government's opinion concerning the constitutional question involved in the case. This opinion is not only important from the point of view of the Government's attitude concerning the constitutionality of the compromise bill, but it is especially significant for the official interpretation of the constitutional provisions concerning the protection of property as part of private rights in general and the guarantee of due process of law, both threatened with violation by the expropriation bill voted in the *Volks-*

[71] *Ibid.*, May 21, 23; June 22.

begehren. As partly quoted and paraphrased in the Osnabrücker Zeitung, Dr. Külz, speaking for the National Government before the Legal Commitcee of the Reichstag on the subject of the constitutionality of the compromise bill under consideration, said in effect this:

As far as the bill deals with civil law property, the regulation of civil law claims, and the expropriation of private property of the former princely houses, the competency of the Reich rests upon Articles 7 and 153 of the Constitution.[72] But even to the extent to which the bill tends to regulate public law matters, it does not contain a change of the constitutional public law competence of the Länder. The question of the constitutionality of the bill has to be examined from the point of view of Article 105 of the National Constitution which states that ". . . no one may be removed from the jurisdiction of his lawful judge." This provision does not preclude the regulation of the issue between princes and Länder by a special National Court, for the reason that it is not addressed to the Legislature but to the Executive and to services usurping executive functions. . . . In the third place, the question of the constitutionality of the bill has to be examined in connection with Article 109 which states that "all Germans are equal before the law." According to the prevailing legal opinion this provision has to be interpreted to the effect that the authorities have to apply the law according to the content equally to all Germans, but that it constitutes no constitutionally binding restriction upon the Legislature for its treatment of the citizen. The constitutionality of the bill is to be considered finally from the aspect of Article 153, containing a constitutional guarantee of private property. According to Article 153 the taking away of property is possible only by expropriation (*Enteignung*). Expropriation is possible under Article 153,

[72] Art. 7, Sect. 12, giving the Reich the right of concurrent legislation over expropriation. The provisions of Article 153 will be considered immediately below.

Section 2, only for the welfare of the commonwealth and by due process of law. According to Article 7, Section 12, and Article 153, the Reich has the unquestionable right to effect expropriation by way of National legislation or by way of authorization of the Länder. The question at the time was one concerning the meaning of the term "expropriation for the welfare of the commonwealth (*des Begriffs der Enteignung zum Wohle der Allgemeinheit*)." This term is now interpreted in theory and practice in general and by the Reichsgericht in particular to the effect that the expropriation must be essential to the execution of a definite purpose serving the welfare of the commonwealth.

According to the prevailing legal conception the mere enrichment of the commonwealth by the transfer of private property into public ownership could not be held to constitute an expropriation for the welfare of the commonwealth. From the point of view of this legal interpretation the individual provisions of the (compromise) bill are not compatible with Article 153 of the National Constitution, and the bill consequently constitutes an amendment of the Constitution requiring for its legal enactment the majority required for such an amendment.[73]

An interesting turn has been reached in the matter of the application of the *Volksbegehren* and *Volksentscheid* in connection with the agitation in favor of the higher valu-

[73] Osnabrücker Zeitung, April 21, 1926. An opinion condemnatory of the object of the *Volksbegehren* was expressed by President Hindenburg in a private letter sent to Herr von Loebell, Prussian Minister of State, in reply to the latter's request for a public expression or exhortation by the National President on the subject of expropriation. President Hindenburg declined to make a public statement or to influence the action of the Government by direct interference. He expressed his private views on the subject to the effect that the object of the *Volksbegehren* was a violation of the constitutional guarantee of private property. President Hindenburg's letter was severely criticized by the supporters of the *Volksbegehren*. See Osnabrücker Zeitung, June 8, 11, 1926.

ation (*Aufwertung*) of German investments invalidated by the monetory inflation and the disappearance of the old German currency. Section 4 of Article 73 of the Constitution exempts from submission to the popular vote of both the *Volksbegehren* and the *Volksentscheid* the budget, tax laws, and laws relating to the classification and payment of public officers, except where the National President authorizes such submission. The National Government has attempted to checkmate the movement for the application of the *Volksbegehren* in favor of *Aufwertung* by the introduction in the Reichstag of a proposal amending Section 4 of Article 73 to the extent of adding to the subjects therein mentioned that of the higher valuation of the instruments referred to.[74] The position of the National Government is a sound one considering the fact that National control to be effective must be placed in the hands of that branch of the Government which is directly held responsible for financial engagements under the Dawes Plan, engagements which would be seriously effected by a revaluation too high for the National financial system to carry. So far no final action seems to have been taken on the subject of the proposed amendment of Article 73, Section 4, nor with regard to the *Volksbegehren* in question.

[74] Osnabrücker Zeitung, April 24; June 22, 1926.

CHAPTER XIII

The National Judicial System

Jurisdiction of National and State Courts. The object of this chapter is not to give a minute presentation of the hierarchy of the German State and National Courts, but rather to discuss the principles of constitutional law underlying the peculiarities of the German judicial machinery as compared with the Anglo-American concepts of jurisprudence and method of judicial procedure.

In every federated State (Bundesstaat) legal conflicts will arise which by their very nature transcend the judicial competence of the State Courts. Recognition of this fact is to be found in the enumeration in the *Federalist* of a number of topics which for the reason just mentioned must be reserved for the jurisdiction of the Federal or National Courts. "To judge with accuracy of the due extent of the federal judicature," Hamilton wrote in the *Federalist,* "it will be necessary to consider, in the first place, what are its proper objects." In his opinion then:

> It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases: 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2nd. To all those which concern the execution of the provisions expressly contained in the articles of union; 3rd. To all those in which the United States are a party; 4th. To all those which involve the Peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations, or to that between the

states themselves; 5th. To all those which originate on the high seas and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunal cannot be supposed to be impartial and unbiased.[1]

Article III, Section 2, of the Federal Constitution, defining the character and extent of federal jurisdiction, embodies the principles here laid down by Hamilton. But while the American Constitution in Article III, Section 2, gives a complete enumeration of cases to which federal jurisdiction extends, the corresponding facts under the German Constitution must be brought together from a number of separate articles, each treating of some phase of the general subject, but from the point of view of the different courts competent in each instance. This difference in the manner of presentation is due to a fundamental difference of the Anglo-American and German legal systems. The Anglo-American, and especially the American, constitutional system does not apply the continental European distinction between private and public law. The term private law as used in European jurisprudence signifies all legal provisions regulating the relations between the citizens of Reich and component States as private individuals. It includes therefore civil and criminal law (*Zivil- und Strafrecht*). Under public law is understood that body of legal norms which regulates all official relations and functions of the Reich and the individual States, and of their rightful agents when acting in accordance with the legal provisions regulating the assessment and collection of taxes, the exercise of the police power, etc.

In the United States the Federal Courts have original jurisdiction over both private and public federal law enacted within the limitations of the subjects enumerated by

[1] Hamilton in the "Federalist," no. 80.

the Constitution. Under the German system National public law is administered in National Courts, while National private law is applied in the State Courts. But this pertains only to original jurisdiction. Revisional or appellate jurisdiction even under private law lies with a National Supreme Court, the Reichsgericht. Keeping in mind this distinction between the American and the German systems it may be stated that the United States Constitution has provided for the creation of a complete system of Federal Courts for the adjudication of cases arising under federal law, while the German Constitution expressly states in Article 103 that "ordinary jurisdiction is exercised by the Reichsgericht and by the Courts of the Länder."

But while from a National point of view the American system has the advantage of a hierarchy of Federal Courts competent to apply federal law, the German system secures National judicial supremacy by way of a National legislative competency infinitely wider than that of the American Union. In its original form Article 4, Section 13, of the German Imperial Constitution of 1871 gave to the Reich the right of "general legislation concerning the law of obligations, criminal law, commercial law and commercial paper, and judicial procedure." From the North German Confederation the Empire inherited uniform trade and criminal codes in the shape of *Die Gewerbeordnung* of June 21, 1869, and *Das Strafgesetzbuch* of May 31, 1870. In 1867 the attempt had been made in the Constituent Reichstag of the North German Confederation to assign to the Federal Union the right of legislation over civil law. Though the motion to this effect was defeated at the time it was adopted two years later in 1869. In 1871 and 1872 similar attempts were made in the Reichstag of the Empire with the result that in 1873 Article 4, Section 13, was

amended to read: "General legislation over the whole domain of civil law" [2] or as given in the translation of Dodd's *Modern Constitutions:* "General legislation as to the whole domain of civil and criminal law and judicial procedure." [3] In the following year, 1874, a commission was appointed for the preparation of a uniform National civil code, using the term civil as exclusive of criminal law. The commission submitted the completed draft to the National Chancellor in 1887. In 1896 the code was finally accepted by the Reichstag and Bundesrat. It was signed by the Emperor and published in the *Reichsgesetzblatt* to become effective on January 1, 1900.[4] A movement for the recodification of the National criminal code led to the appointment of a commission in 1906 and to the preparation of a tentative draft published in 1909. In 1911 a counter draft was published by four jurists, Professors Kahl, Lilienthal, Liszt, and Goldschmidt. In the same year the National Ministry of Justice appointed a new commission charged with the final elaboration of the code.[5] Uniform National regu-

[2] "Die gemeinsame Gesetzgebung über das gesamte bürgerliche Recht." The term "gemeinsame Gesetzgebung," translated as "general legislation," implies a limitation of the National legislative competency. According to Binding (Handbuch des Strafrechts, I, p. 277) "gemeinsame Gesetzgebung" signifies the right to legislate on subjects in which all the States have a mutual or common interest. It does not extend over matters of particular interest to the States. Or, as stated by Representative Miquel in the Reichstag on March 20, 1867: ". . . A local or provincial development of the law is by no means excluded or imperiled in the individual States in consequence of the fact that the [legislative] competence over general interests . . . has been transferred to the Federal Union" (Cited by Dambitsch, p. 162). The first (general) part of the Civil Code specifically exempts from National legislative competence the following topics: *Bergrecht, Jagdrecht, Gesinderecht, Kirchen und Schulbaulast, religiöse Erziehung der Kinder, Anerbenrecht.*

[3] Dodd, Modern Constitutions . . . 1909, vol. I, p. 328.

[4] Meyers Konversationslexikon, III, pp. 623-626.

[5] *Ibid.*, Supplement, 1910-11, pp. 828-829.

lation of judicial procedure of the ordinary, i. e. State Courts, as well as the Reichsgericht and the National Vocational Courts was inaugurated by the Judiciary Act of January 27, 1871, (*Gerichtsverfassungsgesetz*) and numerous subsequent acts dealing with particular phases of the subject not covered by the Act of 1871.[6] Taking over from the Empire these guarantees of National preponderance in the sphere of legislation and control of judicial procedure, the framers of the National Republican Constitution could well afford to leave the application of National law in the hands of the State Courts, especially since State Court decisions remained, as under the Empire, subject to the revisional control of the Reichsgericht.

In the matter of National revisional jurisdiction of cases arising under National private, i. e. civil and criminal law, the German Republican system does not differ essentially from that of the Empire. Under the Constitutions of both the Empire and the Republic the National Governments were given the right of legislation as to the whole domain of civil and criminal law.[7] Under the Constitutions of both, original jurisdiction over cases and controversies arising from National legislation in the sphere of private, i. e. civil and criminal law, was assigned to the State Courts.[8] In the field of private law the Empire had only one National judicial organ, the Reichsgericht at Leipzig, which, much like the French *Court de Cassation,* exercised appellate jurisdiction over the cases decided by the State Courts.[9] The Republican Constitution has pre-

[6] Dambitsch, pp. 164-165.

[7] Art. 4, Sect. 13, of the Constitution of 1871; Art. 7, Nos. 1-2, of that of 1919.

[8] Art. 75 of the Constitution of 1871; Art. 14 of that of 1919.

[9] The Reichsgericht was established by the *Gerichtsverfassungsgesetz* of 1877, Articles 135-139. (RGBl., 1877, p. 64 ff.). Concerning the ob-

served the Reichsgericht with essentially the same functions exercised by that Court under the Monarchy.[10] Thus the Reichsgericht is the National Appellate Court exercising revisional jurisdiction (1) in civil law matters over the decisions of the State Supreme Courts (*Oberlandesgerichte*),[11] (2) in criminal law cases over the decisions of the *Strafkammern* of first instance and the *Schwurgerichte* (of the States).[12] In the Monarchy the Reichsgericht had original and final jurisdiction over cases of high treason against the National Union and the Emperor. Under the Republican Constitution the same jurisdiction has been preserved in cases of "Hochverrat und Landesverrat gegen das Reich."[13] In addition the Reichsgericht has been given jurisdiction over the so-called war crime cases.[14]

There are a number of minor or special National Courts dealing with cases arising under special legislation. Such minor or special courts are the Marine Office (*Oberseeamt*), created by the Law of July, 1877, for the examination of accidents on German commercial ships and on foreign ships within the three mile limit; the Patent Court; the National Insurance Court, and others.[15] By the Law for the Protection of the Republic of July, 1922, original jurisdiction over all acts made criminal by the provisions of Articles 1-3 of this law was assigned to a

ject of the creation of the Reichsgericht see the statement made in the Reichstag in 1877 by the Prussian Minister of Justice (Cited by Hatschek, II, p. 586).

[10] Art. 103 of the Constitution of 1919.

[11] Art. 135 of the *Gerichtsverfassungsgesetz.*

[12] *Ibid.*, Art. 136.

[13] Boyens, p. 55.

[14] Law of December 18, 1919 (RGBl., 1919, p. 2125 ff.). Boyens, p. 56. For a more detailed statement of the functions of the Reichsgericht see Hatschek, I, p. 98 ff.; II, p. 556 ff.

[15] For a complete list see Hatschek, II, p. 584.

newly created National Court for the Protection of the Republic (*Staatsgerichtshof zum Schutze der Republik*). This law was to remain in force for the period of five years and the court in question was established for the duration of this law. The right of appeal from the decision of this court was expressly denied. Since the provisions of the law were in some quarters held to constitute a violation of Article 103 of the Constitution, it was enacted with the majority required for a constitutional amendment.[16]

The jurisdiction of the National Courts in matters of public law has been considered to some extent in connection with the study of the relation of Reich and States and especially with the analysis of the system of National control over the activities of the Länder in the sphere of administration. The judicial control here referred to is exercised chiefly by the Reichsgericht, the Staatsgerichtshof, and the Reichsverwaltungsgericht. The particular activities of these courts from the point of view of National control over the public functions of the States consist of (1) decisions in the form of declaratory judgments by the Reichsgericht concerning the agreement or disagreement of State law with National legislation (Article 13); (2) decisions in the form of declaratory judgments by the Staatsgerichtshof, established in connection with the Reichsgericht, for the settlement of controversies arising between the National Cabinet and the Government of one of the States over the execution or administration of affairs over which the Reich has the right of legislation (Article 15);[17] (3) decisions in the form of

[16] For a description of this Court see the author's "Bavaria and the Reich . . .," p. 22.

[17] See chapter VI, section: Administrative Control with Judicial Review.

declaratory judgments by the Staatsgerichtshof, to be established in connection with the Reichsverwaltungsgericht, for the settlement of controversies concerning the Constitution arising within a State which has no court competent to dispose of them, and controversies of a public law nature arising between different States and between the Reich and one of the States (Article 19).[18]

In addition to the judicial control exercised by the Reichsgericht and the Staatsgerichtshof over the activities of the States there remains to be mentioned the judicial control exercised by the Staatsgerichtshof established in connection with the Reichsgericht for the trial of the National President, the Chancellor, and the members of the Cabinet at the request of the Reichstag (Article 59).[19] However, jurisdiction of the National Courts in public law matters is not limited to the activities enumerated above. In fact, their primary jurisdiction pertains to cases arising under administrative law. The Constitution provides in Article 107 for the creation, in the Reich and in the States, of administrative courts to protect the individual against orders and decrees of administrative authorities. The administrative court for the Reich is to be the Reichsverwaltungsgericht.[20] The National Finance Court (*Reichsfinanzhof*) existing since October 1, 1918, and reorganized by the National Law of December 13, 1919, has jurisdiction over cases arising over National and State payments and charges, double-taxation, the question of compatibility

[18] The Law of July 9, 1921, by which the Staatsgerichtshof was created in accordance with Article 108 of the Constitution provides that until the Reichsverwaltungsgericht has been established the Reichsgericht is to function in its place for the purposes of Articles 16-23 of the law in question (Art. 31), i. e. for the purposes of Article 19 of the Constitution.

[19] *Ibid.*, Articles 1-15.

[20] See note 18.

of State tax regulation with National law, etc. The National Economic Court (*Reichswirtschaftsgericht*) created by the National Law of May 21, 1920, was given jurisdiction over all cases arising under the change from war time to peace time basis, such as controversies concerning the compensation by the Reich for land appropriated during the war for public use and the settlement of Government war contracts. It was given jurisdiction also over all cases arising in consequence of the execution of the armistice conditions and the terms of peace, and over cases arising under the law establishing National responsibility for damages done during civil disturbance by illegal action of National officials.[21] The National Court of Arbitration (*Reichschiedsgericht*) was created by the Law of December 21, 1920, for the purpose of insuring the uniform regulation of the payment of the Civil Service employees of Reich and States.[22]

Judicial Review of the Formal Constitutionality of National Law. Article 102 of the National Constitution declares that "the judges are independent and subject only to the law." This means in the first place that subordinate judges are not subject to control by their superiors in the formulation of their judicial decisions, and in the second place that judges are independent of the two other branches of the Government except as provided by law.[23] The actual control provided by law is of a formal and material char-

[21] Hatschek, II, pp. 593, 597.

[22] *Ibid.*, p. 598.

[23] The attempt made by the forces of the extreme Left during the debates on Article 102 to establish parliamentary supervision of the courts in the form of a legislative repeal of judicial decisions was emphatically opposed by the existing National Socialist Government and was consequently abandoned by its sponsors (Verf. Ber. und Prot., p. 263 ff.).

acter. As to the formal side, it is found in the constitutional provision establishing National concurrent legislative competency over judicial procedure, and in the constitutional provisions establishing administrative supervision by the National Cabinet over the application of National legislation [24] by the judges of the State Courts. On the material side of their activity the courts are of course bound to apply all law passed in a legal manner.[25] The duty on the part of the courts to apply all law passed in a legal manner would seem to imply, on the other hand, the right or duty to inquire into the legality of law from this point of view.[26] In the preceding section attention has been called to the fact that German and continental jurisprudence distinguish between private and public law, and that in Germany as a general rule original jurisdiction over cases arising under private law belong to the State Courts, while public law is administered in the National Courts.

For the purpose of the present topic we must here consider another peculiarity of German and continental jurisprudence, namely the distinction made between formal and material law. This distinction has been defined in the chapter dealing with the ordinance power to the effect that law in the formal sense is law considered from the point of view of the process of enactment, while law in the material sense is legislation viewed with regard to its material content, i. e. its subject matter. It is from these two aspects that we must consider the question of the judicial review of National legislation.

The judicial review of the formal constitutionality of

[24] Art. 7, No. 3, and Art. 15 of the Constitution of 1919.

[25] *Ibid.*, Articles 14, 103.

[26] The question whether and to what extent this right is held to be implied will be discussed later in this chapter.

National law as here discussed is, of course, one incidental to actual litigation. It is a *Prüfungsrecht* as applied only in the course of a civil, criminal, or administrative suit in order to test the law or ordinance upon which the legal case before the court is supposed to rest. As such it must not be confused with the right given by Articles 15 and 19 of the National Constitution to particular National Supreme Courts to decide differences of opinion arising between governmental organs or public officials of the National or State Governments concerning constitutional or public law matters. Especial care must be taken not to confound it with the kind of judicial examination bestowed on the Reichsgericht by Article 13, Section 2, of the Constitution of the Reich, namely to decide whether or not State law agrees from its material aspect, i. e. in respect to its subject matter, with the law of the Reich and with the National Constitution as part of this law. This examination by the Reichsgericht originating from Article 13, Section 2, is not an incidental one arising in the course of legal proceedings, but one conducted at the request of the Cabinet of the Reich or that of one of the States concerned.[27] Article 13, Section 2, Professor Kahl declared before the National Assembly, was not intended to interfere with the right of the ordinary courts to examine and decide the question of the agreement of State law with National legislation when exercised in the course of actual litigation.[28] But while it was not intended to interfere, it is, according to Poetzsch, nevertheless expected to prevent conflicting decisions of the ordinary courts concerning the compatibility of State legislation and National law.

