

## THE CHANGE IN THE FUNCTION OF LAW IN MODERN SOCIETY\*

FASCIST AND SOCIAL-REFORMIST critics conceive of the liberal state as a "negative" state, and Lassalle's characterization of the liberal state as a "night-watchman state" is a generally accepted formulation in these circles. The fact that liberalism too regards its nonexistence as the highest virtue of the state is so evident that no proof is needed. According to this ideology, the state must function imperceptibly and must really be negative. One would, however, fall a victim to a historical fallacy if one were to identify "negativeness" with "weakness." The liberal state has always been as strong as the political and social situation and the interests of society demanded. It has conducted warfare and crushed strikes; with the help of strong navies it has protected its investments, with the help of strong armies it has defended and extended its boundaries, with the help of the police it has restored "peace and order." It has been a strong state precisely in those spheres in which it had to be strong and in which it wanted to be strong. This state, in which laws but not men were to rule (the Anglo-American formula)—i.e., the Rechtsstaat (the German formula)—has rested upon force and law, upon sovereignty and freedom. Society required sovereignty in order to destroy local and particularist forces, to push the church out of temporal affairs, to establish a unified administration and judiciary,

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The article no longer fully represents the views that I hold, as will become apparent by comparison with the subsequent article "The Concept of Political Freedom."

to protect boundaries and to conduct war, and to finance the execution of all these tasks. Political liberty has been necessary to modern society for the safeguarding of its economic freedom. Both elements are indispensable. There is no modern theory of law and state which does not accept both force and law even if the emphasis accorded to each of these components has varied in accordance with the historical situation. Even when it is asserted that sovereignty must be the function of the competitive process, still force, unregulated by law, is demanded independently of the competitive process.

Juridical terminology expresses this actual contradiction in the two concepts of objective law and subjective rights (in German, both meanings can be covered by the term Recht). "Objective law" means law created by the sovereign or, at any rate, law attributable to the sovereign power; subjective rights mean the claims of an individual legal person. The one negates the autonomy of the individual; the other presupposes and affirms it. Various theories have attempted to reconcile the contradiction expressed by these two terms. Sometimes the subjective rights are simply declared to be mere reflections of the objective law—a proposition which completely denies the autonomy of the individual. (This German theory, which was developed and flourished at the end of the nineteenth century, has been adopted by Italian fascism.) Sometimes the difference between objective law and subjective rights is denied altogether. Subjective rights appear as nothing but objective law itself in so far as the latter, by force of the claim to obedience which it establishes, addresses itself to a concrete person (obligation) or is directed against such a concrete person (legal claim). Other theories again reduce objective law to patterns of behavior on the part of those subject to the law.

### I

The work of the classic liberal Locke does not contain the term "sovereignty," but the idea is there. Locke, like all liberal theorists of the state, conceived of man as being good in the state of nature. He thought of the state of nature as a paradise which is supposed to persist even after the formation of the state. It is true, according to Locke, that laws will prevail (he called them "standing laws") whose material content cannot be altered even by democratic procedures. But even Locke approves of extralegal force. He does not, however, call it sovereignty

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(ever since the frank discussions of Hobbes and the absolutism of the Stuarts the word has had an unpleasant connotation in England) but prerogative. By prerogative he referred to the power to act, at discretion, beyond or even against the law. Man, after all, sometimes is evil, and Locke recognized that the positive laws of the state are but imperfect copies of the laws of nature. Whenever these evil tendencies find expression there must be a power to lead man back to his state of natural goodness. The prerogative, the force unregulated by law, is most developed in the "federative power," which Locke puts beside the legislative and the executive. He acknowledged it as a third independent power. The prerogative operates in the conduct of foreign affairs which cannot be based on abstract general norms but necessarily must "be left in great part to the prudence of those who have this power committed to them, to be managed . . . for the advantage of the commonwealth."<sup>1</sup>

This fundamental duality is perhaps even more clearly expressed by absolutists like Hobbes and Spinoza. Although law for Hobbes is pure *voluntas*, identical with all the sovereign's measures, and notwithstanding the fact that outside the state there can be no law, he restricts his monistic theory by basing the state (and hence law) on a natural law which is not only *voluntas* but also *ratio* because it is oriented toward the preservation and defense of human life. In case of a conflict between the measures of the sovereign and the ratio of the law of nature, he concedes clear priority to the law of nature. "Contracts, which prohibit the defense of one's own body, are null and void." No one is obliged to confess to a crime, no one to commit suicide or to kill a fellow-man. Universal military service is against natural law. Lacking his usual lucidity, he writes that the Law of Nature obliges always in conscience (*in foro interno*) but not always *in foro externo*.<sup>2</sup> The point where the obligation of obedience ceases and the right of disobedience (which is only granted in individual cases) commences again is ambiguously defined. "If the sovereign command a man, though justly condemned, to kill, wound, or maim himself; or not to resist those that assault him; or to abstain from the use of food, air, medicine, or any other thing without which he cannot live; yet hath that man the liberty to disobey."<sup>3</sup> Here again Hobbes's ambivalent attitude is obvious. In accord with requirements of this epoch the emphasis is put on sovereignty, legally unchecked force, and on the demand for a strong

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state which is independent of the warring groups. But liberty, however weakly, is also stressed.

The conflict in question is even more evident in the case of Spinoza, who really developed two theories: a theory of the state and a theory of law, between which there exists a dialectical relationship. In Spinoza's theory of the state, state absolutism is at least as unlimited as in Hobbes. The rights of the individual are lacking even though freedom is postulated as the ultimate aim of the state. Even in matters of religion the subject is entirely subordinated to the measures of the sovereign, which are called laws. "It is obedience which makes the subject." Only thought is free. In Spinoza's *Tractatus politicus* even the last traces of the rights reserved to the individual have been eliminated, probably owing to the impression which the murder of his friend De Witt left on him. "If we understand by law the law of civil society . . . then we cannot say that the state is bound by law or can infringe on it." The laws of civil society are entirely dependent on the state and in order to protect its own freedom the state should act only out of consideration for itself and should "regard nothing as good or evil except what according to its own judgment is good or evil for itself."<sup>4</sup> Beside this absolutist theory of the state, however, there stands his theory of law, which really represents a correction of his theory of the state. "The natural right of the totality of nature and consequently of every individual extends just as far as its power. Accordingly, whatever a person does in following the laws of his own nature, he does in accordance with the highest natural law and the justice of his action is proportionate to his power."<sup>5</sup> Under normal circumstances the state has supreme power, and hence it has the highest right. Should, however, an individual or a group acquire power, then they will be right to a corresponding extent. Spinoza's theory, therefore, is not a system in which the relationship of state and society is rigidly determined. The line of demarcation is flexible. If a social group possesses enough power, it may acquire for itself as much liberty as its power allows in the face of the power of the state. It may ultimately succeed to the direction of the state and transform its power into law and justice. The absolutism of the state is based on considerations identical with those operative in the case of Hobbes. But the freedom of individuals is guaranteed by power which becomes legal and just and which they are to apply in order to conduct commerce, to exchange goods, and to co-

operate in a society which is based on division of labor. The theory, according to which might is right, serves primarily to control the masses which Spinoza hated, but at the same time it combated monarchy. Spinoza's theory is the theory of an opposition which feels its strength and which hopes soon to transform its social power into political power.

## II

The antithesis of sovereignty and law corresponds to two different concepts of law: a political and a rational concept. In a political sense every measure of the sovereign power, regardless of its material content, constitutes law. Declaration of war and conclusion of peace, tax laws, and the code of civil law, the policeman's command and that of the bailiff, the decision of the judge and the legal norm upon which the decision is based—in fact, all utterances of the sovereign, because they are utterances of the sovereign, are law. This concept of law is exclusively genetically defined. Law is *voluntas* and nothing else. In so far as a legal theory accepts this political concept of law, it may be called a "decisionist" theory. However, there is also the rational concept of law, which is based not on the source of law but on its material content. Not every measure of the sovereign, and not only measures of the sovereign, are law. Law is here a norm which is intelligible and contains an ethical postulate which is frequently that of equality. Law, then, is *ratio* and not necessarily *voluntas* at the same time. This rational law need not, but can, emanate from the sovereign. For this theory of law, especially in the form of the theory of natural law, asserts that material laws may exist without reference to the will of the sovereign. It defends the validity of a system of norms even when the positive law of the state ignores its postulates. Today these two concepts of law are strictly separated.