The examination of the legality of law, incidental to regular litigation as we are here considering it, must ex-

[27] Giese, p. 99.

[28] Heilfron, III, p. 545; also Poetzsch, p. 60.

tend to the examination of the following questions: 1. Whether the law to be applied has been passed in accordance with the constitutional provisions, in other words, whether it is really law; 2. whether the law to be applied is superseded by later legislation; 3. whether it is suspended by a higher law.

It is self-evident that the courts alone can exercise the *Prüfungsrecht* in the case of the second question, i. e. whether the law to be applied is still in force or whether it has been superseded by later legislation. The relation of higher or superior to lower or inferior law implied in question three is in this connection to be defined as the relation between the superior State law and the inferior law of communal and other administrative units, and between the higher National and the lower State law. It is clear that the courts must have the *Prüfungsrecht* concerning the question whether the law appealed to is the law applicable in the case or whether there is a higher law which must rule.[29] It is this question which is implied in all cases of ordinary litigation involving the examination by the State Courts and by the Reichsgericht of the material agreement of State law with National law including the law of the National Constitution. An interesting illustration of the exercise of this right by both the State Courts and the Reichsgericht is found in a case reviewed by the latter in its decision of November 18, 1921.

By the law of September, 1920, the State of Lippe had cancelled the annuities formerly paid by the pre-revolutionary rulers of the State to two members of a side-line of the ruling house. In consequence of the enforced abdication of the ruling house the former incumbent ceased the payment of these annuities. The law in question decreed

[29] Hatschek, I, p. 27.

the indemnification of the parties concerned on a basis considered by them to be confiscatory. The result was a private suit in the *Landgericht* in Detmold and in second instance in the *Oberlandesgericht* in Celle. In both instances the State Courts decided in favor of the plaintiff on the ground that the State law was found incompatible with Article 153 of the National Constitution. In the final revision of the case the Reichsgericht, agreeing with the lower courts, upheld the charge of confiscation and declared the State law invalid for the reason advanced by the State Courts. According to Article 153 of the National Constitution private property can be expropriated only for the benefit of the commonwealth, and only upon proper indemnification for the fixation of which access to the courts must not be denied. As the Reichsgericht pointed out, the State law in question did not adduce the principle of *pro bono publico* as the reason for the expropriation. Furthermore, it excluded the judicial process for the fixation of an indemnity higher than that provided in the law itself. In its argument the Reichsgericht said: "The judge must apply the law pertaining to the case. Finding that State law is incompatible with National law, he is under Article 13, Section 2, authorized and obliged to declare the State law invalid and to refrain from applying the same." The Reichsgericht disclaimed the right to review the definition of the meaning of the State law by the lower, i. e. the State Courts. On the other hand, it assumed the right to establish the meaning of Article 153 of the National Constitution for the purpose of determining the agreement or disagreement of the State law in question with the established meaning of Article 153. In the revision of the case the State Supreme Court had denied the right of judicial review (*Prüfungsrecht*) with regard to the question whether the confiscation of the private prop-

erty concerned was justified from the point of view of the benefit of the commonwealth. To this the Reichsgericht replied that the right to such judicial review must be claimed "with regard to the examination of the observation and recognition of the constitutional principle referred to." For "the judicial examination of this question lies within the limits of the judicial task of applying the law pertaining to the case." [30]

When we come to consider the first question we find that matters are not so simple. The judicial right to inquire whether law is formally law, i. e. whether it has been enacted in a constitutional manner, has been denied by such authorities as Anschütz, Giese, Arndt, and others.[31] The first two base their denial on Article 70 of the National Constitution which states that "the National President shall compile (*ausfertigen*) the laws constitutionally enacted (*verfassungsmässig zustande gekommen*) and within one month publish them in the *Reichsgesetzblatt*." The argument advanced by Anschütz and Giese runs as follows: [32] According to Article 70 the President must promulgate all laws which have been enacted in the manner prescribed by the Constitution. He must therefore refuse to promulgate those not so enacted. Hence he is not only authorized but compelled to examine whether a law has or

[30] RGZ, vol. 103, pp. 200-203.

[31] Anschütz, pp. 129-130; Giese, p. 222; Arndt, pp. 126-127, 180; Meyer-Anschütz, p. 736 ff. Anschütz calls attention to the fact that this question was seriously discussed in the *Verfassungsausschuss*. The judicial *Prüfungsrecht* was asserted by Preuss and Representative Düringer; it was denied by Representatives Ablass, Kahl, and Sinzheimer. As no agreement could be reached, the question was intentionally left undecided (Verf. Ber. und Prot., p. 483 ff.).

[32] This argument is based on Laband who holds that the promulgation of a law by the Executive presupposes the guarantee for the fulfillment of the constitutional conditions for the expression of the legislative will (Laband, Das Staatsrecht des Deutschen Reiches, II, p. 43).

has not been passed in a constitutional manner. Arndt denies the judicial right to examine the formal constitutionality of law, not because "some one has compiled the law (*ausgefertigt*), but because the law is the supreme will of the State." As Arndt points out, the essence of promulgation under the republican constitutional system is the same as that under the Monarchy. It includes the guarantee that the text of the law as published in the *Reichsgesetzblatt* agrees with that of the law voted upon by the Reichstag, and that the Reichstag in enacting the law has done so in accordance with the norms of the Constitution regulating legislative procedure. Thus Article 70 clearly empowers the National President to examine, prior to its promulgation, the formal constitutionality of National legislation. Under this assumption the courts must of course be denied the same right.[33]

But this conclusion is questioned by Professors Schack, Poetzsch, and others. The former holds that such promulgation by the National President does not deprive the courts of the right to examine the formal constitutionality of an act of legislation. Defending the independence of the legislature in the modern "Rechtsstaat" he holds that the Reichstag is the sole authority and judge of the constitutionality of its own legislation. As far as the interests of the executive department are concerned, all laws passed by the legislature are *per se* law constitutionally enacted. Article 70, then, states no more than that the President shall compile these laws, thus constitutionally enacted, and publish them within one month in the *Reichsgesetzblatt*. As Schack stands out for the independence of the Reichstag, so he asserts also the freedom of the courts from domination by the executive. Hence he holds that the right of the courts to examine the formal constitution-

[33] Arndt, p. 180.

ality of the law to be applied cannot be denied, even if we follow Laband and assume promulgation to presuppose constitutional enactment. For this supposition would merely justify the President in promulgating, but would not bind the courts to apply, the law in question. Thus he reserves for the courts the right to examine the formal constitutionality of National law.[34] Poetzsch's argument is briefly that "the promulgation of a law which has been duly countersigned by the competent Ministers, justifies (*begründet*) the assumption that the law has been constitutionally enacted. The judicial *Prüfungsrecht* of its constitutionality is not affected thereby." [35]

The reason for this divergence of opinion concerning the meaning and effect of Article 70 upon the right of the courts to examine the formal constitutionality of National law seems to lie in the fact that the parties concerned fail to agree upon the premises. Article 70 states that the President shall compile (*ausfertigen*) the laws constitutionally enacted and publish them within one month in the *Reichsgesetzblatt*. Thus this article implies two distinct duties. It orders the President to compile the laws constitutionally enacted and to publish them after compilation. As far as the courts are concerned law is law only after it has thus been compiled and published. Granting that the President by compiling and publishing the law assumes the responsibility of its constitutional enactment by the Reichstag, is it logical and reasonable to assume that the publication of the law in the *Reichsgesetzblatt* is expected to imply the guarantee that the President has duly or

[34] Schack, Die Frage der richterlichen Prüfung von Gesetz und Verordnung während der Umwälzung im Reich . . . ; *and* Zur richterlichen Prüfung der Rechtmässigkeit der Gesetze und Verordnungen im neuen Reichs- und preussischen Recht. . . .

[35] Poetzsch, p. 133. Poetzsch cites Triepel in support of this opinion.

properly compiled the law, and that he has published it in the manner prescribed by the Constitution?

To answer this question we must first analyze the meaning of the term *ausfertigen* and the conditions set in the Constitution for the publication of a law. *Ausfertigung,* as described by Hatschek, means two distinct things. In the first place, it naturally requires an examination into the authenticity of the text to be published with that voted upon by the Reichstag. In the second place, *Ausfertigung* implies the countersigning of the law by the responsible Ministers.[36] Upon the guarantee that these two conditions have been fulfilled, together with its lawful publication, depends the documentary character of the law and the duty of the courts to apply it as such.

The conditions of publication of the law are determined by various provisions of the Constitution. Thus Article 70 says that the President shall compile the laws constitutionally enacted and within one month publish them in the *Reichsgesetzblatt.* However, subsequent articles contain several modifications of this provision. Article 72 for instance declares that "the promulgation of a National law is to be deferred for two months, if one-third of the Reichstag so demands," and that laws which the Reichstag and the Reichsrat declare to be urgent may be promulgated by the National President regardless of this demand." Article 73, Section 2, stipulates that "a law whose promulgation is deferred at the demand of at least one-third of the Reichstag shall be submitted to the people, if one-twentieth of the qualified voters so petition."

In the pre-constitutional period of absolute monarchism the publication of a law by the monarch was considered to guarantee the documentary character of the law. Counter-

[36] Art. 50 of the Constitution of 1919.

signature by responsible ministers was not considered, for the simple reason that such ministers if responsible at all were so only to the monarch. This conception was adhered to by the majority opinion of the leading German jurists of the Empire such as Laband, Lukas, and others.[37] Consequently the publication of the law by the monarch was held to constitute a binding order upon the courts to apply the law thus promulgated without examination as to its formal antecedents. The courts were considered to be legitimately interested only in the actual fact of its publication which was not dependent on any conditions except the discretion of the monarch.[38]

Article 70 of the Republican Constitution, as we have seen, makes the *Ausfertigung* of constitutionally enacted laws and their subsequent publication a duty, not a discretionary power. Article 50 establishes as one of the conditions of the *Ausfertigung* the countersignature by the National Chancellor or a responsible Minister;[39] and finally, Articles 72 and 73 prescribe certain important exceptions as to the time of promulgation as fixed in Article 70. In other words, the Republican Constitution makes the guarantee of the documentary character of a law dependent upon certain definite actions whose execution it imposes as a duty upon the National President. To take the position of Anschütz, Giese, and others, to the effect that the courts must accept the mere fact of the publication of a law in the *Reichsgesetzblatt* as proof of its formal constitutionality would be tantamount to the assumption

[37] For references to Laband, Lukas, and others as well as to those opposing this view see Hatschek, II, p. 97.

[38] Promulgation of National law by the Emperor implied the right to inquire into the formal, but not into the material, constitutionality of the law (See Arndt, Verfassung des Deutschen Reichs [of 1871], p. 166 ff.; also Dambitsch, p. 60 ff., 236 ff.).

[39] Giese, p. 222, Poetzsch, p. 133.

that the National President is the sole judge of the proper fulfillment of these duties imposed upon him by the Constitution. This, however, is contrary to the fundamental conceptions of responsible Government as the essential foundation of the *Rechtsstaat.*

As the Constitution charges the courts with the application of the law, the courts have not only the right but the duty to answer for themselves the question whether the law which they are asked by the Reichstag through promulgation by the President, to apply, is actually law in the meaning of the Constitution. In the *Rechtsstaat* the minimum guarantee of the legality of law is given by the proof of its formal constitutionality, i. e. its documentary character. This, as shown, depends as much upon the fulfillment of the President's duties of compiling and publishing the law in accordance with the specific provisions of the Constitution, as upon the question of the observance by the Reichstag of the constitutional procedure in the course of the enactment of the law. Thus we may well accept that definition of Article 70 which gives to the National President the right to examine, before promulgation, the constitutionality of the law within the limits of its formal enactment by the Reichstag. But we must also accept and assert the right of the courts to examine the constitutionality of the law within the limits of its compilation and publication by the National President.

The error of the legal authorities leading to the conflicting opinions here discussed seems to lie in the fact that they have failed to analyze the extent and character of the *Prüfungsrecht* claimed or denied by them respectively for the National President or the courts.[40] The examination

[40] This conclusion seems to agree with the position assumed by Hatschek. Considering the sources of the law to be applied by the courts, he holds that the courts have the right to examine whether the laws to be applied by them are really valid. This, he states, "means

of the legality of law incidental to regular litigation does therefore extend also to the first of the three questions enumerated above, namely whether a law to be applied is really law.[41] The preceding reasoning shows that, with due regard to Article 70 and the *Prüfungsrecht* which it confers upon the President, the right of the courts to examine the formal constitutionality of a law to the extent of the legality of its compilation and publication must be conceded.

Judicial Review of the Legality of Ordinances. For the same reason that the *Prüfungerccht* of the courts is recognized in questions involving the superiority or inferiority of one legal norm or set of norms over another, the right to examine the legality of executive or administrative ordinances is recognized. In the analysis of the functional relations between the executive and legislative branches of the Government it has been shown that generally speaking the National President has no ordinance power, except that granted him under Article 48 for the maintenance or reestablishment of public order. In the

especially, whether they have been properly promulgated (including the question whether they have been properly compiled and whether the compilation has been countersigned by the responsible Minister)." He accepts the interpretation of Article 70 which assigns to the President the responsibility for the compilation of the laws, and he asserts the constitutional enactment of the law thus compiled. In the chapter dealing with the compilation and publication of laws he definitely states that "the *Ausfertigung* of the original law (by the President) gives to its content the *presumptio juris et de jure* which the courts must respect. The judge must not reexamine the documentation by the head of the State of the constitutional enactment of the law, it being assumed, however, that this documentation be free from intentional faults (*frei von Willensmängeln*)" (Hatschek, II, pp. 96-97).

[41] The question whether the law to be applied has been passed in accordance with the constitutional provisions for the enactment of legislation.

chapter dealing with the ordinance power of the National Government, i. e. the National Chancellor and the Cabinet Ministers, ordinances have been considered as belonging to three classes, namely: 1. Administrative ordinances proper (*Verwaltungsverordnungen* or *Verwaltungsvorschriften*). 2. Administrative ordinances for the execution of National legislation (*Ausführungsverordnungen*) or, as they are called in Article 77 of the Republican National Constitution, "die zur Ausführung der Reichsgesetze erforderlichen allgemeinen Verwaltungsvorschriften." 3. Emergency ordinances (*Notverordnungen* or *Rechtsverordnungen*).

The first class has been defined as ordinances issued by the Government or the heads of the individual services, bureaus, etc. for the organization of the details of the service and for the regulation of the official relations of superiors and subordinates. As such they are directed to the individuals of the public service and not to the body of private citizens. In German constitutional theory and practice the right to issue this class of ordinances is held to be implied in the constitutional delegation of the executive and administrative powers.

The definition of the second class, i. e. those issued by the Regierung or the individual Cabinet Minister for the execution of National laws, is subject to controversy. As shown in more detail in Chapter XI, one group of jurists holds that these ordinances, issued by the Regierung and directed solely to the officials of the public service, must not attempt to define in detail the general provisions of the law for the execution of which they are issued. In other words, they must not assume the aspect of co-legislative norms directed to the body of private citizens. Another group is of the opinion that they may do so, i. e. they may contain legal norms for the specialization of the general

terms of the National law. It is conceded, however, that such ordinances must remain within the meaning and intent of the law in question. According to this view these ordinances are not law in the sense that they offer new or additional legal norms, but they nevertheless partake of the character of *Rechtsverordnungen* to the extent of being co-legislative within the general terms of the National law for the execution of which they are issued. It is apparently because of this failure of the German juristic authorities to agree on the definition of Article 77 that the Reichstag has assumed the almost general practice of including in the particular law enacted a special clause authorizing the Regierung or the Cabinet Minister concerned to issue the ordinances required. According to this special legislative authorization such ordinances may be, as the case requires, co-legislative to the extent of supplementing or explaining in detail the general provisions of the law for the execution of which they are issued, but within the meaning and intent of that law.

The Republican Constitution as promulgated in 1919 does not grant the Reichsregierung the right to issue emergency ordinances, i. e. ordinances of the third kind. But as shown in Chapter XI, the National Government has found it expedient to request such authorization by way of a constitutional amendment. So far no definite steps seem to have been taken in that direction by the Reichstag.[42]

Considering the mode and extent of the *Prüfungsrecht* of the courts concerning the legality of ordinances it may be stated that this right is practically unlimited. In the first place, the court may inquire whether the ordinance in question is purely administrative or whether it is a so-called co-legislative ordinance. This is done by establish-

[42] Chapter XI, pp. 506-507.

ing the absence or presence in the ordinance of legal norms affecting the rights of private citizens. If the ordinance under consideration is found to be not a purely administrative ordinance, but an ordinance issued for the execution of a general law and containing legally binding rules affecting the conduct of private citizens, then the court may or must examine the question whether the legal norms contained in the *Ausführungsverordnung* are merely specifications or explanations of the general principles of the law itself, remaining within the meaning and purpose of that law, or whether the legal norms contained in the ordinance constitute an enlargement of the general principles of the law and as such impose rules of conduct different from and in addition to those of the law in question. If the former is found to be the case, i. e. if the ordinance is found to contain legal norms specifying or explaining the general terms of the law for the execution of which they were issued, then the court may or must inquire whether or not the ordinance under consideration was issued by virtue of a special act of legislation authorizing the maker of the ordinance. If, on the other hand, the court finds that the legal norms contained in the ordinance transcend the meaning and intent of the law for whose execution it has been issued, i. e. if it is found that the ordinance contains new law in excess of and incompatible with the original provisions of the law in question, then the court must, of course, inquire whether the Reichstag has, by a majority required for a constitutional amendment, delegated to the author of the particular ordinance the right to legislate in this specific instance and on the subject in question.

Hatschek calls this right of the courts to examine the legality of ordinances the formal and material (*sachliche*) *Prüfungsrecht,* but he adds that this material *Prüfungs-*

recht must always be one of the legality, not of the expediency (*Zweckmässigkeit*), of the ordinance.[43] The question whether the expediency of an ordinance is subject to judicial review was under consideration in a case decided by the Reichsgericht on July 8, 1920. The military commander of the fortress of Marienburg had ordered the military occupation of a bridge at Dirschau (Prussia) and had suspended the toll levy for the period of the occupation, from August 5, 1914 to March 15, 1915. The bridge in question being under the control of the Prussian River Administration, the Prussian State sued the Reich for the loss of the toll for the period mentioned. The suit was brought under the provision of the National Law of May 22, 1910, on the ground that the ordinance complained of partook of the character of a traffic police regulation which the military commander was not authorized to issue. The Reichsgericht sustained the two adverse decisions of the lower courts. It agreed that the Law of May 22, 1910, providing for legal redress against the Reich for *ultra vires* acts on the part of National officials, was applicable in the case of military ordinances as well as traffic police regulations. The ordinance in question, the Reichsgericht ruled, was a military and not a traffic police regulation. The Commandant in passing the ordinance was exercising his military authority for the purpose of keeping the bridge open for purely military exigencies. The argument adduced by the plaintiff, that this purpose could have been achieved without the suspension of the toll charge, was met by the Reichsgericht to the effect that the discretionary action of a National official can be held subject to judicial review only in the special instances where purely arbitrary action can be proved, and that "with the exception of very

[43] Hatschek, I, p. 30.

special cases the expediency of an administrative ordinance is no more subject to judicial investigation in the course of a damage suit in the civil law courts than it is subject to the review of the administrative courts in accordance with the judicial practice of the Supreme Administrative Court of Prussia." This principle, the court concluded, applies generally to ordinances issued by military authorities during the course of the war for purposes of military expediency.[44]

Hatschek's use of the term "sachliches (material) Prüfungsrecht" as applied to the examination of the legality of the kind of ordinances here considered is rather misleading. For in all these instances of examination the court is concerned with the subject matter of the ordinance only from the point of view of establishing by the absence or presence of such matter the formal character of the ordinances as one of the three classes mentioned or defined. It is thus concerned only in order to decide thereafter whether each particular ordinance has been passed in accordance with the legal process prescribed for each of the classes to which it has been found to belong. This right of judicial examination is not identical with the right of the courts to inquire into the legality of a *Rechtsverordnung* from the point of view of its material agreement with the constitutional limitations of the legislative competency of the Reich.[45] The judicial *Prüfungsrecht* of ordinances with regard to their material legality in the wider and real sense the courts can claim only for ordinances passed by

[44] RGZ, vol. 99, 1920, pp. 254-257. In this connection see also the decision of the Reichsgericht of Jan. 8, 1924, reported below (Note 48 and corresponding text).

[45] The material *Prüfungsrecht* of the courts of ordinances in this respect is merely one phase of the general question of the judicial right to examine into the constitutionality of ordinary law. On this subject see Schack, cited in note 34.

the President under Article 48 of the National Republican Constitution,[46] and for those issued by the Cabinet or Ministers by virtue of special legislative authorization and by way of constitutional authorization through the so-called enabling acts dealt with above.[47]

There have been numerous decisions by the State Courts, the Reichsgericht, and the Staatsgerichtshof involving both the formal and material constitutionality or legality of ordinances issued under the authorization of Article 48 and the enabling acts granted from 1919 to 1925. By ordinance of April 13, 1919, President Ebert had declared a state of siege over the Free State of Braunschweig. In this instance the state of siege was declared under authority of Article 68 of the Imperial Constitution then still in force within the limitations of the Transition Law of March 4, 1919. By the limitations of this law the functions of the former Emperor were temporarily transferred to the Provisional National President, those of the Reichstag to the National Assembly, and those of the Bundesrat to the *Staatenausschuss* created by the Provisional Constitution of February 10, 1919.

In the execution of the ordinance National troops entered the State. They were opposed by State soldiers, one of which was killed in resisting the National forces. The children of the deceased sued the State of Braunschweig for the damage incurred by the death of their father. The lower State Court and the State Court of Appeal found a verdict in favor of the plaintiffs. The State appealed to the Reichsgericht for a revision of the verdict.

[46] Corresponding to Articles 19 and 68 of the Imperial Constitution then still in force within the limitations of the Provisional Constitution of February 10, 1919, and the Transition Law of March 4 of the same year (See the following decision of the Reichsgericht).

[47] Chapter XI, section: Enabling Acts and Cabinet Legislation.

Plaintiff in error claimed that the presidential ordinance had been issued in violation of Article 19 of the former Imperial Constitution which provided that: "If the States of the Confederation do not fulfill their constitutional duties, they may be compelled to do so by execution. This execution shall be decided upon by the Bundesrat and carried out by the Emperor." The State of Braunschweig as plaintiff in error argued that the ordinance of President Ebert should have been decided upon by the *Staatenausschuss* as the provisional successor of the former Bundesrat. On the basis of this argument the State denied the "Rechtmässigkeit" of the ordinance and consequently the charge of a violation of duty on the part of the State authorities in ordering the resistance of the State troops to the National forces. The State of Braunschweig further claimed that the right to declare a state of siege under Article 68 of the Imperial Constitution applied only to local disturbances and that execution of this state of siege could therefore only be local. Execution against a whole State, being authorized only under Article 19, was declared to require the consent of the *Staatenausschuss.*

According to the construction of Article 68 by the Reichsgericht there was no such local limitation of the state of siege implied in the provisions of this article. Under Article 68 the former Emperor, and since March 4, 1919, the National President, could enforce the declaration of a state of siege without reference to Article 19, i. e. without previously securing the consent of the Bundesrat or *Staatenausschuss.* Concerning this point the Reichsgericht said:

Article 68 of the former National Constitution made the declaration of a state of siege dependent upon the endangering of public security in the territory of the Confederation. The

question of existence of the danger premised had to be decided at the time by the National President in accordance with his duty and in his discretion. There exists no judicial right to examine these premises unless it is asserted that the exercise of this discretionary power constitutes a purely arbitrary act. An assertion of this kind, for which all foundation is lacking, has not been advanced. Nor did the provision of the Constitution stipulate the declaration of the state of siege only for the purpose of combating local disturbances. It enabled the Emperor and later the National President to declare the *Ausnahmezustand* over every part of the federal territory. Hence military action against the entire territory of the State of Braunschweig was admissible without a concurrent decision of the *Staatenausschuss*.[48]

In so far as the legality of the presidential ordinance was denied on the basis that it was not issued in accordance with the procedure prescribed by Article 19 of the Imperial Constitution then still in force, the question involved was one of the formal constitutionality of the ordinance. To the extent, however, to which the legality of the ordinance was denied on the ground of an alleged disregard of the material (geographical) limitations of Article 68 of the Imperial Constitution, the question of the legality of the ordinance was one affecting its material agreement with the Constitution.

With regard to the judicial *Prüfungsrecht* of ordinances issued under the so-called enabling acts it should be remembered that the object and effect of these acts was the constitutional authorization of the National Government to legislate by a simplified process through cabinet or ministerial ordinances as the case might be. These ordinances, containing as they did new law, are therefore to be

[48] Decision of the Reichsgericht of Jan. 8, 1924 (RGZ, vol. 107, 1924, pp. 396-400).

classed as National legislation. This being so, the question of the judicial right to examine their validity or constitutionality, material as well as formal, will have to be discussed below in connection with the study of the judicial review of the material constitutionality of National legislation.

Judicial Review of the Material Constitutionality of National Law. The legal right of the courts to review or examine National law from the point of view of its material compatibility with the provisions of the National Constitution may be established in two ways: It may be based upon a definite grant of such a right by the Constitution; or, where such a specific authorization does not exist, the courts may establish the practice of such review on the basis of a right assumed to be implied in the general intent of the Constitution or in the intent of some particular provision. The implied right can be assumed only when the Constitution does not contain or imply a denial of this right.

There is no provision in the German National Constitution of 1919 giving to the State Courts charged with the application of National law the right to examine in ordinary litigation its material constitutionality. On the other hand, there is no specific provision explicitly denying such a right. In the absence of such definite provisions it would seem that the general principle of the supremacy of National over State law, expressed in Article 13, Section 1, of the Constitution, would tend to work in favor of the application of National law by the State Courts without the right of examination as to its material constitutionality. Nevertheless, it is quite thinkable that in actual practice a State Court might dismiss a case on the ground that the National law under which it arises is

unconstitutional. It may be accepted as certain, however, that in such an emergency the National Cabinet would not wait until such a case should reach the Reichsgericht by way of appeal, but would immediately make it an issue under Article 15. In other words, the National Cabinet would appeal to the Staatsgerichtshof for a decision enforcing the application of National law by the State authorities. Whether the Staatsgerichtshof would consider the question of the material unconstitutionality of the National law in question cannot here be answered. The decision of the Staatsgerichtshof would not be one of private law litigation but one of a declaratory judgment concerning a public law matter.[49]

The chief argument over the question whether the courts have the right to examine National law with regard to its material constitutionality does, however, not center around the Staatsgerichtshof acting under Article 15, but around the Reichsgericht functioning under Article 13, Section 2. During the discussions of the general question of the judicial review in the National Assembly a resolution is supposed to have been introduced to the effect that Article 13, Section 2, should be construed to establish the right of the National Supreme Court (Reichsgericht) to examine not only the agreement of State law with National law, but also the material constitutionality of National legislation. However, no action was taken on this motion.[50] In the consideration of the same question before the *Verfassungsausschuss* Dr. Ablass proposed that what is now Article 108 of the Constitution, providing for the creation

[49] See chapter VI, section: Administrative Control with Judicial Review.

[50] See Marx, "Art. 13, Abs. 2, der Reichsverfassung," pp. 221-222. Heilfron's edition of the debates of the *Nationalversammlung* does not seem to support the interpretation of Marx with regard to the resolution in question (Heilfron, III, p. 626).

of the Staatsgerichtshof, should be enlarged to embody a definite statement excluding from the competency of the Staatsgerichtshof the right to examine the constitutionality of National law and ordinances, but that at the request of one hundred members of the Reichstag the Staatsgerichtshof should be authorized to examine the constitutionality of National legislation and ordinances, and that its decisions should be generally binding. The resolution was tabled. In the lively discussion on this subject Preuss, National Minister of the Interior, expressed himself in favor of judicial review in the interpretation of Gneist as opposed to that of Laband. While Laband holds that the mere fact of the promulgation of a National law precludes the right of judicial review, Gneist, though admitting the impossibility of the court's examination into the details of its formal enactment, nevertheless insists on the judicial right of examining the material compatibility of National legislation with the provision of the Constitution. Agreeing with Gneist, Preuss stated that in his opinion German constitutional theory and practice assume the existence of such a right except where and when it is specifically excluded. He therefore opposed the inclusion of the motion proposed by Dr. Ablass on the ground that it implied a negation of the principle of the *Rechtsstaat* in so far as it contained in its first sentence a principal denial of the *Prüfungsrecht*.[51] He was supported by Dr. Düringer of the German National party and by members of the Socialist groups. On the other hand, the *Prüfungsrecht* was denied with great vigor by Professor Kahl who stated that he always had taught the non-existence of that right and that he was still teaching it, basing his attitude upon the principal teaching of Laband

[51] Verf. Ber. und Prot., p. 483 ff.

that the promulgation of a law guarantees its constitutionality in every way. The position of Kahl was supported by the Socialist, Dr. Sinzheimer, who disagreed in this particular with Kahl but favored the motion of Dr. Ablass, which was later rejected.[52]

The question was thus left purposely undecided by the framers of the Constitution and aside from the stipulation of Article 13, Section 2, there is no constitutional provision which could be interpreted as either implying the right or the denial of the judicial examination into the question of the material constitutionality of National law. But the issue thus left open by the framers of the Constitution and by the Constitution itself has passed into the constitutional legal literature as one of the many controversies concerning the future development of the constitutional practice in republican Germany. In this controversy the positive side favoring the right of the courts to examine the material constitutionality of National law is taken by such authorities as Triepel, Poetzsch, Hubrich, Bühler, Eber-Mayer, and Marx,[53] while the negative position is represented by Anschütz, Schack, Arndt, Wittmayer, Jellinek, Hatschek, Thoma, and others.[54]

In a general way it may be said that the legal authorities opposing the judicial review of National law do so on the basis of the superiority of National over State law, i. e. on the assumption that the constitutionality of National law cannot be questioned on account of this superiority. Hatschek, for instance, denying the right of the State Courts to question the constitutionality of National law in the course of ordinary litigation, calls attention to the fact

[52] *Ibid.*

[53] For references to these authors see Thoma, Das richterliche Prüfungsrecht, p. 269.

[54] *Ibid.*, p. 270.

that even the judicial review by the Reichsgericht of State law is not based upon the principle involved here, i. e. of its actual agreement with the National Constitution, but rather on the doctrine of superiority of National law over State legislation. In other words, Hatschek holds that the National Constitution is superior to State legislation only in so far as or because it is National law.[55] The theory to which Hatschek here refers, namely that there is no difference of rank or quality between constitutional and ordinary law, is common to Europe in general. England has laws which relate to the organization and functions of the Government and which as such are sometimes called constitutional.[56] France had its written constitutions prior to the second Empire, but what is considered as the Constitution of modern France is only a collection of separate laws regulating the affairs of government. Neither in England nor in France have the courts the right to examine ordinary legislation with respect to its agreement with these so-called constitutional laws. The Swiss Constitution specifically states that in disputes between the Federal and Cantonal Governments in which the Federal Court has been given jurisdiction, "the laws and general decrees of the Federal Assembly, and the treaties approved by them, shall be the supreme law for the Federal tribunal."[57] The new Constitution of Austria of 1919 definitely states in Article 89 that "the examination of the legality (*Gültigkeit*) of laws properly promulgated does not come under the jurisdiction of the courts."[58]

[55] Hatschek, I, p. 29.

[56] Dicey, Law of the Constitution, 8. ed., pp. 84, 87.

[57] Art. 113.

[58] The Constitution of Czechoslovakia, on the other hand, declares that "laws which conflict with the Constitution are void" (Art. 1) and that the Constitutional Court decides whether a law conflicts with the Constitution (Art. 2).

While the opponents of the right of judicial review of National law thus generally base their opposition on the doctrine of the superiority of National law over State legislation, the advocates of this right claim that the denial of the authority to question the constitutionality of National law as distinguished from that of State law constitutes a one-sided interpretation of Article 13, Section 2, in favor of the Reich to the disadvantage of the Länder. Triepel and Marx call attention to what they consider an important fact, namely, that while the National Constitution may not require the protection of the courts, the States are not in such a fortunate position.[59] As Marx points out, the interests of a State may be threatened by a prospective National law considered not in agreement with the material provisions of the National Constitution or transcending the material legislative competency of the Reich. He proceeds to show that there is no possible legal way for the State to prevent the passage of such a law if all the legislative factors of the Reich are in favor of its enactment. Since no State or National Court is supposed to question the constitutionality of the National law, the only redress which the State has in such a case is to deny the application of the law in the State Courts. But as shown above,[60] this would lead to a conflict between the National Cabinet and the State Government under Article 15 of the Constitution. As a matter of fact, such a course was actually suggested in connection with the conflict between Bavaria and the Reich over the attempted nullification of certain sections of the Law for the Protection of the Republic, but the suggestion was never carried into effect since the conflict was terminated by agreement between the parties

[59] Triepel, Der Weg der Gesetzgebung nach der neuen Reichsverfassung, p. 257 ff.; Marx, p. 223 of work cited in note 50.

[60] See note 49.

directly concerned. However, it is difficult to see how, in case of actual nullification of National law by a State on the specific ground that the law thus nullified is materially unconstitutional, the National Court acting under Article 15 could render a decision either in favor or against the nullifying State without expressing some kind of opinion concerning the question of the judicial review here under consideration.

Judicial Review in Recent Decisions. It seems reasonable to assume that the question of the judicial review of the material constitutionality of National law is likely to be settled not by way of academic discussion or controversy, but on the basis of judicial practice. By this is meant that a National Supreme Court, be it the Reichsgericht, the Staatsgerichtshof, or the Reichsfinanzhof, will finally dispose of the issue either by directly ruling on the question of the legality or illegality of such review, or by establishing and following the precedent of refusing or consenting to the examination of the material constitutionality of National law. Marx's assertion that the Reichsgericht has "with absolute certainty" assumed the right to examine the constitutionality of National laws[61] is made with reference to the argument of Thoma denying the *Prüfungsrecht* and advising against the assumption by the courts of such a right.[62] Thoma refers to two decisions of the Reichsfinanzhof rendered during 1921. In these decisions the Court was asked to pass on the legality of laws passed by the National Constituent Assembly. It decided that the Constituent Assembly had the right to enact ordinary laws as well as the Constitution itself, and it therefore declared the laws in question to be in force.

[61] Marx, *ibid.*, p. 225.

[62] Thoma, Das richterliche Prüfungsrecht, p. 269.

As Thoma suggests, these decisions could hardly be cited in substantiation of the question here under discussion. But an examination of German National Court decisions bear out the statement of Marx that the Reichsgericht as one of the National Supreme Courts has asserted and practiced the right in question.

The judicial right to examine not only the formal but also the material validity of National law has been definitely asserted by the Reichsgericht in its decision of December 8, 1923. "It is the recognized rule of law (*Recht*) that the courts are in principle (*grundsätzlich*) authorized to examine the formal and the material validity (*Rechtmässigkeit*) of laws and ordinances." [63] This statement of the Reichsgericht is followed by a reference to earlier decisions of the same Court in which the same assertions were made.[64] It is true that in the case in which the above statement was made, the Reichsgericht was dealing not with an act of ordinary legislation, but with an ordinance passed under the authority of the Enabling Act of April 17, 1919. Nevertheless, the juxtaposition of the terms "laws and ordinances" leaves no doubt that what the Court had in mind was ordinary legislation as well as ordinances. The assumption that the Reichsgericht definitely meant to claim the judicial *Prüfungsrecht* for National law is further strengthened by the fact that the Court on the same occasion definitely characterized ordinances issued under the enabling acts as National legislation. Speaking of certain limitations by National law imposed in Article 153, Section 2, Sentence 2, of the National Constitution, the Reichsgericht added that "the National legislative ordinance, i. e. the legislative ordinance of May 4, 1920, has to

[63] RGZ, vol. 107, p. 379.
[64] *Ibid.*, vol. 102, pp. 161, 164.

be considered as a National law (*hat als Reichsgesetz zu gelten*)." [65]

By the Enabling Act of April 17, 1919, the National Government was authorized to issue, with the consent of the *Staatenausschuss* and of a Committee of twenty-eight chosen from the members of the National Assembly, ordinances with legislative content and force for the purpose of transferring the conduct of National affairs from a war time to a peace time basis. Under this Act the National Government on May 4, 1920, issued an ordinance which was asserted by the plaintiff to be of a confiscatory character inasmuch as it deprived him, without compensation, of a certain property right guaranteed by former legislation. As such it was claimed to be incompatible with Article 153, Section 2, of the National Republican Constitution. The *Kammergericht* of Berlin had rendered a verdict in favor of his contention declaring the ordinance unconstitutional. The question involved was clearly one of the material agreement of the ordinance with the provisions of the Constitution, as the argument of the Court affirms. Article 153, Section 2, Sentence 1, the Reichsgericht pointed out, provides that the expropriation of property for the benefit of the commonwealth can take place only on the basis of law, i. e. by due process of law. According to Sentence 2, however, "there must be just compensation, in so far as is not otherwise provided by National law." As shown by the Court, the ordinance itself claims to have been issued "in the general interest and especially in the interest of a comprehensive and harmless elimination of the bodies of diseased cattle," i. e. for the purpose of preventing epidemics. It was passed on the basis of law since the ordinance itself was issued under the Enabling Act of

[65] *Ibid.*, vol. 107, p. 381.

April 17, 1919, and as such was National law. It contained no provision for compensation. Nevertheless, the Court ruled it was not incompatible with any provisions of the National Constitution for the reason that the ordinance itself was National law in the sense referred to in the qualifying clause of Article 153, Section 2, Sentence 2. In other words, the ordinance failing as National law to provide for compensation was declared constitutional because in harmony with the rest of Article 153.[66]

In its decision of March 1, 1924, the Reichsgericht acting as Court of Appeals dealt with the constitutionality of Article 1 of the Third Emergency Tax Ordinance of February 14, 1924, issued under the Enabling Act of December 8, 1923. The question of the incompatibility of the article under consideration had been raised with regard to three different provisions of the National Constitution. Article 1 of the ordinance provided a maximum restoration (*Aufwertung*) to 15% of their original gold value of mortgages and other secured debts paid in paper money, and, like the ordinance in the previous case, stipulated that adjustment should take place not through the ordinary courts but by a special process. These provisions, the opponents of the ordinance claimed, were incompatible (1) with Article 153 of the National Constitution which guarantees the rights of property; (2) with Article 134 which stipulates that "all citizens, without distinction, contribute in proportion to their means to all public burdens in accordance with the provisions of the law;" (3) with Article 105 which orders that "no one may be removed from the jurisdiction of his lawful judge."

The Reichsgericht asserted the constitutionality of the ordinance on all three points. With regard to Articles 105

[66] *Ibid.*, pp. 377-382.

and 153 its argument follows the line of the preceding case.[67] Concerning Article 134 the Court stated that in the first place Article 1 of the ordinance did not contain any provisions for an extraordinary tax (the subject of taxation being taken up in Article 3 ff.), and that in the second place even in Articles 3 ff. no tax was imposed upon the creditor (the owner of a mortgage), but rather upon the proprietor (*Eigentümer*) and tenant (*Mieter*). Granting that the *Aufwertung* of the proper payments for gold mortgages be considered as taxing the owner of the mortgages, such a tax would not be incompatible with Article 134 of the National Constitution. According to the Court the term "all citizens without distinction" used in Article 134 refers to the abolition of privileges such as the old tax exemption of the princely houses and implies the inhibition of the creation of similar privileges in the future. It does not follow from this inhibition "that all citizens must in like measure be held to contribute to all public taxes." Their share must be "in proportion to their means" and "in accordance with the provision of the law." The stipulation of Article 1 of the ordinance was declared to be "in accordance with the provisions of the law," for the reason that "the ordinance itself is to be regarded as National law" under the terms of the Enabling Law of December 8, 1923. The Court specifically declared its inability to inquire into the question of the expediency of the provisions of the ordinance.[68]

The material constitutionality of an ordinance passed under the authority of the Enabling Act of October 13, 1923, was examined by the Reichsgericht in its decision of January 25, 1924. Article 1, Section 1, of the Enabling

[67] See text corresponding to note 66.