There is no such separation in the Thomist system of natural law. There *voluntas* and *ratio* are still one. Not every measure of the authority is law. Only those measures are law which also correspond to the requirements of the law of nature. Law is the basis, the standard, the *regula artis*, by means of which a just decision is to be obtained. Against a law which contradicts the principles of *lex naturalis*, passive resistance is not only justified but it becomes rather a duty, because even God cannot dispense with the *lex naturalis*. In the Thomist sys-

tem, the law of nature is sufficiently concretized and, in part, institutionalized: Thomism derives from it a number of concrete demands on the legislator. At the same time the recognition of the right of, at least, passive resistance makes possible the realization of the law of nature in the face of a conflicting law of the state.

The separation of the two concepts of law is undertaken by the Nominalists and in the Conciliar theory. Since then law has been viewed as the conscious creation of civil society. The detachment of the political concept of law from non-secular natural law was consummated in the course of the struggles between church and state and of the internal conflicts within the church and the temporal order. The nominalists, who represented specifically bourgeois interests, opposed the papal demand for the subordination of the temporal power. During these conflicts natural law underwent a series of metamorphoses, serving at one time a revolutionary function and at another a conservative one, at still another a critical function, and then an apologetic one. Whenever a political group attacks the powerfully entrenched positions of another group, it will use revolutionary natural law as an implement and will derive from natural law even the right to tyrannicide. Whenever such a group has succeeded, it will abjure all its former ideals, suppress the revolutionary implications of natural law, and transform it into a conservative ideology. Marsilius of Padua, owing to his antagonism toward the ecclesiastical claim for temporal sovereignty, was forced to restrict the rule of the temporal sovereign by recognizing a type of natural law which supported demands for freedom. The legislator, the *pars principans*, is not without restrictions, but is placed under the domination of universal norms of natural law, which are, to a high degree, concretized and institutionalized. At the same time, however, Marsilius, in order to receive sufficient popular support, was forced to postulate democratic rights of participation in which he conceives of the people not as the totality of all free and equal citizens but only as the *pars valentior*. The conciliar theorists, Gerson and Nicolas of Cusa, were driven to the acceptance of the same postulates in consequence of their conflict with the claims of the Pope for ecclesiastical sovereignty. Gerson reduced the will of the church to the individual wills of the members of the ecclesiastical aristocrats who were assembled at the council. Nicolas of Cusa went even further and made the ecclesiastical power subject to the general norms of natural law

while denying the validity of papal measures which contradicted these universal laws.

Beginning with the fourteenth century, the identity of political and rational law ceases to be insisted on. The political law is regarded only as the measure of the sovereign. Natural law, as expressed in universally, generally valid norms, stands in opposition to political law and plays a restrictive role with reference to it; natural law points in a definite direction and contains social demands which usually refer to the preservation of private property and to political liberties. Furthermore, it contains the demand for equality before the law. This type of natural law, as in the case of the Monarchomachs, is always put forward by an attacking group. Bodin, who produced the first modern system of legal and political theory, accepts sovereignty as an absolute and permanent power as unequivocally as he accepts rational law which restricts that absolute power.

### III

In the age of liberalism, natural law declines to the same degree as democracy and the social-contract theory find acceptance. The generality of the positive law acquires a position of central importance in the legal system. Only a norm, which has a general character, is regarded as law. It is sometimes asserted that the difference between the general law and the individual measure is only a relative one, because each command of the superior to the subordinate has some degree of generality with respect to the act to be executed since the executor always possesses a certain amount of initiative, however small. Those legal theorists who accept as legitimate only those concepts which lend themselves to a logically unambiguous formulation, and who will reject every decision as subjective and, therefore, arbitrary, will also reject the distinction between general norms and particular measures. We conceive of a legal norm as a hypothetical judgment of the state regarding the future conduct of its subjects, and the statute is the principal form in which this legal norm appears.