[68] RGZ, vol. 107, pp. 370-377.

Act specifically stated that in the ordinances to be issued under the Act the Government could depart from certain principles of the National Constitution. The ordinance in question dealt with the subject of the adjustment of financial claims against the Reich. Its main object was to bring about a reduction in these claims and for that reason to set up a special method or procedure of adjustment. Thus Article 1, Section 1, of the ordinance stated that these claims should be adjusted, not by the ordinary courts, the Reichsverwaltungsgericht, etc., but by a special process. Section 2 stipulated among other things that the question whether a particular claim was thus to be dealt with in accordance with Section 1 should be decided by the National Minister of Finance and that his decision should be binding upon the courts. The constitutionality of both sections of the ordinance was questioned by the plaintiff. The Reichsgericht declined to review the case on the following grounds: Article 1, Section 1, of the ordinance does eliminate the ordinary judicial process for the adjustment of the particular claims mentioned. But in doing so it complies with the object and provisions of the Enabling Act in so far as it aims at the alleviation of the financial stress of the Reich and in so far as its interference with the judicial procedure by the ordinary courts is based on this aim. Furthermore, its elimination of the ordinary judicial process for the purpose here given was sanctioned by Article 1, Section 1, of the Enabling Act which permitted the National Government to depart from the so-called fundamental rights (*Grundrechte*) of the Constitution, enumerated in Articles 163 ff.

The question of the material constitutionality had been raised by the *Kammergericht* of Berlin with regard to Article 1, Section 1, Sentence 2, of the same ordinance. Sentence 2 stipulated that the National Minister of Fi-

nance should be authorized to regulate the method and procedure of the adjustment of the claims described. This the *Kammergericht* held to be incompatible with the terms of the Enabling Act. The argument of the Reichsgericht in reply to the *Kammergericht's* charge was in effect as follows: Constitutional legal practice of the past and present permits the materially limited delegation by the Reichstag to other organs of the Government of the right to issue *Rechtsverordnungen.* There can be no objection in principle to a further delegation of this authority with the same limitation. The Enabling Act in question cannot be construed as containing an inhibition of such delegation. Its object was to enable the Reichsregierung to accomplish certain definite tasks for the alleviation of the distress of the Reich. As the history of the Enabling Act shows, its author clearly intended to authorize the National Cabinet to delegate the right to issue the necessary *Ausführungsverordnungen,* including *Rechtsverordnungen,* to the various Ministers as the heads of the Government Departments.[69] As a matter of fact, the Reichsregierung as a whole would never have been in a position to accomplish the objects of the Enabling Act except by delegating to the various Ministers the right to prepare and issue the detailed provisions for the execution of the general terms of the ordinance issued under the Enabling Act by the Cabinet as a whole. When in consequence of the change in the political composition of the Government the Enabling Act in question ceased to function, the regulations effected under the Act remained in force and as such also the delegation to the Minister of Finance of the right to

[69] In this connection it must be remembered that such delegation can take place only by constitutional amendment and that the enabling acts were considered as such amendments. (See chapter XI, section: Enabling Acts and Cabinet Legislation.)

issue *Ausführungsbestimmungen* to the Cabinet ordinance of October 24, 1923.

But while the Reichsgericht thus upheld the material constitutionality of Sentences 1 and 2 of Article 1, Section 1, it definitely asserted the incompatibility of certain provisions of Section 2 of the same ordinance. These provisions stipulated that the decision of the Minister of Finance with regard to the kind of claims adjustable under the new process should be final and binding upon the courts. This provision, the Reichsgericht claimed, was a violation of Article 103 and Article 105, Sentence 2, of the National Constitution. Article 103, the Court continued, charges the Reichsgericht and the courts in general with the ordinary application of the law. Article 105, Sentence 2, stipulates that no one shall be denied access to the ordinary courts. The extent of the application of the law by the courts, the Reichsgericht stated, was established by law, but within the limits thus established the courts alone have the right to determine their own competence and the right of the citizen to his day in court. As the Reichsgericht pointed out, Articles 103 and 105 do not belong to the section of the National Constitution dealing with the *Grundrechte* from which the Enabling Act authorized the National Government to depart in the ordinances to be issued under the Act. Hence the Reichsgericht declared unconstitutional the provision of Article 1, Section 2, of the ordinance in question, which delegated to an administrative organ, i. e. the National Minister of Finance, rights beyond the authorization contained in the Enabling Act under which the ordinance containing the delegation was issued.[70]

In the preceding cases the Reichsgericht has asserted

[70] RGZ, vol. 107, p. 315 ff.

the right to examine the formal and material constitutionality of laws and ordinances. The term laws in this connection is to be interpreted as including National as well as State laws. As a matter of fact, the legal norms subject to the examination of the Court in the cases cited were ordinances passed by the National Cabinet under the authority of the so-called enabling acts. As the Reichsgericht specifically declared, these ordinances are to be considered as National law. But they are law only in a material sense, formally they are ordinances, and no more. Hence, in the cases reported above, the Reichsgericht, while claiming the *Prüfungsrecht* for National law, has actually applied the right thus claimed only to the borderline cases of material law in the form of ordinances.

The question of the material constitutionality of a National law enacted as formal legislation was considered and decided in the decision of the Staatsgerichtshof of June 30, 1923. In this instance the Staatsgerichtshof acted under Article 19 of the National Republican Constitution in a controversy of a public law matter which had arisen between the Reich and the State of Prussia. Subject to controversy was the interpretation of Article 90 of the National Constitution and the Treaty of March 31, 1920, between the Reich and Prussia, regulating the transfer of the Prussian State Railways to the Reich. In connection with the interpretation of Article 90 and the Treaty there was raised also the question of the compatibility of a certain provision contained in Article 17 of the National Budget of 1921 and the corresponding articles of the budgetary laws for 1922 and 1923. The provisions in question assigned to the National President the right to pass upon the permissibility of certain expropriations in connection with the transfer of the railroads from the States to the Reich. They further stipulated that the final decision con-

cerning the method of execution, the extent of this expropriation, and the use of land for the purpose of preparatory work were to be reached by the National Minister of Communication (*Reichsverkehrsminister*). These provisions the Prussian State declared to be incompatible with Article 7, no. 12, of the National Constitution which gives to the Reich the concurrent right of legislation over the subject of expropriation. The presentation of the case in the Reports of the Staatsgerichtshof fails to give the full reasoning upon which the claim of Prussia was based. From the argument of the Staatsgerichtshof it appears that Prussia interpreted Article 7, no. 12, to demand the regulation of the subject of expropriation by a special act of National legislation and not by a supplementary provision (rider?) attached to the budgetary law. As the answer of the Staatsgerichtshof tends to show, this aspect of the question of the incompatibility of the particular articles of the budgetary laws of 1921-1923 seems to cover only their formal constitutionality. The Court stated that, like the old public law, the present Constitution does not bind the Reichstag to observe a particular form of enacting its legal norms. It is authorized to legislate on the same subject by supplementary provisions to the budgetary law as well as by special acts. Hence, as far as the particular provisions in question depend upon Article 7, no. 12, they are constitutional. But the Staatsgerichtshof added that the provisions of Article 17 of the budgetary law of 1921 and those of the corresponding articles for 1922 and 1923 were sanctioned by Article 90 of the Constitution, which states that: "With the taking over of the railroads the Reich also acquires the right of expropriation and the sovereign powers of the Länder pertaining to railroad affairs. The Staatsgerichtshof decides controversies relating to the extent of these rights." This phase of the

Court's argument clearly covers the material compatibility of the articles questioned with the provisions of Article 90 of the National Constitution. For Article 90 assigns to the Reich the right of legislation over the subject matter actually regulated by Article 17 of the Budget of 1921 and the corresponding articles of the budgetary laws of 1922 and 1923.[71]

The question of the compatibility of an act of National legislation with a provision of the National Constitution was implied also in the argument of plaintiff in a decision of the Reichsgericht of June 24, 1924. In 1919 certain officials of the former Prussian Ministry of War had been transferred to the newly organized National Ministry of Defense. By the National Law of April 30, 1920, regulating the salaries of National employees, these officials were assigned to class VI of the service. They claimed, however, that according to the salaries received in their former positions they should have been assigned to a higher group, i. e. to class VII. Their assignment to class VI they held to be a violation of their duly acquired rights guaranteed in Article 129, Section 1, Sentence 3, of the National Constitution, which states that "the established rights of officials are inviolable." Though plaintiff did not explicitly assert the unconstitutionality of the law in question, but merely sued for the difference in salary from the date of the promulgation of the law, the issue involved is clearly one of the compatibility or incompatibility of the law with the provision of the Constitution quoted. Agreeing with the lower State Courts, the Reichsgericht dismissed the request for a repeal of judgment on the following grounds: The fact that at a certain time two groups of officials received the same or approximately the

[71] StGH, 1924, pp. 1-16 (RGZ, vol. 107, Anhang).

same salary does not constitute a right on the part of the officials to be kept in this position of financial equality. The fact that one of the two groups was raised to a higher salary does not lower the financial position of the other. Article 129, Section 2, of the National Constitution prohibits the actual transfer of an official from his present to a lower group or class. But the raising of one group is not identical with lowering the group not so advanced. Hence the regrouping of the officials in question does not constitute a violation of the established rights of officials. Though the Court did not specifically say so, its argument clearly justifies the conclusion that the National law of April 30, 1920, effecting the regrouping complained of, was held to be not unconstitutional, i. e. not unconstitutional in a material sense.[72]

It is quite evident, however, that the preceding decisions have so far neither convinced the opponents nor satisfied the advocates of the *Prüfungsrecht* to the effect that the practice thus assumed by the State and National Courts is to be considered as final. Sufficient proof for this is found in the fact that among the jurists the controversy for or against judicial review is going on unabated. In a recent number of the *Deutsche Juristenzeitung*[73] Dr. Külz, National Minister of the Interior, has announced and published the text of a bill intended to establish the *Prüfungsrecht* over National law as a constitutional provision. The chief points of the proposed bill are as follows:

1. In cases of doubt or differences of opinion whether . . . a National law or ordinance is in agreement with the National

[72] RGZ, vol. 108, pp. 314-316.

[73] September, 1926, p. 837 ff. Reprinted in Richard Grau's article: "Zum Gesetzentwurf über die Prüfung der Verfassungsmässigkeit von Reichsgesetzen und Reichsverordnungen (Archiv des öffentlichen Rechts, N. F. 11. bd., 1926, pp. 287-334).

Constitution, the Reichstag, the Reichsrat, or the Reichsregie rung may request a decision of the Staatsgerichtshof . . . ex cepted are treaties with foreign States and the laws enacted for their execution. [According to Section 2 of the same para graph this applies to the question of the formal and materia constitutionality of the National provision concerned]. . . .

2. If a court deciding in last or sole instance believes that it cannot apply . . . a National law or ordinance because the law or ordinance is held incompatible with the National Con stitution, it must discontinue the case and inform the Reichs regierung, giving the reasons for its opinions on the subject (*Begründung seiner Rechtsauffassung*).

3-4. [Prescribe the procedure to be followed by the Reichs regierung in requesting and by the Staatsgerichtshof in render ing the decision requested].

5. If the doubts or differences of opinion submitted to the Staatsgerichtshof concern only one or several provisions of a law or ordinance, the Court in declaring such particular pro visions unconstitutional must declare in its decision whether and to what extent the constitutionality of the remaining pro visions of the law or ordinance are affected.

6. The Reichsregierung must publish the decision [of the Staatsgerichtshof] without motivation in the *Reichsgesetz blatt*. The decision has the force of law.

7. Even before the promulgation of a law enacted [by the Reichstag] or an ordinance issued [by the Reichsregierung], the National President or the Reichsregierung may seek an advisory opinion of the Staatsgerichtshof with regard to the question whether any provision of the law or ordinance would be [formally or materially] unconstitutional. . . .

8-10. [Contain additional provisions for the judicial pro cedure to be followed by the Staatsgerichtshof in the rendering of the opinions and decisions requested].

In his discussion of the provisions of the proposed bill Professor Grau points out that what is here proposed is a uniform procedure for the *Prüfungsrecht* by the courts

deciding in last or sole instance in the course of litigation, the final decision of the constitutionality of National law and ordinances being in these instances assigned to the Staatsgerichtshof. But as Grau significantly remarks: "It is not explicitly stated whether, in addition to the Staatsgerichtshof, the other [National Supreme] Courts [such as the Reichsgericht, the Reichsfinanzhof, the Reichsverwaltungsgericht] are to have the right to examine the constitutionality of National law and ordinances." Grau assumes, and apparently with good reason, that the proposed bill presupposes the existence of the general right of the courts to examine the constitutionality of National law and ordinances. He therefore concludes with equal logic that since the bill offers a uniform procedure only for decisions by the Staatsgerichtshof in cases of doubt and difference of opinions arising in courts of last and sole instance, it does not provide a simplification or uniform system of judicial review (*Vereinheitlichung des richterlichen Prüfungsrechts*) such as exists in Czechoslovakia.[74]

Judicial Interpretation of Law. Entirely different from though intimately connected with the question of the constitutionality of State or National law is that of the meaning or interpretation of a particular legal norm to be applied by a court in the course of litigation. The right or obligation to apply the law in the case before the court necessitates not only the finding of the facts with regard to the subject of the controversy, but also the establishment of the meaning and the intent of the particular law governing the case. For the United States, where at least in principle jurisdiction is based on a differentiation between State and Federal legislation, it may in general be stated that the State Courts interpret State law, while Federal

[74] And to all practical purposes, though not formally, also in Austria. See note 58 and corresponding text.

law is interpreted in the Federal Courts.[75] When dealing with the question of the interpretation of State statutes the Federal Courts accept as a rule the meaning of the State law as established or asserted by the State Courts.[76]

Where, on the other hand, original jurisdiction in the matter of both State and National legislation is by constitutional provision assigned to the State Courts, as is the case under the German system, the question of the interpretation of the law to be applied is considerably more complicated. In so far as the German ordinary, i. e. State Courts, are the tribunals of first and second instance for all cases arising under State and National law, they must of necessity assume the right of interpreting both State and National legislation for the purpose of its application to the facts of the case subject to adjudication. It is only as the National Supreme Court of Appeals that the Reichsgericht assumes this same right in the final revision of the judgments of the State Courts. In other words, in the absence of a definite establishment of the meaning and intent of a particular National law by a National Court, State Courts may interpret such a National law in order to apply it intelligently. This interpretation, however, is subject to review in the course of a revision of the State Court's decision by the Reichsgericht as the final Court of Appeals. The revised interpretation of the National Law by the Reichsgericht then becomes the established meaning and remains binding upon the State Courts in all future decisions. The same applies, of course, to the interpretation of National law by the Reichsgericht under Arti-

[75] In this connection see "The Power of State Courts to Enforce Federal Statutes" (Yale Law Review, vol. 33, 1923-24, p. 636 ff.).

[76] For exceptions to the general rule see Willoughby, The Constitutional Law of the United States, vol. I, p. 22 ff.; vol. II, p. 1024 ff. See also Swift *v.* Tyson. 41 U. S. 1; and Gelpcke *v.* Dubuque. 1 Wall. 175.

cle 13, Section 2, where such interpretation is incidental to the question whether a particular State law is compatible with National law. It also applies to the decisions of the Staatsgerichtshof under Article 19 in case of constitutional disputes between the Reich and the Länder.

The Reichsgericht has repeatedly assumed the right to interpret National law, including the provisions of the Constitution, or rather it has undertaken to uphold or to revise the interpretation of National law by the State Courts. In its decision of July 3, 1923, for instance, the Reichsgericht, sustaining the interpretation by the State Courts, stated that the National School Law of April, 1920, contained only general principles for the guidance of State legislation on the subject of the adaptation of existing schools to the standard of the "Grundschule" of four years. In agreement with the State Courts the Reichsgericht held that the right to compensation claimed by the plaintiff for pecuniary losses arising from the enforced reduction by State ordinance of the number of classes or years of her private school could not be based upon the general terms of the National law. Such a right, the Court ruled, could be founded only on the special conditions under which State legislation would provide for such claims in accordance with the general instructions of the National law in question.[77]

On the other hand, the Reichsgericht, exercising revisional jurisdiction in civil law matters over the decision of the State Supreme Courts, and in criminal law cases over the decisions of the *Strafkammern* of first instance and the *Schwurgerichte* of the States, assumes the right of revision of the interpretation by the State Courts not only

[77] RGZ, vol. 107, pp. 103-106. In its decision of May 16, 1924, the Reichsgericht assumed the interpretation of Art. 129, Sect. 2 of the National Constitution (RGZ, vol. 108, p. 170 ff.).

of National but also of State law applied in the case subject to review. This right the Reichsgericht exercised, for instance, in connection with its decision of March 5, 1923. The Prussian Law of March 11, 1850, establishing liability for damages inflicted upon individuals during public disturbances, failed to specify the existence of such liability on the part of a rural community (*Landgemeinde*) for damages incurred on large autonomous estates located within the community. Plaintiff had brought suit against both the estate and the community for damages incurred on the estate. The lower State Court had dismissed the claim against the estate as not supported under the State law. But it upheld the plaintiff's claim against the community. The State Court of Appeals dismissed also the claim against the community on the ground that if the State law did not extend to estates, the rural community could not be held liable for damages inflicted on the estates. Plaintiff appealed to the Reichsgericht as the last instance, insisting upon the liability of the community. The Reichsgericht, ruling that such liability was not established under the Prussian law in question, dismissed the appeal for revision of the decision of the State Court in second instance.[78]

As a final consideration, attention must here be called to the fact that the Reichsgericht claims this right of revision of the interpretation of State law only in cases where the decision depends solely upon the meaning of the terms of the State law and not upon the constitutionality or compatibility of State legislation with National law. When or where the interpretation of State law is only inci-

[78] RGZ, vol. 107, pp. 129-132. See also decision of April 1, 1924, concerning the interpretation of Art. 37 of the Prussian Teachers' Salaries Law; and Art. 2 of the Prussian Law of May 24, 1861, dealing with judicial procedure (RGZ, vol. 108, p. 144 ff.).

dental to the examination of its agreement with the National Constitution or with National legislation, the meaning of State law as established by the State Courts is final, the National Court, i. e. the Reichsgericht, being in this instance interested only in the consideration of State law—as thus interpreted—in its relation to the National Constitution or to the superior National law. In its decision of November 18, 1921, reported in detail elsewhere in this chapter, the Reichsgericht specifically recognized the finality of the State Court's interpretation of the State law in question. In this connection the Reichsgericht definitely disclaimed the right to review this interpretation, asserting for itself the right to examine whether the State law as interpreted by the State Courts was or was not in agreement with the National Constitution or with National law as the case might be.[79]

[79] RGZ, vol. 103, pp. 200-202. For a detailed statement of the case see text corresponding to note 30.

CHAPTER XIV

Special Topics and Conclusion

The Rights of Man and Citizen. As indicated in the title of this work and as stated in the Preface, the present undertaking does not pretend to be a commentary on the German National Constitution. By this is meant that it does not purport to offer an interpretation or annotation of the individual provisions of the Constitution. The intention has been no more nor less than to make available to the teacher and student those fundamental principles of German constitutional law and practice on the basis of which the framers of the German National Constitution, under the given circumstances of the political, economic, and social upheaval of the Revolution, made the Constitution what it is. This intention is founded on the belief that the proper application of these principles will guide teacher and student in the study of the specific stipulations of the Constitution towards their correct interpretation and understanding. A few illustrations in the form of an actual attempt to interpret some of the vital provisions as suggested will substantiate the justification of that belief.

There is, for instance, the question of the fundamental rights of man and citizen. What is the American student, taught to believe in the doctrine of natural rights, to make of the section of the *Grundrechte* as found in the German National Constitution? What is he to make of them in the face of the fact that there is no German "Declaration of Independence," nor any specific statement in the Constitution itself in which their inalienable, be-

cause natural or *quasi* divine, character is asserted? Is he justified in enumerating the catalogue of these rights, in comparing them with the corresponding catalogue in his own Constitution, and in attempting to form from that comparison any conclusions as to the relative state or degree of liberty of the German as a citizen of the Reich and of himself as a citizen of the United States? If he does, he may occupy himself in a manner gratifying to himself, but his effort will prove utterly barren of benefit beyond that of such personal gratification.

In the preceding chapters it has been shown that, with their own interpretation of the details, the Germans have come to look upon the State as a juristic person, i. e. as an organization acting through governing agents appointed and functioning in accordance with the norms of its own law.[1] The individual citizen, conceived as a member of that organization, maintains his existence as such only by virtue of the law. His conduct, i. e. his outward acts of omission and commission, are regulated by law. In other words, his rights and duties are the creation of law or at least exist only in consequence of the law. Proof of the fact that this was the conscious conviction of the framers of the National Constitution of 1919 is easily found in the debates on these rights, especially in the debates in the *Verfassungsausschuss*. The most convincing and illuminating statement on the subject of fundamental rights is unquestionably that by Dr. Naumann. Referring to Jellinek's studies in the field of fundamental rights,[2] Naumann

[1] Chapter III.

[2] Jellinek, Georg, The Declaration of the rights of man and citizen . . . tr. by M. Farrand . . . 1901. See also Giese, Die Grundrechte . . . 1905. On the subject of the *Grundrechte* of the new Constitution see Triepel, Die Entwürfe zur neuen Reichsverfassung; *and* Wolzendorff, Der reine Staat.

distinguishes four groups of such rights: 1. The rights of man (*Menschenrechte*); 2. the rights of the citizen (*Bürgerrechte*); 3. freedom of thought; 4. social emancipation (*Verschiebung*) and liberation.

Of the first group, the rights of man, rights which are essentially negative, Naumann said:

> Under these rights we understand the rights that hang high above among the eternal stars, the rights born with us, the rights which have, since the foundation of the American Republic, played a rôle all through European history, appearing in all modern constitutions. . . . These rights are concerned chiefly with the question: What may the State not do to the individual citizen? . . . One may possibly state them in positive form, but they remain essentially negative. These negative rights, the inalienable rights of the ego in contraposition to the power of the encircling (*umdrängenden*) State, are present in the drafts before us in [the following provisions]: "Personal liberty is inviolable"; "the home is inviolable"; "property is inviolable"; "the postal secret is inviolable." Similar statements were contained in the Constitution of Frankfurt [of 1849] . . . such as "the death penalty is abolished"; "the condition of subjection (*Untertänigkeit*) and servitude is abolished forever."

Of the second group Naumann says that they are positive in the sense of stating that the individual has such and such a right in the State.

> The second group goes back to the ideas of Rousseau: "The State is made by the will of the people." The will of the people is something mystical, unfathomable, but it represents and is materialized from majorities which can be counted. . . . The formulas of this group are found in our draft [in such phrases] as: "All Germans are equal before the law"; "the equality of the citizen in the National Union"; "the equal right to offices,

appointments, etc., without consideration of class or denomination."

In this connection Naumann raises the question why so little is said about the duties of the citizen toward the State. Answering his own inquiry he concludes that this must be explained on historical grounds. Thus he said:

Fundamental rights were mostly the documentary evidence of political victory, the victors so to say formulating in peace terms what they have won in the political or socio-political struggle. But while these peace terms state in documentary form the rights of the individual gained by revolution, there has been wanting an equally firm formulation of the new responsibilities and duties assumed by the same act. Still it goes without saying that the more the right of the individual citizen grows, the more grows also what the State can demand of him. It would be a good thing, therefore, to speak in connection with the fundamental rights not only of rights, but also of their corollaries, i. e. duties, with greater definiteness. To the most common duties of the past belong the obligation of defense, general obedience to laws and authorities, the paying of taxes, and, if one wants to state it so, the duty of suffering expropriation if the higher interests of the State and the principles of the commonwealth demand.

The third group of fundamental rights is the one pertaining to ideas (*die ideelle Gruppe*), consisting of three subdivisions: 1. the right of free thought, speech, and association, including the right to one's mother tongue as provided in Article 40 of the draft under discussion; 2. the free choice and practice of one's religion; 3. the freedom of teaching.

The fourth and last group Naumann calls the material group of social emancipation (*Verschiebung*) and libera-

tion. It is this group which constitutes the essentially new element in the examination and study of the subject. Once more Naumann begins by the historical consideration of the development of the idea of fundamental rights as applied to the fourth group. Again we shall let Naumann speak for himself.

> While the spiritual phases have in many directions been carefully treated in the old fundamental rights, it is all the more strange how little has been said of the economic aspect (*Weltanschauung*), i. e. of the economic group of rights. The politics of the past was the politics of the *Rechtsstaat an sich,* which failed to conceive or at least to understand sufficiently the connection between the State and economic groups (*Gruppierungen*).

Naumann then goes on to consider the provisions of the *Grundrechte* found in the Prussian Constitution of 1850. The reforms of von Stein, introduced after the defeat of Prussia in 1806, had at least formally abolished the servitude of the peasant. By the inclusion of certain *Grundrechte* the Prussian Constitution went at least nominally one step further towards the realization of the principles of the French Revolution, which by that time had become the principles of the masses of all of western Europe. The *Grundrechte* of the Prussian Constitution he summarizes under the phrase: "Abolition of certain privileges of the aristocracy, such as the establishment of liens and the exercise of justice on the estate." The Constitution of Frankfurt of 1849 moved in the same direction, regulating the individual's right to game hunting, limiting the acquisition of landed property by the *main morte,* aiming in these provisions at the final liberation of the peasant. The essence of the *Grundrechte* of the Prussian Constitution and of that of Frankfurt of 1849 was the formal attempt to

eliminate the last vestiges of the feudal aspect of society. Neither one of these constitutions goes to any length in the establishment of fundamental rights of an economic character. The Constitution of 1849 only touches here and there on the principles of free trade and enterprise (*vom freien Handel, vom freien Erwerb*) and of the freedom of migration. The only right of this kind definitely found in the Constitution of 1849 is that of emigration.

The speaker then comes to the question: What are the principles, old or new, which we must introduce into our National Republican Constitution? and in particular: What are the principles of the *Grundrechte* in the field of economics and sociology which should be thus introduced? The answer Naumann considers as depending upon the value to be attached to such *Grundrechte* from the point of view of their protective quality or enforceable character. Once more he draws upon past history to throw light upon the present and future. Speaking of the actual application of the principles of private rights in the Prussian Constitution of 1850, he points out that the mere presence of *Grundrechte* in that instrument did not prevent the Prussian election law and the conditions of the upper house of the State Assembly from effecting a peculiar contrast to the supreme right of the Prussian citizen, that of equality before the law. Passing from the past to present and future, the speaker continued:

This causes us to look upon the *Grundrechte* with a certain degree of resignation. One will have to ask also to what extent the individual rights given the citizen in these *Grundrechte* have been rights in the sense that he was able to enforce or demand their application or execution. I shall leave the particulars to the members more experienced in juristic affairs. I shall only say that in general the *Grundrechte* did not possess such efficacy that the individual who did not receive what the

State had promised in the *Grundrechte* merely had to reach to the eternal and starry rights in order to secure the liberty guaranteed in them. To use an expression of Jellinek, these rights were subjective rights, they were *Weltanschauungsmomente*. . . . If we want to introduce *Grundrechte* into our Constitution [it must be realized] that also these rights will be rights in a sense not very different from those of the Prussian Constitution. But they can be at least what the Prussian *Grundrechte* have been, the fundamentals of a certain profession or faith (*Bekenntnis*). This the Prussian *Grundrechte* would have been to an even greater degree if the Prussian Government had stood squarely upon the ground of these rights. For if it had, these rights would have been a voluntary and popular catechism for the establishment of that frame of mind upon which the State is founded. . . .

It is from this aspect of the idea of the *Grundrechte* as *Weltanschauungsmomente*, or as a profession of faith for the establishment of that frame of mind upon which the State is founded, from which the speaker proceeded to consider the question of the introduction of *Grundrechte* into the new German Constitution, especially with regard to the rights pertaining to the social and economic sphere. From this point of view, Naumann holds, the question of the need for *Grundrechte* is practically identical with that of the need for a new constitution. Thus he argues:

Why do we have to establish a new constitution? In the first place, because the Monarchy has disappeared. . . . We are compelled to create a new constitution because one of the ground pillars of the State . . . has disappeared. The architectural structure must be given a new foundation. This new foundation is to be given in the constitutional labor which we have to perform. This includes, if possible, also the contents of the profession of faith of the fundamental principles of State (*des Staatsgrundbekenntnisses*). . . . With the Mon-

archy a good deal of the—let us say—transcendental, the mystical, aspect of the State has disappeared. But to build the State merely upon passing considerations of expediency is extremely dangerous and technically difficult. There seems to be an absolute need for a profession of State faith (*Staatsbekenntnis*), i. e. for the profession of the democratic republic as a moral necessity surpassing legal formulations, a necessity of State wisdom and State caution.

The second great cause [for the creation of a new constitution and the corresponding introduction of *Grundrechte* of a social and economic character] is the entry of the fourth estate —to use the old phrase—the entry of the Socialists into the Government. . . . But let us not forget that even in the political parties which are not socialistic the minds are occupied with the same problems, and that the whole people . . . is filled with the one question: What has the State to say, not to the problems of 1848, but to the problems of to-day? The Socialists in entering the Government bring with them an entirely different fundamental principle. I have previously shown that the old principles started with the individualistic rights: "What is it that the State can or can not do to the individual?" "What are we doing to the State as individuals since the State consists of us as individuals?" This old way of putting the question is no longer right inasmuch as the socialist masses by their very nature can never feel as individualistic as the bourgeois third class which formerly stood in the foreground. The normal man of the present is the group man (*der Verbandsmensch*). It is the socialized man belonging to a group seeking for himself expression in the constitution, seeking a confession of State faith if such there can be. . . . Are we then capable of expressing in definite forms this transmutation of the fundamental concepts of the State? Viewed with the eyes of the constitutional jurist of 1848, Article 33 of my draft, which says that "all honest labor is of equal right and equal dignity," is by no means political in character. This phrase is in principle nothing but the general right of man pronounced for the era of the coming laboring masses; it is a phrase dis-

tinguished from all former phrases in so far as the question at issue to-day is not one of the individualistic right which is inviolable, but one of visioning the people in its group individuals and of recognizing these group individuals as such in their relation of equality. The old *Grundrechte* conceived the phrase "property is inviolable" in the absolute sense of the "individual and his property." A social era, however, cannot but recognize the group and its property, i. e. property in its relation to the commonweal (*Gesamtheit*), to group economics. We shall be compelled to take cognizance of this and to find a formulation such as the one attempted by me in Article 33, to wit: "National economics (*Volkswirtschaft*) supersedes private economics." The old Constitution only knew the individual in his private economics. Little had to be said of him in the State catechism because the State was not concerned with the economics and self-supporting ability of the individual. It was the principle of that time that the individual had to go his way as much as possible without the State. To-day the economics of the individual must be viewed as a part of commonweal economics (*der Allgemeinwirtschaft*).

What, then, is the measure of the change or the measure of what must or can to-day be pronounced as the social ideal of State? Even the composition of our Assembly [the Weimar Constituent Assembly] shows that it will be impossible to create a purely socialistic State jurisprudence. It equally shows the impossibility of maintaining the old individualistic system of constitutional law. All that can possibly result from the attempt at a socialistic constitutional law is apparently a kind of arbitration peace treaty between Capitalism and Socialism. Either we succeed in formulating this [in the Constitution], or we do not succeed in doing so. The result is the same if we consider this matter, not from the aspect of the composition of the Constituent Assembly, but from the point of view of the historic position of the present Germany. The political question for us to-day is this: Either we are drawn into the Russian conception of Soviet Councils or we adhere to the western European and American form [of State and Gov-

ernment]. The confession to be expressed in the *Grundrechte* contains our political decision with regard to the western people. . . .[3]

If Naumann's views of the essence and the meaning of the fundamental rights of man and citizen represent the opinion of the framers of the German National Constitution—and it is safe to state that they do—then the foreign student must consider these views in the interpretation of the individual provisions pertaining to these rights. For only on the basis of these views will he be able to realize and to concede that a detailed study of the subject of the fundamental rights of the German citizen since August 11, 1919, is not so much a chapter in constitutional law as in the deep and dark waters of politics, or at best of State philosophy. He will then understand that, on the one hand, the entire second half (*Zweiter Hauptteil*) of the German Constitution, consisting of Articles 109 to 165,[4] is devoted to these rights, while, on the other hand, a single sentence of Article 48 suffices to empower the National President "temporarily to suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153, if public safety and order in the Reich are materially disturbed."[5] Only on the basis of political considerations and reasons of State will he understand how, by the Law for the Protection of the Republic of 1922, some of the rights of free speech, press, and

[3] Verf. Ber. und Prot., p. 171 ff.

[4] See enumeration of such rights in section: Police Power.

[5] See in this connection chapter XI, text corresponding to note 51 ff., dealing with presidential ordinances of this kind and text corresponding to note 79 ff., dealing with the provisions of the Enabling Act of October 13, 1923, authorizing the National Government to legislate by ordinances to the extent of deviating from the *Grundrechte* of the *Reichsverfassung*.

association were infringed upon not for a short period of time, but for five years with the option of an extension of the law if there should be need for such extension.

It was considerations of this kind, such as the undeniable fact that the political, economic, and social upheaval of Germany since 1918 played an important part in the postulation of these fundamental rights, which prompted the author to abandon the original idea of treating the subject of the *Grundrechte* more extensively. For by what rationalizing process but that of practical social morality or elemental reasons of State, using the term in its widest sense, could one explain the presence in the German Constitution of the assurance that "every German shall have the opportunity to earn his living by economic labor . . . ,"[6] when everyone, the authors of that assurance included, must have known that such opportunity could never be given in the literal construction of the phrase? That the framers of the Constitution had no illusion on that subject is proven by the further stipulation immediately following their high promise, to wit: "So long as suitable employment cannot be procured for him, provision will be made for his maintenance. . . ." So far has the promise of an opportunity of economic labor for every German fallen short of realization that in the first half of December of 1926, despite a fair degree of recovery of German industry and commerce, there were no less than 1,464,000 unemployed in the Reich.[7] Where the stipulations of the Constitution

[6] Art. 163. The complete article reads: "Every German has, without prejudice to his personal liberty, the moral duty so to use his intellectual and physical powers as is demanded by the welfare of the community (Sect. 1). Every German shall have the opportunity to earn his living by economic labor. So long as suitable employment cannot be procured for him, his maintenance will be provided for. Details will be regulated by special National laws" (Sect. 2).

[7] Osnabrücker Zeitung, Dec. 31, 1926.

did come into lively operation, however, was in the provision for the maintenance of those not supplied with that opportunity for work guaranteed as the primary right by the same article of the Constitution. An interesting side light is thrown upon this phase of the problem by a report that the National Minister of Public Welfare, upon complaint by the Communists to the effect that citizens assigned to work had to supply their own tools, conceded the justice and fairness of the practice of granting to those working under assignment a compensation for the increased wear and tear of clothing and shoes.[8]

An additional reason for the abandonment of the idea of a more exhaustive treatment of the *Grundrechte* is found in the fact that the subject of fundamental rights has to some extent been treated elsewhere. The ethical aspect of the question of the rights of the individual has been considered in the author's "Concepts of State, Sovereignty, and International Law" in connection with the problem of the rights and duties of the State. The juristic aspect has been dealt with in the present work in the discussion of a number of decisions of the Reichsgericht in cases arising from National legislative provisions for damages for injuries resulting from *ultra vires* actions of public officials and from National and State laws affecting the rights of property and expropriation.[9]

[8] *Ibid.* In January, 1927, an elaborate draft for a Labor Unemployment Insurance Law was submitted to the Reichstag (*Ibid.*, Jan. 9, 1927).

[9] See Index: *Ultra vires* actions of public officials, *and* Expropriation. Three other decisions are discussed by Häntzschel (Archiv des öffentlichen Rechts, N. F. 10. bd.). The three decisions were rendered in cases arising over the interpretation of Art. 118, Sect. 1, which states that "Every German has the right within the limits of the general laws to express his opinion freely by word, in writing, in print, by picture, or in any other way. No relationship arising out of his employment may hinder him in the exercise of this right, and no one may discriminate

Police Power. The subject of police power under the German constitutional jurisprudence of the Republic is another topic which can be properly understood by the foreign student only on the basis of approach laid down in the preceding consideration of the *Grundrechte.*

Naumann, as will be remembered, distinguished between "rights of man (*Menschenrechte*)," and "rights of the citizen (*Bürgerrechte*)." The rights of man he defined as essentially negative, i. e. as rights implying what the State could not do to man. Of the rights of the citizen he said that they are positive in the sense that the citizen has such and such rights in the State. But Naumann's discussion of the subject of *Grundrechte* or fundamental rights leaves no doubt that he accepts this distinction between "rights of man" and "rights of the citizen"—only as a differentiation in theory. As far as the practical question of the postulation of *Grundrechte* in the German Constitution was concerned Naumann recognized only one kind of rights, namely rights of the citizen. This can be asserted most emphatically also for the majority of the framers of the Constitution as the enumeration of the constitutional

against him if he makes use of this right." The courts rendering the decisions were the *Oberlandesgericht* of Prussia, the *Kammergericht* and the Reichsgericht. In the first case a Prussian Civil Service employee asserted the incompatibility of the Prussian Civil Service Disciplinary Law with Article 118 of the National Constitution on the ground that the Prussian law in question was a special and not a general law in the sense of the restriction of Art. 118, Sect. 1. The Court proved in the first place that the term general (*allgemeine*) laws remained in the final text of the Constitution by error, a motion having been accepted in the *Verfassungsausschuss* to eliminate the adjective "general" from the phrase. It showed in the second place that the *Verfassungsausschuss* consented by absention from objection to the statement of Preuss that the *Grundrechte* were not intended to invalidate special laws, the law of defense and other legislation establishing obligation of service (Verf. Ber. und Prot., p. 504). The Court upheld the validity of the Prussian Disciplinary Law. In the second decision

rights of the German citizen will demonstrate. For they contain what in theory we may call "rights of man" as well as "rights of the citizen."