Three elements are relevant in the characterization of the law: the law must be general in its formulation, its generality must be specific, and it must not be retroactive. Rousseau formulated the claim for the generality of formulation as follows: "When I say that the object of laws is always general, I mean that the law considers subjects *en masse*

and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name . . . In a word, no function which has a particular object belongs to the legislative power."<sup>8</sup>

This first requirement is insufficient, however, for "right receives only by becoming law not only the form of its generality but also its true determinateness. Therefore in considering the nature of law-making, one should not dwell only upon the first formal aspect of a law, namely that it declares something as the universally valid rule of behavior. Rather it is more important and essential to consider the contents of a law and to recognize that these contents partake of a specific, defined generality."<sup>9</sup> But what is the substantive content of this generality? In order to deduce this concrete definition, we distinguish between specific laws and "legal principles" or legal standards of conduct (*Generalklauseln*, as they are called in German jurisprudence). Propositions like the following: that contracts which violate public policy or are unreasonable or immoral (§ 138 of the German Civil Code, BGB) are null and void; or that he who damages someone in a way which violates good morals is responsible for indemnities (§ 826); or that he "who commits an act which has been declared punishable under the law or which is deserving of punishment because it is in conflict with healthy popular sentiment" shall be punished (§ 2 of the Criminal Code for the German Reich as formulated by the Law of June 28, 1935), are not specific laws with true generality. They embody rather a spurious generality. Because in present-day society there can be no unanimity on whether a given action, in a concrete case, is immoral or unreasonable, or whether a certain punishment corresponds to or runs counter to "healthy popular sentiment" they have no specific content. A legal system which derives its legal propositions primarily from these so-called general principles (*Generalklauseln*) or from "legal standards of conduct" is nothing but a mask under which individual measures are hidden. On the other hand, rules like the following: the legal existence (rights and responsibilities) of a person begins with his birth (§ 1 of the German BGB), or that the transfer of landed property is effected by agreement of the parties concerned and registration in the registry of landed property (§ 873 of the German BGB) are real legal norms because all the essential facts to which the norm refers are clearly defined and because there is no reference to moral standards

which are neither generally binding nor accepted as binding. If the fundamental principles or the essential parts of a legal system are placed under the rule of such *Generalklauseln*, then one can no longer speak of the rule of a general law.

The formal structure of a general law—and herein lies the third element of generality—contains also a minimum of substantive content. The general law which is defined in such a manner guarantees to the judge a minimum of independence because it does not subordinate him to the individual measures of the sovereign. Likewise a general law contains the demand for the inadmissibility of retroactivity. A law which provides for retroactivity contains particular commands inasmuch as the facts to which the law refers already exist.

The facts which are regulated by general laws are to be found either in spheres of free choice or in institutions which guide and control behavior. Liberty, in the legal sense, has an exclusively negative meaning. It is merely "the absence of external compulsion" (Hobbes). This "negative freedom or this freedom as conceived by the intellect is one-sided; but this oneness always contains in itself an important determination. It is therefore not to be discarded. The shortcoming of the intellect is, however, that it elevates a onesided determination into an exclusive and dominant one" (*Hegel Philosophy of Right*, § 5, suppl.).

It is necessary, however, to do more than indicate the existence of a sphere of freedom from the state. It is important in this connection to point out a distinction, however superficial, between the various kinds of legal freedom. We distinguish in general four separate legal freedoms: (1) Personal freedom, which comprises the rights of the isolated individual, such as the provision that a person can be arrested only on the basis of laws and by means of legal procedures; and domiciliary and postal inviolability. (2) Political freedom, which is political because it obtains its significance only on the basis of an organized social life within the framework of the state. It includes, e.g., freedom of association and assembly, freedom of the press, and the right to the secret ballot. These rights are liberal as well as democratic. They are liberal in so far as they guarantee freedom to the individual in certain spheres of life and democratic in so far as they are means to the democratic determination of state policy. (3) A third category is constituted by economic freedom, i.e., freedom in trade and industry. (4) In the

period of democracy the political rights of liberty find expression also in the social sphere by the recognition of a right of association on the part of employees. This fourfold classification does not claim exhaustiveness either logically or historically. These freedoms ordinarily are not constitutionally guaranteed as unrestricted rights. Such guaranties would be absurd. They are guaranteed exclusively within "the framework of the law." Interference with these rights is therefore permitted only on the basis of legal provisions. It is the most important and perhaps the decisive demand of liberalism that interference with the rights reserved to the individual is not permitted on the basis of individual but only on the basis of general laws.