To be sure, the postulate of the "rights of man" has always been and will forever remain the divine spark which keeps the ideal of human dignity and worth glowing under the callous indifference of a magistracy acting as the tool of a fanatical minority or an unintelligent majority, and the levelling surge of the ever growing power of group and mass. As such the postulate of the "Menschenrechte" has been and always will be the inspiration for heroic self-sacrifice in the continuous struggle against autocracy, intolerance, and stupidity. But what does victory in that struggle signify if not the transformation of such a postulate from rights in the sphere of moral and intellectual imperatives to that of civil rights in the form of constitutional legal guarantees sanctioned by the formal acceptance by the majority and thereby placed under the protective force of the police power of the State? If proof for this assertion is needed it will be found in the following enumeration of

the *Kammergericht* upheld the constitutionality of the Prussian Press Law of May 12, 1851, interpreting the phrase "allgemeine Gesetze" to mean laws applying to all citizens and not to a particular group or class. The Prussian Press Law being general in this sense was found not to be affected by the restriction of Art. 118, Sect. 1, of the National Constitution. In the third decision the Reichsgericht evaded the issue raised by the difference of interpretation of the term "general laws" by the two lower courts. It rendered its decision on the question of the constitutionality of the Prussian Press Law on the basis of a difference between the content and the mode of the expression of opinion. The Court ruled that Art. 118, Sect. 1, of the National Constitution merely guaranteed the right to the free expression of the content of one's opinion, and that the Prussian Press Law in question merely restricted the mode of such expression (Häntzschel, Das Grundrecht der freien Meinungsäusserung und die Schranken der allgemeinen Gesetze des Artikels 118, I, der Reichsverfassung). See also RGZ, 1925, ID, pp. 105-125, decision of March 24.

the most significant of the "Grundrechte" of the German National Constitution of 1919, to wit:

All Germans are equal before the law. Men and women have fundamentally the same rights. . . .[10]

Personal liberty is inviolable. An interference with or abridgement of personal liberty through official action is permissible only by authority of law. . . .[11]

The home of every German is his sanctuary and is inviolable. Exceptions are permissible only by authority of law.[12]

The secrecy of postal, telegraph, and telephonic communication is inviolable. Exceptions are permissible only by National law.[13]

Every German has a right within the limits of the general laws to express his opinion freely by word, in writing, in print, by picture, or in any other way. No relationship arising out of his employment may hinder him in the exercise of this right, and no one may discriminate against him if he makes use of this right. . . .[14]

All inhabitants of the Reich enjoy full freedom of religion and conscience. The free exercise of religion is assured by the Constitution and is under public protection. . . .[15]

Art, science, and the teaching thereof are free. The State guarantees their protection and takes part in fostering them.[16]

The regulation of economic life must conform to the principles of justice, with the object of assuring humane conditions of life for all. Within these limits the economic liberty of the individual shall be protected. Legal compulsion is permissible only for safeguarding threatened rights or in the

[10] Art. 109, Sect. 2.
[11] Art. 114.
[12] Art. 115.
[13] Art. 117.
[14] Art. 118. Concerning interpretation by judicial decision of Art. 118 see Note 9.
[15] Art. 135.
[16] Art. 142.

service of predominant requirements of the common welfare. . . .[17]

[The right of private] property is guaranteed by the Constitution. Expropriation may be proceeded with only for the benefit of the community and by due process of law. . . . Property rights imply property duty. Exercise thereof shall at the same time serve the general welfare.[18]

The right of inheritance is guaranteed in accordance with civil law. . . .[19]

Intellectual labor, the right of the author, inventor, and artist enjoy the protection and care of the Reich. . . .[20]

The right of combination for the promotion of labor and economic conditions is guaranteed to everybody and to all professions. All agreements and measures which attempt to limit or restrain this liberty are unlawful.[21]

. . . Every German shall have the opportunity to earn his living by economic labor. So long as suitable employment can not be procured for him, his maintenance will be provided for. Details will be regulated by special National laws.[22]

Of course, these constitutional postulates imply, if anything, that the State shall not let its own agents act toward the individual in a manner contrary to the guarantees established. But they also imply, and this fact is of vital importance for their proper interpretation, that the same State through its agencies guarantees to the individual, as far as such guarantee can be reasonably expected to go, protection against the violation of these rights by his fellowman. This fact is definitely stated in some of the provisions quoted. In other words, the same rights, implying

[17] Art. 151.
[18] Art. 153.
[19] Art. 154.
[20] Art. 158.
[21] Art. 159.
[22] Art. 163, Sect. 2.

a limitation of the actions of the State's agents in the matter of control over the individual, place upon the State a corresponding degree of control as a duty in the form of the police power for the protection of man's constitutional rights against his encroaching neighbor. It is this relation between the fundamental rights as limitations upon the State's agents on the one hand, and as the foundation of its police power on the other, which more than any other consideration constitutes the raison d'être of both the *Grundrechte* and the police power of the State. But let it be understood that this is true only if the *Grundrechte* are conceived, not as transcendental inalienable rights, but as specific *ad hoc* provisions regulative of the correlative constitutional privileges and obligations of individual and State agent alike, and as such subject to modification demanded by the changing conditions of the basic needs of society as expressed in accordance with the letter and spirit of the constitution.

Proof of this relation between the *Grundrechte* viewed as limitations of the activities of the State's agents and the essential motivation of the police power of the State is found in the indisputable fact that even though certain fundamental rights may in accordance with legal sanction, as for instance under Article 48, Section 2, of the German National Constitution, be suspended as far as the limitation of State action is concerned, the same State may or rather must nevertheless continue to claim and exert its privilege or duty of defending these same rights against violation by private violators and self-appointed guardians of law and morals. In other words, temporary suspension of the fundamental rights authorizes their infringement, but only by legally designated public agencies. It does in no way deprive the State of the right, nor does it release the State from the duty, of protecting the individual citi-

zen in his assertion of these rights against their violation by fellow citizen or fellow man. This is the logical conclusion formed under the juristic conception of the State in its relation to its own agents and to its citizenry. It is the doctrine adhered to by German jurists in their commentaries on Article 48, Section 2. It is the practice followed in the actual application of the provision of Section 2 of Article 48.[23] In fact, this is the very criterion of the transformation of pre-civic society into a body politic or State and the object and essence of such transformation that in a society politically organized no citizen, no group of citizens, nor even the majority of citizens may perform any function of State, least of all that of the police power, unless specifically and formally authorized to do so by direct or indirect constitutional delegation or commission. For such is the inexorable dictum of the State conceived as a juristic person that no legally valid public function whatsoever can be performed except by constitutionally legal authorization. Of course, such extra-legal non-valid functions have in the past been performed in every State and they will be performed at one time or another in the future. But under the juristic conception of the State

[23] Anschütz, pp. 106-108. In 1921 the National Government felt the need of a special Law for the Protection of the Republic curtailing the freedom of speech, press, and association. The law was directed chiefly against a number of secret organizations aiming at the destruction of the republican form of government and whose members had been adjudged guilty of the murder of members of that government. Art. 3 of the law in question stipulates that: "Immunity shall be accorded to the member of such a society or association . . . who shall inform the authorities, or the person threatened, of the existence of the society, agreement, or association . . . before, in pursuit of the purposes of such a society, agreement, or association, the murder shall have been committed or attempted." Art. 5, Sect. 1, of the law provides a penalty for those failing to inform the authorities or persons threatened as provided in Art. 3. But Sect. 2 states that: "This provision is not to be applied in the case of a minister of the Church coming into pos-

they are considered extra-legal or even revolutionary as the case may be. They are indicative of a change in the prevailing ideas of the mutual interests of the citizenry or of dissatisfaction with the magistracy entrusted or charged with the conduct of the affairs of the commonwealth for the realization of those interests, but failing to live up to their trust or charge. Such extra-legal or revolutionary acts may lead to the complete disintegration of the body politic, or they may result in the remedial replacement of the recalcitrant magistracy by one willing to conduct the affairs of State in accordance with the norms of the Constitution as the nearest approach to the honest expression of the mutual interests of the Nation. There can be no denial of the fact that extra-legal or revolutionary acts have been necessary in the past or of the assumption that they will be necessary in the future—but when resorted to they are extra-legal or revolutionary. As such they are not what concerns us here where we are dealing with acts of commission and omission by the public agents and functionaries of the State.

It is only under the conception of the State as an organization whose magistracy acts in accordance with norms

session of such knowledge through the exercise of his spiritual office. Immunity shall be accorded to relatives in the ascending and descending line, husbands and wives, brothers and sisters, if they have tried to the best of their ability, to deter the would-be assassin, except when the failure to give such information has resulted in the commission of a murder." It must be remembered that this law was enacted as a constitutional amendment under Art. 48, Sect. 2, of the National Constitution providing for the temporary suspension of the *Grundrechte* in question. It is to be noted, however, that while Articles 3 and 5 of the Law for the Protection of the Republic establish a limited duty of information, they do so only for the protection of the fundamental rights of those illegally threatened by their fellow man. Furthermore, they impose this duty upon relatives only for the prevention of the extreme offence of murder.

definable as and by law that the State's agents may be conceived as legally authorized to disregard in their own relation to the individual the provisions of the rights temporarily suspended, and at the same time may or must lend every effort to the prevention of the violation of those rights on the part of private individuals or organizations. Thus it is conceivable that in times of danger to the State the courts may, under suspension of the fundamental rights in point, hold the political offender without trial or convict him without trial by jury, but they will not encourage or tolerate mob violence by the application of the whip, torch, rope, or the like. It is thinkable that under the same circumstances the police may arrest without warrant, but it will not let watch and ward societies steal its thunder nor permit neighbor to pounce upon neighbor. Thus also, the overzealous official inquisitor may be imagined applying the third degree upon the mere suspicion of political nonconformity, but he will disdain to act upon the information offered by brother spying upon brother. Last, but not least, it is quite possible that in times of strain and stress the legislature may, for reasons of State, or under the honest delusion of interpreting public opinion, enact legislation obnoxious to a great part or majority of the population, but it will not permit its members to be bought or cowed into enacting as law binding upon society as a whole the opinion of the fanatic and the designs of the crook.[24]

[24] In this connection reference should be made to the conflicting juristic interpretation of the general phrase introducing the special provisions of the *Grundrechte*. Art. 109, Sect. 1, states that "all Germans are equal before the law." The same provision was found in the Prussian Constitution of 1850 (Art. 4, Sect. 1). According to the opinion of Anschütz and followers, Art. 109, Sect. 1, like its prototype of the Prussian Constitution, merely demands that the law, whatever it be, shall be equally applied to all citizens of the State or Reich. The obliga-

It is under this construction of the State, and under this construction alone, that the institution of the police power ceases to arouse the distrust and alarm with which its ever growing extension has for long been viewed by the thinking element of the citizenry of the modern State. For it is under this construction that the police power assumes the aspect and functions which in reality as well as in definition are not subversive of the aspirations and ideals of the members of society, but rather subservient to the best interests of group and individual alike. Approaching the subject from this angle the student will understand that in modern German constitutional jurisprudence the concept and institution of the police power is no longer to be identified with police regulations and signs of "verboten." He will realize that police power has come to signify in Germany—and should signify in every "Rechtsstaat"—nothing more nor less than the legalized activity of the State as far as it manifests itself for the realization and maintenance of what Naumann fittingly calls the "State's confession of faith," embodied in the constitutional provisions of the *Grundrechte* and, we may add, in all the stipulations of the Constitution dealing with the acts

tion of "Rechtsgleichheit" in the sense that the legislature must enact only such legislation which equally affects all citizens is not contained in Sect. 1, but in Sections 2 and 3 of Art. 109, and, one may add, in certain of the specific provisions of the *Grundrechte* as introduced by the phrase of Art. 109, Sect. 1 (See commentaries of Anschütz, Giese, and Poetzsch on Art. 109). But there is another school of thought represented by Hatschek, Triepel, and others, who insist that Art. 109, Sect. 1, introduces the innovation of the "Rechtsgleichheit" in the sense that it prohibits the enactment by the Reichstag of legislation which does not affect all Germans in the same manner and degree (Hatschek, I, p. 196). For a discussion of the controversy see Hippel, Zur Auslegung des Artikles 109, Absatz I, der Reichsverfassung (Archiv des öffentlichen Rechts, N. F. 10. bd., 1926, pp. 124-152). Another item of importance in this connection is the fact that Art. 109 is not one of those subject to temporary suspension by virtue of Art. 48, Sect. 2.

of the State's agents and citizens alike, in so far as they affect the existence and interests of the Nation or Reich. He will come to see that police power thus understood does not constitute a danger to man's aspiration to individualistic expression and activity, but that it is the only practical guarantee of the *Grundrechte* viewed as the voluntary and popular catechism for the establishment of that frame of mind upon which the State is founded. Once more the student must be reminded that ample illustrations on the subject of police power will be found in the present work in connection with the legal cases discussed [25] and in the consideration of the rights and duties of the State in the author's "Concepts of State, Sovereignty, and International Law." [26]

International and Constitutional Law. One more topic of the German National Constitution allowing of a proper understanding only by those familiar with the principles illustrated in the preceding pages is that concerning the position assigned to international law in the constitutional or municipal law of the Republican Reich.

As stipulated in Article 4, "the generally recognized principles of international law (*Völkerrecht*) are accepted as an integral part of the law of the German Reich." What these generally recognized principles of international law are, the Constitution is of course not able to tell, and, except in commonly cited generalities, no student of international law is in a position to state. This uncertainty throws serious doubt upon the meaning of the article itself. There exists in consequence of this uncertainty a difference of opinion with regard to the question whether it implies the acceptance of the modern Anglo-American atti-

[25] See Index to present work under: Reichsgericht.

[26] See Index to that work under: State, liability of; limitation of; subject of rights and duties.

tude towards international law in relation to municipal law, or whether it goes beyond that conception, thus giving to generally accepted principles of international law the status of equality with or even superiority over German statutory and constitutional law. According to the prevailing juristic opinion in England and the United States the generally accepted principles of international law, including the law of conventions, treaties, agreements, and the common law principles, are accepted and applied by the National Courts to the extent to which they are compatible with the law of the land. This statement requires no substantiation by references to authorities and legal decisions. As a general proposition it may be said that the Reichsgericht, prior to 1914, followed a practice implying acceptance of the same doctrine.[27] It would naturally follow that the inclusion in the National Republican Constitution of the specific provision of Article 4 must be interpreted either as a specific affirmation that the National Republic will follow the same practice, or as an indication that the stipulation of said article means something more. Thus it may, for instance, be held to posit the supremacy of international over municipal law, an interpretation advanced by Verdross and Kunz for the corresponding Article 9 of the new Austrian Constitution.[28] Or it may imply at least the obligation of interpreting *Reichsrecht* in such a way that conflicts between international and municipal law are avoided.[29]

[27] For a review of such decisions see Walz, Die Bedeutung des Art. 4 der Weimarer Reichsverfassung für das nationale Rechtssystem (Zeitschrift für Völkerrecht, bd., XIII, 1925, pp. 165-193).

[28] Kunz, Völkerrechtliche Bemerkungen zur österreichischen Bundesverfassung, in section III dealing with Article 9 of the Austrian Constitution (Annalen des Deutschen Reichs, Jahrg. 1921 and 1922, pp. 295-324).

[29] See statement to that effect by Dr. Simson (Verf. Ber. und Prot., p. 407).

The debates in the *Verfassungsausschuss* [30] and in the *Nationalversammlung* [31] contribute little to the clarification of the issue. Its solution is thus left to the eventual preponderance of one of the diverging schools of thought in the juristic literature or by the decisions of the courts. One must agree, however, with Walz that "Article 4 has the . . . function of harmonizing the material provisions of the *Reichsrecht* with those of international law," and that thus "Article 4 is but one of the historic links in the chain of progressive politico-legal endeavors of modern civilized States to eliminate possible conflicts between international and municipal law." This is true whether this result be accomplished by the transformation theory which demands the formal recognition of international law as municipal law, or by the substitution theory (*Verweisungstheorie*) according to which international law is applied as or in lieu of municipal law.[32]

The decisions of the Reichsfinanzhof and the Reichsgericht have been reviewed by Jacobi [33] and Walz [34] respectively. The gist of the decisions of the Reichsfinanzhof so far may be expressed in its ruling to the effect that principles of international law to be generally accepted in the sense of Article 4 must be accepted by Germany.[35] The Reichsgericht, though applying stipulations of international treaties and conventions, seems to have avoided any reference to Article 4 and its meaning.[36]

The differences of opinion referred to above have to do

[30] Verf. Ber. und Prot., pp. 31 ff., 405 ff.

[31] Heilfron, II, pp. 144-145, 209.

[32] Walz, p. 187 ff.

[33] Jacobi, Die Rechtsprechung des Reichsfinanzhofs und das Völkerrecht (Zeitschrift für Völkerrecht, bd. XIII, 1924, pp. 120-124).

[34] Walz, pp. 192-193.

[35] See note 33.

[36] Walz states that this has been the case at least up to 1922 (p. 192).

with the formal aspect of the interpretation of Article 4. But there are considerations concerning the material side of the provision in question, considerations which are equally if not more vital for the realization of the essentials involved. For the sake of an unbiased approach to the understanding of the stipulation of Article 4 it must be remembered that the German need or desire for a new German Constitution containing such a provision crystallized and materialized to a large degree in consequence of a change of public opinion, voluntary or enforced, concerning Germany's right to consider abrogated the international convention guaranteeing Belgian neutrality. There never has been a generally accepted principle that all international treaties or conventions are binding forever. In fact, it is correct to state that the generally accepted doctrine of international law on that subject teaches that treaties and conventions are considered as valid only so long as the conditions upon which they were entered into prevail. The question is at bottom then not one of the validity *in perpetuum* of treaties or conventions, but one of the generally accepted opinion concerning the presence or absence of the conditions upon which these treaties or conventions were originally established. Applied to the case of Germany and the Belgian Neutrality Convention this means that Germany discovered *post factum* a difference of opinion between herself and her political adversaries, not concerning the perpetual validity of the Neutrality Convention, but rather concerning the expediency of the abrogation of that Convention at that particular time and by herself alone as one of the signatories of that Convention. The German reasoning leading to the act of abrogation and the act itself were of a purely political character. Had the consequences of that act been different, the new German Constitution, if there had been one, might not

have the particular provision concerning the position which the generally recognized principles of international law now assumes in the law of the Constitution. As it was, the framers of the Republican Constitution proceeded to arrange matters in such a way that henceforth the reasoning leading to the abrogation or circumvention of a generally recognized principle of international law will be a matter not of a purely political but of a juristic character as well. In other words, they placed upon the political leaders the necessity of considering in future all international treaties, conventions, and agreements, whether formally promulgated as the law of the land or not, and all other generally recognized principles of international law, not as purely political engagements to be recognized or ignored as political expediency might dictate, but as legal norms with the binding aspect of domestic municipal or constitutional law.

To not a few of the students of the German Republican Constitution this particular provision of Article 4 considered from this angle may appear either as a pious but unconvincing gesture or as a cynical but artful concession.[37] The individual's opinion in this respect depends entirely upon his particular *Weltanschauung* in the matter of international politics and morality. But be that as it may, it must be accepted by each and everyone as decidedly realistic in the possibilities and consequences of its application. In substantiation of this assertion we need

[37] See statements by some of the speakers in the *Verfassungssausschuss*. Kahl, for instance, requested the elimination of what was Article 3 of the draft under consideration on the ground that the provision of that article "might give the impression of a self-accusation on the part of the German people because of its former attitude towards international law and of a submission to the foreign point of view (*eine Verbeugung vor dem ausserdeutschen Völkerrechte*)" (Verf. Ber. und Prot., p. 31).

consider only one fact. To the Germans, at the time of the enactment of their new Constitution, the stipulations of the Armistice Agreement and of the Peace Treaty were the most generally accepted principles of international law then in existence. Upon their acceptance of these principles as not only politically but also as legally binding for them depended the salvation of the Reich and of thousands if not millions of their citizens. The provisions of the Versailles Treaty had been formally enacted into German law by the Act of July 16, 1919, and by the formal publication in the *Reichsgesetzblatt* of August 12 of the same year. Article 178, Section 2, of the Constitution specifically states that "the provisions of the treaty of peace signed on June 28, 1919, at Versailles, are not affected by the Constitution." But the insertion of Article 4 in the Constitution indicates more than the formal acceptance of a specific rule of international law or of a particular treaty promulgated as formal law of the Reich. It signifies the acceptance as a matter of course of all generally recognized principles of international law whether such rules or treaties are formally promulgated as law or not.

To illustrate this point let us consider an instance of actual conflict between the provisions of the Versailles Treaty and the National Republican Constitution. In the Constitution as enacted by the National Assembly there was found a provision for the eventual inclusion of Austria as a member State in the German Union. Such inclusion would of course constitute a change in the status of Austria as an independent State, which status had been guaranteed by Germany in the Treaty of Versailles, signed prior to the promulgation of the Constitution. The treaty stipulation in question provided that the status of the independence of Austria could not be altered without the specific consent of the Allied and Associated Powers. The

provision of the German Constitution, on the other hand, failed to state that such consent was to be secured prior to the amalgamation contemplated. It is true, as stated above, that the Treaty of Versailles was formally promulgated as German law, and having been thus promulgated prior to the Constitution itself, was the superior law from the point of view of time. It could therefore be eliminated only by way of a formal or implied repeal. It is of course possible to argue that the provision of the Constitution stipulating the conditions of Austria's future participation in the functions of the German Reichsrat constituted such a repeal. But let us not forget that Article 178 of the same Constitution says that nothing in the Constitution is to affect the provisions of the Treaty of Versailles. So we are back again at the status of the Versailles Treaty as the superior law not only from the point of view of time, but also from the point of view of law *per se*. It is evident, then, that the Germans were bound by their own law to heed the Allied and Associated Powers' request for the elimination from the Constitution of the article violating the corresponding provision of the Treaty of Versailles.[38]

So far the argument is based on the superiority of the Treaty of Versailles by virtue of the promulgation of that Treaty as formal law of the Reich and upon Article 178 of the Constitution specifically stating that nothing in the Constitution was to affect the provisions of the Treaty. What interests us here, however, is the question whether the same superiority of the Treaty of Versailles would exist under Article 4 of the German Constitution, i. e. if that treaty had not been formally promulgated as German law, but had to be considered as an integral part of the law of the German Reich only in consequence of Article 4. The

[38] On this subject see Brunet, pp. 310-311. For text of the Allied and Associated Powers' Protest see Triepel, Quellensammlung . . ., p. 75.

answer to that question is simple and definite if we consider two facts: First, the Treaty of Versailles was enacted as formal law and promulgated as such, not in order to enhance its legal force and binding quality as an international agreement, but solely because Article 45, Section 3, of the National Constitution prescribes that international treaties of this kind require the formal sanction of the Reichstag. Secondly, as a formal enactment by the Reichstag it was promulgated by the National President in accordance with Article 70 so that the legislative process be duly completed. In other words, formal enactment and promulgation were merely the constitutional method of the acceptance by Germany of the treaty as an international agreement. Once legally accepted it became an integral part of the law of the Reich under the provision of Article 4 until legally repealed by the same organs which enacted it as law in the first instance.

As far as the particular provisions of the Treaty of Versailles here discussed are concerned, repeal was possible as a legal measure only with the consent of the Allied and Associated Powers or rather the signatories of the treaty. This applies whether we consider the Treaty of Versailles as part of the law of the Reich by virtue of its formal promulgation as such or under the stipulation of Article 4. Hence, even if the treaty had not been so promulgated, i. e. even if it had merely held the status of German law as any other generally accepted principle of international law, it could be legally repealed *in toto* or *in parte* only by the consent of all the signatories holding legal rights under that treaty. Any attempt on the part of the Reich at a repeal without the consent or against the expressed will and wishes of any one of the interested parties would constitute an extra-legal act, essentially the same as the overthrow of a Constitution by means other

than those provided for in the Constitution for the process of altering the fundamental law of the land. For reasons of political expediency such extra-legal acts are, as we well know, often permitted to succeed. Whether a Nation decides to abide by the demands of its own law or whether it decides to set up another law is purely a question of politics. Whether it decides to set up the new law in the manner prescribed by its own Constitution or whether it chooses rather to follow the extra-legal process is a question of political expediency or morality. The same applies to the sphere of international law, especially when the latter is considered part of the law of the land. In a State governed by men whose discretionary public acts are not limited by legally binding norms, the presumption may well be in favor of a decision on the basis of political consideration. In the State conceived as a body politic claiming a government "of law" it should always be in favor of the observance of the legal process.

But there is one danger in this purely juristic speculation as to the meaning and efficacy of the provision of Article 4. It is the danger of expounding theory rather than reality. No one with a moderate understanding of the attitude of man to man and of nation to nation will fail to realize that the presence of Article 4 in the German Constitution does not obviate the possibility of "conflicts of law," i. e. of conflicts between international and municipal law of the kind that allows of a settlement only by diplomacy or acts of State rather than by voluntary or enforced compliance on the part of the legislative or judicial machinery. Article 4 establishes as an integral part of German law the generally recognized principles of international law. What in the particular case these principles are and which principles are thus generally recognized, are questions to be decided by the German courts dealing with

concrete cases as and when they arise.[39] Ignoring the difference of opinion concerning the formal aspect of the question referred to in the beginning of this section, it may be stated, however, that these questions are not, as heretofore, to be decided by the political heads of the executive branch of the Government. The interest of the executive or political branch of the Government in the subject here discussed is limited to the formal process or act of negotiating international engagements and of recognizing principles of international law. Once they have been formally accepted and recognized they are to the executive and political branch no longer mere political obligations subject to legal abrogation at their own discretion, but norms of law to be altered or legally amendable only in the way prescribed by the Constitution and on the basis of the terms contained or implied in the international engagements or principles themselves.

But while the courts rule on the question whether a principle of international law is generally accepted and is therefore also accepted by Germany,[40] they are not concerned with the question whether such a principle shall be accepted, or whether after acceptance it shall be continued to be recognized or abrogated. The cynic may say that this is a distinction without a difference, but it was not the cynic who established reasonably peaceful relations be-

[39] See reviews of such decisions in articles by Jacobi and Walz, cited in notes 27 and 33.

[40] While there is a difference of opinion concerning the question whether the principles of international law to be generally accepted must be accepted by all Nations or only by those concerned in the particular case, German jurists and courts seem to agree that general acceptance according to the meaning of Article 4 presupposes acceptance by Germany (see opinions of Preuss and others in Verf. Ber. und Prot., pp. 30 ff., 406 ff.; also decisions of Reichsfinanzhof cited above, note 33).

tween the individuals of society by a body of civil laws, nor is it the cynic who will succeed in establishing similar relations between nations by a similar body of norms not only accepted but also adhered to by those accepting them. As a matter of fact there is a difference in this distinction. As shown by the decision of the Reichsfinanzhof cited above,[41] a principle to be generally accepted by international law must under the construction of Article 4 also be accepted by Germany. Such acceptance is and remains under Article 4 a purely political act. The right to enter into international agreements and to accept such principles implies the right to reject or abrogate those impossible of acceptance or of further recognition. The act of rejecting a proposed international norm in the form of a treaty or convention remains, as heretofore, a function dictated by purely political motives beyond the control of the courts. But the procedure of abrogating existing engagements and accepted principles is now no longer subject only to the rules of the Constitution regulating the making of treaties and repealing existing National law. It has been placed under the supervisory jurisdiction of the courts in the same way and to the same extent to which the evasion or obstruction of an ordinary law is placed under the courts' guardianship. The full meaning of this fact will be made clear by a consideration of a possibility of which no mention has been found in the available literature on the subject. According to Article 59 of the German Republican Constitution, "the Reichstag is empowered to impeach the National President, the National Chancellor, and the National Ministers before the Staatsgerichtshof of the Reich for any culpable[42] violation of the Constitu-

[41] See note 33 and text corresponding to note 35.

[42] "Schuldbare." The translation of "schuldbar" by "wrongful" as given in Gollomb's translation of Brunet falls short of the real point of formal legal liability involved.

tion or laws of the Reich. . . ." From the point of view of legal and logical reasoning there is but one conclusion possible with regard to the application of this article to the provisions of Article 4, namely that the Reichstag's authorization to impeach the President, Chancellor, and Ministers must apply also to culpable violations of generally accepted principles of international law as an integral part of the law of the Reich.

It is for this reason that Article 59 seems to clear away much of the difficulty implied in what we referred to as a distinction without a difference. The lawmaking body is the Reichstag, i. e. the legislative branch of the Government. Whatever difference of opinion may exist between the different branches of the Government on the question whether or not a certain principle of international law shall continue to be accepted and as such remain part of the law of the Reich, is one to occur between the Executive and the Legislature and not between the Executive and the Judiciary. It is with the Reichstag as the lawmaking and representative organ of the Nation that rests the ultimate decision whether the political branch of the Government will continue to recognize accepted principles of international law or whether it will be permitted to abrogate them in a legal or extra-legal manner. In the case of the Allied and Associated Powers' protest against the violation of the Versailles Treaty provisions concerning the independence of Austria, the Legislature decided in favor of the recognition of the treaty as the superior law. To what extent the attitude of the Reichstag has been responsible for the peaceful development of international post-war relations along the lines of treaty fulfillment and treaty amendation is a question beyond the scope of this work. It is, however, within the sphere of a juristic study such as this to point out that formally the provisions of

Articles 4 and 59 are a big step forward in the direction of respect for the legal process in general and of the application of the legal process to the enactment, execution, and abrogation of engagements and principles of international law in particular.

Conclusion. A final word must be added concerning the quite general criticism that the German National Republican Constitution is but another of the modern attempts to establish the Utopia of democracy and the prediction usually coupled with such criticism that, like all the rest of such undertakings, it is doomed to ultimate failure. This criticism and the accompanying attempt at prophecy require attention only to the extent to which they affect the raison d'être of the present work.

What has been said on the subject of private rights, police power, and the relation of international to constitutional or municipal law applies with equal force in this connection. A study of the constitutional jurisprudence of the German National Republic has no concern with the question whether the Republican Constitution and the kind of government established under it will be able to maintain themselves or not. To essay any defense of the staying quality of the German Republic would fall little short of assuming partisanship in the political struggle of a Nation which as yet has hardly had time to adjust its party life and machinery to the exigencies of the new form of State. It would at best require an exposé of the complicated party system, explaining the origin, program, and aims of the existing parties,[48] stating the result of their activities as far as it has affected the stability or unstabil-

[48] On this subject see Bergsträsser, Geschichte der politischen Parteien . . . 1924.

ity of the various governments or cabinets since the establishment of the Republic. Such an enterprise, however, is totally foreign to the task here undertaken, which is intended to deal strictly with the working or workability of the present Constitution. It is the working or workability of the Constitution viewed as a practical experiment of conducting the business of a modern commonwealth envisaged from the aspect of the juristic conception of the State. The question of politics can be permitted to enter into its consideration only to the extent of explaining on the basis of the social, economic, and political background the actual creation of the new Constitution and the meaning of its provisions as expressed and defined by those responsible for the change from the old to the new order. An examination of the kind of politics that should be played or the kind of changes that should be effected in the political doctrines and practices of the individual parties in order to ensure a more stable government and in consequence the maintenance of the Republic, in short the question of the political expediency of the actions of the individuals, organs, or parties constituting the Government, lies outside the legitimate interest of the constitutional jurist or the analytical political philosopher. For the seeker after truth in general and for the adherent to the juristic conception of the State in particular, the important question is not whether the new Constitution of the German Naional Republic will be successful or will fail as an experiment in the practical application of the principle upon which it is built. It is rather what its success or failure will contribute to the general field of constitutional jurisprudence and above all to that body of opinion which aims at the elaboration and practical realization of a theory of the State whose affairs are conducted by a government of law or, more correctly, a government of men subject and obedient to law.

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ABBREVIATIONS

Anschütz——Anschütz, Gerhard, Die Verfassung des Deutschen Reichs vom 11. August, 1919 . . . 2. Aufl. 1921.

Arndt——Arndt, Adolf, Die Verfassung des Deutschen Reichs vom 11. August, 1919 . . . 2. Aufl. 1921.

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Poetzsch——Poetzsch, Fritz, Handausgabe der Reichsverfassung vom 11. August 1919 . . . 2. Aufl. 1921.

RGBl.——Reichsgesetzblatt.

RGSt.——Entscheidungen des Reichsgerichts in Strafsachen.

RGZ——Entscheidungen des Reichsgerichts in Zivilsachen.

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Sartorius——Sammlung von Reichsgesetzen staats- und verwaltungsrechtlichen Inhalts . . . Hrsg. von C. Sartorius . . . 5. Aufl. 1921.

StGH——Entscheidungen des Staatsgerichtshofs.

Stier-Somlo——Stier-Somlo, Fritz, Die Verfassung des Deutschen Reichs vom 11. August 1919 . . . 2. Aufl. 1920.

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INDEX

Administrative organization
  of the North German Confederation and the Empire, 228 ff
  of the Republican Reich, 234 ff
Administrative reform of Reich and Länder, 355 ff
Advisory decisions
  in American practice, 279-283
  of German National Courts, 250, 280 ff
Anschütz, on
  distinction between possession and exercise of Staatsgewalt, 113-114, 146-147
  juristic conception of the State, 98-99
  National and State Sovereignty, under the Empire, 166 ff; under the Republic, 168 ff
  ordinances, 471 ff, 482 ff
  organs of State and Government, 116-117
  popular vote in election, initiative, referendum, and recall, 537
  Regierungsgewalt, 108
  Staatsgewalt, 102, 103n
  Staatsgewalt and independence, 104, 106, 167, 312-313
  State character and Staatsgewalt of the Länder, 166 ff
  supremacy of National over State law, 191-194
Arbeiterräte, see: Workers' Councils
Aristotle, on change of Constitution and change of State, 138
Ausführungsverordnungen, conflicting definitions, 456-459, 471 ff, 476-482
Ausnahmezustand
  definition and application, 325 ff, 500, 507, 588-589
  differentiated from martial law, 485, 507

Binding, on compactual origin and State character of the North German Confederation, 49-50, 52-53, 56
Bismarck, on the establishment of the Bundesrat and a real upper house, 399
Boundaries of the Länder, subject to change by amendment of the National Constitution, 180-181, 185-187; by National law, 181 ff, 186 ff; by consent of people affected, 181-182
Brunet, on direct government, 525 ff, 537 ff
Bundesrat, position and functions under the Empire, 398-402
Bundesstaat or Staatenbund, question of, under the North German Confederation, 46, 50; under the Empire, 56

Cabinet
  composition and appointment of members, 390 ff
  impeachment of members by Reichstag and trial by Staatsgerichtshof, 422
  participation in process of legislation, 438 ff
  relation of Chancellor and Ministers, 423

relation to Reichsrat, 439-440
resignation of, 393 ff, 423
responsibility to Reichstag, 422
right and duty of members to be present at sittings of Reichstag and its committees, 429, 438; at sittings of Reichswirtschaftsrat and its committees, 449
see also: Ministers; Ministerial responsibility; President and Cabinet
Cabinet legislation
by ordinances under enabling acts, 488 ff
deviating from fundamental rights of Constitution, 499
question of compatibility with parliamentary government, 502-503; of constitutionality, 503-505
Calhoun, on
compactual origin of the American Union, 49-50
nullification, 307
Chancellor
appointment, position, and functions, 119-120, 388, 393
impeachment by Reichstag and trial by Staatsgerichtshof, 422
right and duty to be present at sittings of Reichstag and its committees, 429, 438; of Reichswirtschaftsrat and its committees, 449
Checks and balances, in organization of National government, 548
see also: Cabinet; President; Reichsrat; Reichstag
Civil rights, see: Grundrechte
Civitas, term applied by Romans to early Germanic political units, 7, 9, 13
Coburg, amalgamation with Bavaria, 185-186
Committee on the Constitution, appointed by National Constituent Assembly, 94
Confiscation, of property, 574-575, 598; see also: Expropriation
Conflicts, between Reich and States, etc., see: Controversies . . .
Constituent Assembly of Frankfurt of 1848-1849, 35 ff
Constitution, change of, by constitutional, unconstitutional, or extra-constitutional, illegal, or extra-legal means, 530-531
Constitution of 1849, analysed, 38 ff, 131
Constitution of 1871, mode of amendment, 182
Constitution of 1919, mode of amendment, 182 ff; see also: Reichsrat
Constitutions of the Länder, republican form prescribed by National Constitution, 179
Continuity, legal, see: Legal continuity
Controversies
between Reich and States, 291 ff, 323 ff
between States, 291 ff
"concerning the Constitution" and "of a public law matter," distinguished, 269 ff, 291
within a State, concerning the Constitution, 267-268, 271-273, 275 ff; concerning a public law matter, 267-268, 273
Council of Commissioners (Council of Six)
creation of, 72
relation to Labor and Soldiers' Councils, 72-73, 76

surrenders political power to National Constituent Assembly, 85
Courts, National, see: National Courts
Courts of the States (Länder), see: State Courts
Crown Prince, abdication of, 67, 69
Customs Union, Prussian-German, see: Zollverein

Declaratory judgments, see: Advisory decisions
Delbrück, on choice of name for the Republic, 129-130
Democratic government
in Europe, origin of, 3
in Germany, origin of, 35; opposed by dynasties, 34-35; under Constitution of 1849, 39-40, 44
Deutsche Reich, Das, see: Germany
Deutscher Bund, see: German Confederation of 1815
Deutsches Reich, see: Germany
Direct government
different forms of, 542-543
under Constitution of 1919, analysed, 540 ff
see also: Election; Initiative; Recall; Referendum
Drafts of the Constitution of 1919
first and second Preuss drafts, 86-89
first and second Government drafts, 92-95
private drafts, 652-653
vote in National Assembly on final draft, 96
Due process of law, 263, 553, 558, 598-599, 601, 603, 606
Duguit, on parliamentary government, 374-375

Ebert
Chairman of Council of Commissioners, 72, 80, 82 ff
Chancellor of revolutionary Socialist Republic, 69-72
President of provisional Government of German Republic, 85-86
surrenders mandate of revolutionary Socialist Republic to National Constituent Assembly, 82 ff
see also: President
Economic Council, National, see: Reichswirtschaftsrat
Economic Councils, 445-447
Economic solidarity, see: National union; Zollverein
Einheitsstaat
as proposed in drafts of the Constitution, 88, 92, 172 ff
favored by Socialists and Spartakus Bund, 89, 160-161, 351
present situation and prospects for future, 123, 162, 164 ff, 341 ff, 349 ff
Election
casting of vote is not "sovereign act," 523 ff, 533 ff
of President and members of Reichstag, 539-540
Election districts (units) and representatives elected, 534
Emergency ordinances, see: Ordinances, executive
Emperor William II
abdication of, 65-69
Reform Acts of October 1918, 59, 62
Enabling acts, 488 ff; see also: Cabinet legislation
Equality before the law, 559, 633n
Ermächtigungsgesetze, see: Enabling acts

Expropriation and property rights, 553 ff, 558 ff, 604 ff; see also: Confiscation

Fahlbeck, on parliamentary government, 373-374
France, before 919, see: Frankenreich
Frankenreich
  administrative and political organization, 16 ff
  division into France and Germany, 19-21
Freistaaten, see: Republics
Fürst (Roman, princeps), in early Germanic history, 10-12, 15
Fundamental rights, see: Grundrechte

Gagern, von, on object of National Constituent Assembly of 1848-1849, 131-132
German Confederation of 1815, a league of independent States, 30 ff
Germany, 919-1806, founding of, in 919, 21-22
Germany, 1815-1866, see: German Confederation of 1815
Germany, 1866-1871, see: North German Confederation
Germany, 1918, choice of name for the Republic, 123-125, 129-130, 135-136, 161
Germany, 1871-1918, question of establishment by compact or treaty between Princes or Governments, 124, 127, 141, 143, 147-148
Giese, on
  legal continuity of the Republic, 139-141
  popular vote in election, initiative, referendum, and recall, 536
Gliedstaaten, see: Land (plural, Länder)
Government
  transition from *de facto* to *de jure* government, 529-530
  utilitarian aspect of change and form of government, 3 ff, 57 ff, 62 ff, 71-72, 74-75
Government (Reichsregierung), see: Cabinet
Governments of the Länder, republican and parliamentary form prescribed by National Constitution of 1919, 179
Grosshundert, see: Hundred (Hundertschaft)
Grotius, on legal continuity of the State, 138
Grundrechte
  as proposed in Constitution of 1849, 40
  as proposed in second Preuss draft of Constitution of 1919, 89
Grundrechte under the Constitution of 1919
  civil rights distinguished from natural rights, 614, 616 ff, 625 ff
  civil rights enumerated, 628 ff
  infringement of civil rights by Cabinet legislation under enabling acts, 499