In addition to defining areas of freedom, general laws also regulate human institutions. By institution we mean an enduring, dominational or co-operative association for the continuance of social life. (These relationships can be formed either between different properties or between different people or between persons and properties.) This definition is purely descriptive and has nothing to do with pluralistic theories of the state, with Thomism or with the National Socialist philosophies of law, both of which have attached central significance to "institution." This concept includes all sorts of associations, the foundation, the factory, the business enterprise, the cartel, and the institution of marriage. Above all, it comprises the most important institution of all historical societies—private property in the means of production. Private property as such is a subjective and an absolute right which lends to the proprietor legal defenses against anyone who interferes with possession or enjoyment of the property. In addition, however, private property in the means of production is also an institution. It is destined to be enduring; its functions in the maintenance and continuance of social life; it assigns to man a place in a dominational structure.

There are definite and definable relations between institutions and the various liberties. A certain liberty may be a principal freedom and, for the guaranty of its operation it may require a complex of auxiliary liberties and auxiliary institutions. An institution likewise may also require auxiliary liberties. Private property as the central institution of modern society in the age of competitive capitalism requires the decisive auxiliary liberties of freedom of contract and freedom of enterprise. The owner of capital must have the liberty to establish or

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discontinue a business enterprise; he must have the right of concluding all sorts of contracts, since he can operate only if these particular rights are recognized. These economic liberties are not protected for their own sake, but only because in a particular phase of economic evolution their protection is necessary for the functioning of the principal institution. The contract—i.e., the legal form in which man exercises his liberty—is, in the period of free competition, a constituent element of modern society. The contract terminates the isolation of the individual proprietors and constitutes a means of communication between them. It is therefore as indispensable as property itself. To bring about "that I may own property not only by means of a thing and my own subjective will, but also by means of another will, and thereby in a common will—this constitutes the sphere of contract."<sup>8</sup>

Liberalism regards as the rule of law exclusively the rule of statute law, and not that of customary or natural law. Actually natural law disappeared in England under the rule of Henry VII. It was during this period that both the supremacy of parliamentary laws and the duty of the judge to obey these laws became undeniable. Hence, already in the sixteenth century the prevailing formula of the rule of law meant only the rule of laws passed by Parliament. During the Puritan revolution, of course, there emerged strong natural-law tendencies, which were used not only by the Republicans in their struggle against monarchism but were also employed by the Royalists in defense of their own position. Since that time the rule of natural law has never been asserted either in juridical literature, jurisprudence, or judicial practice. Even Blackstone (1723-80) who, in the first volume of his Commentaries, copied the natural-law system of Burlamaqui, and who acknowledged the rule of an eternal and immutable natural law, was compelled to admit (when discussing the sovereignty of Parliament) that Parliament can do whatever it desires and that he knew of no way of realizing the rule of the natural law which he postulated.

In Germany natural law experienced a different fate. At first it changed its character; finally, it disappeared altogether. Natural law can provide a theory of liberty. In this form it represents the critical theory of a bourgeois opposition at war with absolutism. Or it appears as an apologetic doctrine legitimating not a liberal system but the sovereignty of the state. In England there was no reason for the further retention of either of these kinds of natural law—neither for the