Hamilton, on jurisdiction of Federal Courts, 562-563
Hanover, plebiscite on option for statehood in the Reich, 187
Hart, on ordinances in constitutional practice of the United States, 465-470
Hatschek, on
  election, initiative, referendum, and recall, 532 ff, 538 ff

juristic conception of the State, 100-103
legal continuity of the Republic, 138-139, 141
organs of government, 118 ff
Staatsgewalt (Herrschermacht, Souveränetät), 103, 149
Hertling, Chancellor, 58-60
Herzog (Roman, dux)
leader of early Germanic clan in times of war, 10-11
official of the Frankenreich, 16, 18
position in medieval German Empire, 21-22
Holy Roman Empire of the German Nation, relation of Emperor and regional rulers, 22-24
Hudson, on establishment and State character of North German Confederation, 47 ff, 56
Hundred (Hundertschaft), socio-political institution of early Germanic units, 5 ff

Independence, as an essential characteristic of Staatsgewalt, 104, 167, 312; see also: Staatsgewalt and independence
Independent Socialists, and
Revolution of 1918, 66, 68, 70, 72, 76
Socialist *de facto* Government, 79-80
International law
as law of the land, 635 ff
ministerial responsibility and international law as law of the land, 645-646
Initiative
in actual application, 551 ff
of legislation, 524, 540-541, 544, 549n
Interpellation of the Government, see: Reichstag; Reichswirtschaftsrat
Investigating committees, 285-287, 290, 429-431

Jefferson, on nullification, 306-307
Jellinek, Georg, on organs of government, 117
Jellinek, Walter, on
legal continuity of the Republic, 137-138
State character of the Länder, 342-344
Judicial decisions of National Courts as precedents for State Courts, 265
Judicial procedure, National legislative control over procedure of State Courts, 563 ff
Judicial Review
defined, 571 ff
of formal constitutionality of legislation, 576 ff
of National legislation, by National Courts, 591 ff, 596 ff; by State Courts, 590, 593-596
of State legislation, by National Courts, 250; by State Courts, 574 ff
Judicial system, Anglo-American and German, compared, 562 ff
Jurisdiction of German National and State Courts, defined, 564 ff
Juristic conception of the State, in German political theory, 97 ff; according to Anschütz, 97-99; Georg Meyer (Meyer-Anschütz), 99-100, 112-115; Hatschek, 100-103; Georg Jellinek, 100

Kahl, on
Einheitsstaat, 123, 162
judicial review, 253, 592-593
legal continuity of the Republic, 123-124
National control over execution of National law by the Länder, 207-209
National or State Sovereignty, 174-175
term Länder or Staaten (Gliedstaaten), 162-165
supremacy of National over State law, 189-191
King (König; Roman, rex), in early Germanic history, 10, 11n, 12-13, 15
Kompetenz-Kompetenz
National competence to determine the competence of the Reich, 198
restricted by agreement between Bavaria and the Reich, 320

Laband, on
juristic conception of the State, 98
State character of the Empire of 1871, 47, 50-51, 56
Labor and Soldiers' Concils
assumption of political power, 72-73
Central Council appointed for supervision of National and Prussian Cabinets, 78
Central Council surrenders political power to National Constituent Assembly, 84
Executive Council elected by Councils of Berlin, 76
Executive Council delegates political power to Council of Commissioners, 77-78
formation and organization, 69, 74-75
National Convention of local Councils, 78
Labor and Soldiers' Councils and Constitution of 1919, 79, 444-445
Land (plural, Länder)
term chosen instead of Staat (plural, Staaten), 161 ff
term used in Constitution instead of Staat, 322
Landrecht, see: State law; State legislation
Länder
amalgamation and creation of new States, 181 ff, 185 ff
restriction of constitutive powers by National Constitution, 179 ff
right of representation in Reichstag, 409-411, 429
Law
formal and material law distinguished, 470-471, 571
private and public law distinguished, 566
relation of ordinary and constitutional law, 594
application of National law in State Courts, 565 ff
interpretation of National law by National Courts, 574; by State Courts, 605, 610-611
interpretation of State law by National Courts, 574, 610
revision by National Courts of interpretation of National law by State Courts, 611; of State law by State Courts, 612-613
see also: Judicial review; Legislation; National law; National legislation; State law; State legislation

Legal continuity
of Imperial and revolutionary Socialist Governments, 69-72, 82, 152-153
of Empire and National Republic, 52, 122 ff
of North German Confederation and Empire, 56
Legal continuity, and
creation of the Constitution, 150 ff
legal succession, 144
location of Sovereignty, 145 ff
Legislation
compilation and promulgation by President, distinguished, 440, 577-581
initiation of, 438-439, 446
procedure of, 434 ff
referred by President to popular vote, 441-442
transmission for ministerial signature, 440
Liability of the State for *ultra vires* acts of the State's agents, 262
Lutz, on German Revolution of 1918, 57-58, 59n, 65n, 66-68, 69n

Majority Socialists, and
Revolution of 1918, 70, 72, 76
Socialist *de facto* Government, 79-80
Malberg, on relation of Constitution to origin of the State, 150n
Max von Baden, Chancellor, 59-60, 65-68, 70
Meyer-Anschütz, on location and exercise of Staatsgewalt, 107, 112-115, 147
Middle and upper classes and Revolution of 1918, 64
Ministerial responsibility
under the Constitution of 1849, 39-40
under the Reform Acts of October, 1918, 61
under the Republican Reich, see: Cabinet; Ministers
Ministers, position and mode of appointment, defined by framers of the Constitution, 381-383; according to terms of the Constitution, 388 ff
Monarchy, feudal decentralization and National State, 4

National Administrative Court, see: Reichsverwaltungsgericht
National Constituent Assembly
advocated by Max von Baden, 69, 80
compared with Frankfurt Assembly of 1848-1849, 83
law regulating election of delegates, 81
representative of sovereign German Nation, 81-85
National control over execution of National law by State organs, under the Empire, 201-203, 206; under the Republic, 204 ff
National Courts
judicial decision of, as precedent for State Courts, 265
see also: Reichsfinanzhof; Reichsgericht; Reichsschiedsgericht; Reichsverwaltungsgericht; Staatsgerichtshof
National Courts, minor, 567
National Economic Council, see: Reichswirtschaftsrat
National law
execution by National organs, 214, 233-234
execution by State organs, 178, 201-204, 216
supremacy of National over State law, 188 ff

National legislation
concurrent competence, under the Empire, 195n; under the Republic, 197, 204-205
exclusive competence, under the Empire, 195-197; under the Republic, 196-197, 204-205
National Savings Commissary, 246, 356
National union
need for, as conceived by Bismarck, 45
opposed by dynasties, 32-33, 35-41
sponsored by dynasties, 43-45, 56
utilitarian reasons for, 35, 41, 43-44, 54
National will, enforcement by National armed forces, 323 ff
Natural rights, see: Grundrechte
Naumann, on Grundrechte, 615 ff
Norddeutscher Bund, see: North German Confederation
North German Confederation
as contemplated by the King of Prussia, 29-30
creation of, 46 ff
established by compact or treaty between Princes or Governments, 50-51, 53, 124, 142n, 147-148
established as *de facto* creation by the authorities heeding national-minded will of population, 52, 54-55
Notverordnungen
defined, 459-462, 473-474
under the Empire, 483-485, 489-491
under the Republic, 483-489, 499, 507; request by National Government for emergency ordinance power by constitutional amendment, 506 ff
see also: Cabinet legislation; Ordinances, executive
Nullification
in American theory and practice, 305 ff
in German theory and practice, 310 ff; by Bavaria, 315-323

Occupied territories, National Ministry for, 247
Officers of Army, Navy, etc., appointment of
under the Empire, 62n
under the Reform Acts of October 1918, 62n
under the Republic, see: President, functions of
Ordinances
definition and differentiation of, 453-454
formal and material, 471
in American constitutional practice, 462 ff
in English constitutional practice, 454-459
issuance by Cabinet or individual Ministers, 602
judicial review of expediency of, 585-586, 588-589, 600
judicial review of legality of, 581 ff
Ordinances, administrative
for the execution of legislation, 456-459; see also: Ausführungsverordnungen
for the execution and specification of legislation, 453-454, 456-459; see also: Rechtsverordnungen
for the organization of the administrative service, 453-454
Ordinances, executive, emergency legislation by Cabinet, President, King in Council, etc., 459-462, 471 ff; see also Notverordnungen

Organs of State and Government, see: Anschütz; Jellinek, Georg; Juristic Conception of the State; Hatschek; Staatsgewalt
Ostreich, see: Germany, 919-1806

Parties competent to request advisory decisions of National Supreme Courts, 256-257, 266, 269-274, 295-304
Plebiscite
  history and use of term, 508 ff
  in France, 517-519
  in Italy, 518
  in transfer of territory and Sovereignty, 518
  under the Constitution of 1919, 181, 186 ff, 547-548; see also: Referendum
Poetzsch, on
  legal continuity of the Republic, 137
  National and State Sovereignty, 177
Police power
  defined, 629
  relation to civil rights, 629 ff
Popular government
  different types of, 361 ff
  form chosen for German National Republic, 369 ff
Popular vote, not sovereign act, but participation in government, 523 ff, 533 ff
Preger, von, on
  choice of term Stämme or Länder, 158
  legal continuity of the Republic, 126-128
  National or State Sovereignty, 173-174
President
  functions of, 396-398, 425-426, 577 ff
  impeachment by Reichstag and trial by Staatsgerichtshof, 421-422
  mode of election, 415-421
  mode of inauguration, 421
  participation in process of legislation, 440 ff, 577 ff
  position of, defined by framers of the Constitution, 375 ff
  reelection, 421
  removal from office by popular vote at request of Reichstag, 421
  replacement in case of disability or death, 417 ff
  stabilizing element in political confusion of parliamentary government, 380 ff
President and Cabinet
  division of powers, 388 ff, 437
  influence of, in formation of new Cabinet (Government), 394-396
  right of President to call and preside at meetings of Cabinet, 392-393
President and Chancellor, 393
Preuss, on
  choice of terms Stämme, Staaten, or Länder, 159, 162
  Einheitsstaat, 348-349
  judicial review of State legislation by National Supreme Courts, 254; of National legislation, 592
  legal continuity of the Republic, 125-126, 132
  National control over execution of National law by State organs, 212-213
  National or State Sovereignty, 173-174, 176
  Notverordnungen, 484-485, 489
  referendum, 545-546

relation of President and Cabinet, 384-385
Princeps, see: Fürst
Property rights, see: Expropriation and property rights
Provisional Constitution of February 10, 1919, analysed, 85 ff
Prüfungsrecht, see: Judicial review
Prussia
and National unity, 29, 41-42
proposed division of, 87, 184-185
votes in Reichsrat, 183-184
Pyrmont, see: Waldeck-Pyrmont

Rat der Volksbeauftragten, see: Council of Commissioners
Räterepublik, 75
Railroads, creation of Deutsche Reichsbahngesellschaft, 247
Recall, history of term and application, 520
Recall, of
legislation, 549-551
President, 542
Rechtsverordnungen
defined, 465, 472 ff
difference of opinion concerning meaning and right to issue Rechtsverordnungen, 476-480, 482
Redslob
influence on framers of the Constitution, 375-376
on parliamentary government, 373-374
Referendum
history and use of term, 512 ff
measure of last resort, 544, 546, 548
proposed in second Preuss draft, 89
resort to, since 1919, 540-544, 547-548, 557
Reform Acts of October, 1918, 59; see also: Emperor William II
Regierungsgewalt, defined, 108
Reich and Länder
choice of names expressive of relations, 161-162
Conference of Representatives of Länder in November, 1918, 90-91
conflict of interests under *de facto* revolutionary Government, 89-90
conflicts or differences of opinion concerning compatibility of National and State law, under the Empire, 251, 254; under the Republic, 249 ff
diplomatic intercourse between, 223 ff; between the Länder, 223 ff
proposed territorial regrouping in first and second Preuss drafts, 87-88
see also: Boundaries of the Länder; Constitutions of the Länder; Governments of the Länder; Länder, amalgamation, etc.; National law, supremacy . . . over State law; National legislation; State law; State legislation
Reichsfinanzhof, jurisdiction and decisions, 249n, 569, 596, 637
Reichsgericht
decisions as National Court of Appeals, 74n, 109 ff, 265, 573 ff, 585-587, 597-603, 606, 611-612, 625n
decisions on subjects of international law, 636 ff, 644
decisions under Article 13, Section 2, 257
jurisdiction, 249, 564-567
Reichsrat
composition and functions, 182 ff, 402 ff

consent of, to Cabinet regulations for execution of National law by State organs, 407-408
convocation and adjournment, 439-440
initiation of legislation, 405-406
membership and distribution of votes, 412-415
membership representative of State Governments, 402
membership of Prussia divided between State and provinces, 94, 402-403, 415-416
participation in Cabinet legislation under enabling acts, 405-406
participation in judicial functions, 411
participation in legislation, defined, 403-405, 438-439
participation in National administration, 410-411
position as upper house, 402
relation to Cabinet, 439-440
right to issue legislative ordinances, 408
right of representation in Reichstag, 409-410
standing committees, 410, 440
supervision of National administrative departments, 410
Reichsrecht, see: National law; National legislation
Reichsschiedsgericht, 570
Reichstag
as the National Assembly of the Germanic groups under the Frankenreich, 17 ff
convocation, see: election period, etc.
declared dissolved by revolutionary Government, 73
dissolution by President, 426
dissolution by rejection of Reichstag's request for removal of President by popular vote, 421
election of members, 423-426
election period and legislative sessions, 424-425
functions and organization defined by Rules of Procedure, 432 ff
functions and organization prescribed by Constitution, 427
immunity of members, 426-427, 431-432
interpellations of Government, questions, and petitions, 436-437
members representative of entire German people, 426
members not bound by instructions, 426
right of, to request presence of National Chancellor and Ministers, 429
standing committees, 430, 431, 433; see also: Investigating committees
war and peace, declaration of, see: Article 45, Section 2 of Constitution
Reichsverwaltungsgericht, jurisdiction of, 568, 570 (erroneously called "Reichswirtschaftsgericht" on p. 234)
Reichswirtschaftsgericht, see: Reichsverwaltungsgericht
Reichswirtschaftsrat
functions of, 442 ff
organization of provisional Council, 447 ff
participation in process of legislation, 446-447
proposed drafts for permanent Council, 449 ff
Rentenbank, 247
Republic of 1918, see: Germany, 1918

Republics (Freistaaten), in early Germanic history, 12-13
Revolution, result of changing needs of man and society, 4 ff
Revolution of 1918 and *de facto* Government, result of different aims, 74-75
Revolution of 1918 and French Revolution of 1789, contrasted, 4-5
Revolutionary Government of 1918, change from *de facto* to *de jure* Government, 83
Rex, see: King
Rhenish Confederation (Rheinbund)
  creation of, established independence of princes, 24-30
  dissolution of, 31
  independence insisted upon by princes in establishment of German Confederation of 1815, 31, 32
Rights of man and citizen, see: Grundrechte

Savings Commissary, National, 246, 356
Scheidemann, proclaims establishment of the Republic, 69-70
Seydel, on compactual origin and State character of North German Confederation and Empire, 49-50, 53, 56
Siege, state of, see: Ausnahmezustand
Silesia, Upper
  plebiscite on question of remaining a province of Prussia or becoming a State in the Reich, 186
  plebiscite on question of retention by Germany or transfer to Poland, 186
Sippe (clan; Roman, centena), 7-10
Socialists, before and during the Revolution, 58, 64, 66, 68; see also: Independent Socialists; Majority Socialists
Socialization of National resources, 197n, 220
Soldiers' Councils, official character recognized by Army Command, 74n; by Reichsgericht, 100 ff
Souveränetät, as independence in international law, 105-106
Sovereignty
  exercise of popular Sovereignty legalized in form of popular vote in election, referendum, initiative, and recall, 521, 531-532
  in constitutional law, see: Staatsgewalt
  in international law, see: Independence
  National and State Sovereignty, under the medieval Empire, 34; under the Constitution of 1849, 38-40; under the North German Confederation, see: North German Confederation; under the Empire of 1871, 165-168; under the Republic, 169 ff
  possessed by the State, not by rulers or people, 115-116, 146, 361-362, 524 ff
  term State Sovereignty (Hoheitsrechte, of the Länder) not used in Constitution of 1919, 322
  without independence, see: Independence
Sovereignty and Staatsgewalt, analysis of apparent difference, 103-104
Spartakus Bund, 66
Staatenausschuss, upper house, under Provisional Constitution

of February 10, 1919, 85; under Transition Law of March 4, 1919, 86
Staatsgerichtshof
decisions under Article 19, 283-291, 294-295, 298-304, 604-606
jurisdiction of, 568-569
Staatsgerichtshof zum Schutze der Republik, 568
Staatsgewalt
defined, 102, 103n, 105, 107, 112-113
distinguished from Souveränetät, 105 ff
exercise of, 107
not affected by change of governing organs, 112-113
possessed by the State, not by rulers or people, 115, 146-147, 149
possessor and bearer of, distinguished, 112, 115 ff
source and location of, 171 ff, 524 ff
synonyms of, 102, 106, 108
Staatsgewalt and Government, dual system of government, not of Staatsgewalt, 170 ff
Staatsgewalt and independence, see: Independence
Staatsgewalt and Regierungsgewalt, conflicting use of terms, 109 ff
Staatsgewalt and Souveränetät, conflicting use of terms, 102-103, 107 ff
Stamm (plural, Stämme), definition and translation, 14, 16, 157 ff
State
creation by *de facto* or revolutionary act, 529
defined as juristic person, see: Juristic conception of the State
juristic conception of, see: Juristic conception of the State
legal origin denied, 51-52, 149, 150n
limitation of, see: Grundrechte; Police power
organs of, defined, 116 ff
suability of, 293-294
State and Government, differentiated, 529 ff
State character of the Länder, 166 ff, 320 ff, 341 ff
State legislation
concurrent competence, 197-198
exclusive competence, 197-198
judicial review of State legislation, 249 ff
question of compatibility of State legislation with National law, 249 ff, 262-264
subject to National control prior to enactment, 215, 217, 220, 222
see also: Reichsgericht; Staatsgerichtshof
State sovereignty, as distinguished from National Sovereignty, see: Sovereignty, National and State Sovereignty
States rights, 94, 305 ff, 333 ff
Stier-Somlo, on legal continuity of the Republic, 142-143
Suability of the State, see: State, suability of

Taxation, question of equal contribution or contribution in proportion to means, 599-600
Territory, change of, and legal continuity of the State, 138
Territory of the Länder, see: Boundaries . . .
Thousand (Tausendschaft), defined, 5 ff

Thuringia
created by amalgamation of seven small States, 185
transfer of tax administration to the Reich, 357n
Transition Law of March 4, 1919, analysed, 86
Treaty making power
under the Empire, 62n
under the Reform Acts of October, 1918, 62n
under the Republic, see: President; Reichstag

Ultra vires actions of public officials, 585
Unabhängigkeit, see: Independence
Unitary State, see: Einheitsstaat

Verfassungsausschuss, see: Committee on the Constitution
Vermeil, on direct government, 528
Verwaltungsverordnungen
defined, 465, 471 ff, 479 ff
under the Republic, 481 ff
see also: Ordinances, administrative
Völkerschaft, political unit in early Germanic history, 7, 12-13
Volksabstimmung, see: Initiative; Recall; Referendum
Volksbegehren, see: Initiative; Recall
Volksentscheid, see: Referendum
Volksgemeinde, Volksgemeinschaft, see: Völkerschaft
Volksstaaten (Freistaaten), see: Republics

Waldeck, amalgamation with Prussia, 186n
Waldeck-Pyrmont, amalgamation with Prussia, 185-186
War, declaration of,
under the Empire, 61n
under the Reform Acts of October, 1918, 61n
under the Republic, see: Article 45, Section 2 of the National Constitution of 1919
Weimar Assembly, see: National Constituent Assembly
William II, see: Emperor William II
Willoughby, on relation of the Constitution to the origin of the State, 151, 154
Wirtschaftsräte, see: Economic Councils
Wittmayer, on legal continuity of the Republic, 143-145
Workers' Councils (Arbeiterräte), 445-447

Zollverein, origin and object of, 41-44
Zweigert, on judicial review of State legislation by National Supreme Courts, 254-255