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liberal type, since the bourgeoisie had acceded to political power in the seventeenth century, nor for the absolutist type, because ever since Henry VIII the unity of the state had been unquestioned (even during the Puritan revolution). In Germany, however, neither of these events had yet occurred. The most pressing task was the establishment of a unified state in order to provide an important pre-condition for industrial and commercial expansion. Pufendorf's system of natural law, which exerted extraordinary influence upon the jurists of the seventeenth and eighteenth centuries, served the purpose of justifying, by means of natural law, the power of the state. Human nature, according to his theory, is dominated by two impulses—the impulse of sociability and the impulse of self-preservation. Since there is no natural harmony among these instincts, harmony must be achieved by compulsion. Natural law, however, because it has no sanction at its disposal, is unable to accomplish this task. The execution of the law of nature is entirely dependent on the *foro divino et conscientiae*. This, however, is insufficient. Sanctions, therefore, are applied by the state, which has been founded by contract and which must be an absolutist one. The law of the state is the command of the sovereign; it is pure *voluntas*. The right of resistance which Pufendorf includes in his system is only of secondary significance. In Christian Thomasius' system, natural law offers only a body of counsel from which certain moral obligations follow. However, as law and morality are distinctly separated and as the supreme criterion of law is its compulsory character Thomasius' system of natural law likewise serves to make compulsion on the part of the state legitimate. However different Christian Wolff's point of departure is, however determinedly he stresses the validity of a *Lex aeterna*, he too arrives at the conclusion that only the state is able to assure a well-ordered social life. The only difference from the rationalistic theories of Pufendorf and Thomasius lies in the fact that Wolff assigned to the state the additional tasks of promoting welfare and culture. His system was as adequate to the governments which Frederick II of Prussia and Joseph II of Austria had set up, as the systems of Pufendorf and Thomasius were expressive of the state which the Elector Frederick William I had established.

If Kant's legal theory is examined apart from his ethics, it is found that natural law has completely disappeared from it. The state is viewed as an organization which is to guarantee that individuals can

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be free without interfering with the freedom of their fellow-men. But the decision is delivered not by the autonomous individual but by the absolute state, which is the logical postulate derived from the state of nature under which, in turn, the existence of provisional private property and of the rule of *pacta sunt servanda* are already asserted as a dogma. According to Kant, the freedom of the legal subject is guaranteed solely by the requirement that the state must rule only on the basis of general laws. But this postulate is asserted with rigorous consistency. Kant even rejects the softening of the strict legal system, as it is codified by (statutory) general laws, through the law of equity. For "equity is a dumb goddess who cannot claim a hearing of right. Hence it follows that a Court of Equity for the decision of disputed matters of Right would involve a contradiction."<sup>9</sup> From the time of Kant until the end of the nineteenth century the demand for the generality of law forms the center of German legal theory. By demanding that the domination of the state be based on general laws Kant adopted the theories of Montesquieu and Rousseau.

The demand that the state must rule only by means of general laws is perhaps most clearly voiced in Montesquieu's *Esprit des Lois*. Montesquieu, by way of Malebranche, was influenced by Descartes. The universe, according to Descartes, is governed by general mechanical laws which even God is unable to alter because individual measures are alien to him, and because God withdraws from the universe and becomes *immense, spirituel et infini*. According to Montesquieu, the laws of the state are general and inaccessible to the measures of the sovereign in the same way. The French Revolution was most profoundly affected by the doctrines of Rousseau and Montesquieu. Mirabeau, the chairman of the committee for the drafting of the Rights of Man, proposed, on August 17, 1789, the following provision: "Being the expression of the general will (*volonté générale*), the law must be general with respect to its object." Hence, one article of the Declaration of the Rights of Man and Citizen contains a provision that the law is the expression of the general will (*volonté générale*). This was restated in Article 6 of the Declaration of 1793 and in Article 6 of the Constitution of the *Année III*. During the Revolution, in the Constitution of 1791 and the Jacobinist Constitution of 1793, a distinction was made between laws (*lois*) and decrees (*décrets*). The Girondist Constitution of 1793, which was under the decisive influence of Con-

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dorcet, emphasized sharply in Section 2 of Article 4: "The distinctive characteristics of laws are their generality and their unlimited duration," and it distinguishes laws from measures (*mésures*) for an emergency case.

The German doctrine is deeply indebted to the French doctrine but, toward the end of the nineteenth century, it diverged widely from it. Robert von Mohl, Lorenz von Stein, and Klueber viewed the demand for the generality of the law as the central problem of political theory. Yet under the pervasive influence of Paul Laband this doctrine became enfeebled and was replaced by the distinction between formal law and material law. Every utterance of the will of the state is considered as formal law, whereas only those utterances which contain a legal norm, i.e., which produce subjective rights and duties, are considered as material laws. The budgetary law, in this sense, is not a material law since it only enables the state to make expenditures within the framework of the budget. This dualistic theory was generally accepted by German jurisprudence.

Notwithstanding the fact that the theory of the supremacy of Parliament was victorious in England, there too the general character of law was not neglected. Blackstone even asserted that an individual law is "a declaration rather than a law." (*Commentaries of the Laws of England*, Vol. I, p. 44). Even Austin, the most extreme representative of Hobbes's concept of political law, asserted that one could speak of a law only if it has a general character. But in the only case in which an English court dealt with the question of whether individual measures have the character of law, this question was answered in the affirmative. This decision is of the greatest interest because the judges discussed the reasons why in this particular case an individual measure must be a law. The decision deals with the validity of a measure of a colonial high commissioner, by which a native was deprived of his freedom. The question was how far such an individual measure could suspend liberties which had been guaranteed by the Habeas Corpus Act. Lord Justice Farwell deduced the legality of the measure as follows: "The truth is that in countries inhabited by natives who outnumber the whites, such laws [as the Habeas Corpus Act], although bulwarks of freedom in the United Kingdom, might very probably become the death sentence of the whites if they were applied there [i.e., in the colonies]." Lord Justice Kennedy added that legislation which is ori

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ented toward a single person, is a privilege and "generally, so I hope and believe, such legislation recommends itself to a British legislator just as little as it appealed to the legislators of ancient Rome." (Rex versus Crewe; ex parte Sekgome; 1910; 2 K. B. 576.) This case clearly stresses the double-edged character of the general law in a society characterized by decisive conflicts of interests.

The postulation of the generality of law is accompanied by the repudiation of the retroactivity of law. "Retroaction is the most evil assault which the law can commit. It means the tearing up of the social contract, and the destruction of the conditions on the basis of which society enjoys the right to demand the individual's obedience, because it deprives him of the guarantees of which society assured him and which were the compensation for the sacrifice which his obedience entailed. Retroaction deprives the law of its real legal character. A retroactive law is no law at all." This is the way in which Benjamin Constant characterized the retroaction of laws (*Moniteur*, June 1, 1828, p. 755). This notion, too, is directly derived from Rousseau's theory. It was adopted by the *Declaration of the Rights of Man and Citizen*, by the *Constitution of 1793* and by the *Constitution of the Année III*, although today there exists neither in England nor in France any obstacle against the enactment of retroactive laws. In Republican Germany, however, the Weimar Constitution assigned the status of a constitutional guaranty to the prohibition of retroactive criminal laws.

Such a theory of the formal structure of law leads automatically to a specific theory of the relation between the judge and the law. If the law and nothing but the law rules, then the judge has no other tasks than cognitive ones. Judges, as Montesquieu had remarked, are only "the mouthpieces of the law and inanimate things." Owing to this alleged insignificance, the acts of the judge are *en quelque façon nul* (Montesquieu, *Esprit des Lois* xi, 6). This phonographic theory of the judicature is, of course, closely bound up with the theory of the separation of powers, i.e., with the assertion that creation of law and legislation are identical, and that, apart from the process of legislation, law can be created neither by society, by judges nor by administrative officials. Cazalès expressed this notion most clearly when he said: "In any political society there are merely two powers, one that creates law and another one that sees to its execution. The power of the judges . . . exists only in the plain and simple application of the law. . . ."

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(Archives parlementaires, series 1, vol. XI, p. 892). Similar ideas, however, were already to be found in the *Federalist*, in Hobbes and in Hale's *History of the Common Law*.

The legal system of liberalism, therefore, was regarded as a closed system without gaps. All the judge had to do was to apply it. The juridical thinking of this epoch was called positivism or normativism, and the interpretation of the laws by the judge was called the dogmatic interpretation (in Germany) or exegetical interpretation (in France). Bentham, too, in order to achieve complete intelligibility and clarity in the legal system, recommended the codification of English law, for "a code formed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody: each one might consult it at his need. . . . No decision of any judge, much less the opinion of any individual, should be allowed to be cited as law until such decision or opinion have been embodied by the legislator in the code. . . . If any commentary should be written on this code, with a view of pointing out what is the sense thereof, all men should be required to pay no regard to such comment, neither should it be allowed to be cited in any court of justice in any manner whatsoever. . . . If any judge should in the course of his practice see occasion to remark any thing in it that appears to him erroneous in point of matter . . . let him certify such observation to the legislature with the reasons of his opinion and the correction he would propose."<sup>10</sup> It is of great importance that, above all, the French Revolution was not content with the merely doctrinal form of the proposition that judges may not create law but attempted to institutionalize it. This development started with the famous formulation of Robespierre: "The statement that law is created by the courts . . . must be expelled from our language. In a State which has a constitution and a legislature, the jurisprudence of the law courts consists only in the law." (Archives parlementaires, series 1, vol. XX, p. 516.) The decrees of August 16 and 24, 1790, consequently, prohibit the interpretation of laws on the part of the judge and request him to appeal, in all doubtful cases, to the legislature. The functions of the so-called *Référé Législatif* were fulfilled later on by the *Tribunal de Cassation* and, subsequently, by the *Cour de Cassation*, which institutions were constituted not as courts but as a part of the legislative. Later, owing to the influence of Portalis, this impracticable

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doctrinaire attitude was given up and in the Code Civil freedom of interpretation on the part of the judge was re-established. According to Portalis, the judge is supposed to fill any legal gaps in accordance with "the natural light of legal sense and common sense." But this idea was not incorporated into French legal theory; on the contrary, especially after 1830, the exegetical school was victorious. The year 1830 really is the turning-point in French legal theory. Henceforth laws are interpreted in a dogmatic manner, the legal system is regarded as a closed one, the "phonograph" theory is rigorously applied, and the law-creating function of the judge is denied. Henceforth there is no recourse to considerations of justice or appropriateness.

Similar developments took place in Germany. On April 14, 1780, Frederick II of Prussia prohibited the interpretation of laws. Article 4 of the Introduction to the *Allgemeines Landrecht* prohibited interpretations which conflicted with the literal sense of the words or grammatical contexts in which the laws were framed. Feuerbach is probably the author of the Bavarian order of October 19, 1813, which prohibited the writing, by officials and private scholars, of commentaries on the Bavarian code of criminal law of 1813. On this point Feuerbach's adversary, Savigny, took the same view. Savigny and the historical school of law regarded only law, the folk-spirit, and customary laws as genuine sources of law. Savigny likewise viewed the legal system as closed, unified, and complete, the judge having only to apply the truth, not to create it. During the whole of the nineteenth century the German theory of the application of law was dogmatic.

The theory of the separation of powers, upon which this theory of legal application depends, does not imply, however, that the three divided powers are of equal value. Since Locke it has always asserted the preeminence of the legislative power. Hence, during the whole of the nineteenth century, and in Germany until 1919, the right of the judiciary to examine laws which have been properly enacted was denied. German constitutional theory was split in this respect, the liberals favoring judicial review, the conservatives rejecting it. Yet although the majority at the fourth annual meeting of German jurists in 1863 declared itself in favor of judicial review, the number of its proponents declined rapidly under the rule of Bismarck. In practice such a right was consistently rejected and only the examination of laws with reference to the compatibility of state law and federal law was permitted.

What are the social causes and consequences of the theory of the rule of law, of the denial of natural law, and of the absolute subordination of the judge to the law? In England, in Germany, and in France the belief in the rule of law expressed both the strength and the weakness of the bourgeoisie. The proposition of the supremacy of statutory law implied the additional proposition that social change may be carried out only by legislation. The priority of legislation is maintained because the middle classes, at least in England and France, participated to a significant degree in the legislative process. Laws, however, always involve interferences with liberty or property. If such interferences can only be undertaken on the basis of laws, and if the bourgeoisie is, to a decisive degree, represented in Parliament, then this doctrine implies that the social class which is the object of intervention will itself determine the content of those interferences and will, of course, see to it that its own interests are taken into account. If Parliament is the chief agent of social change, then the rule of the laws of Parliament will also operate as an instrument to prevent, or at least to retard, social progress. This doctrine, therefore, veils the unwillingness of the ruling classes to give way to social reforms, for the slowness of the parliamentary machinery transforms the sole means of legal change into a means for the preservation of the status quo. Finally, the doctrine has an ideological function, namely, that of disguising the real holders of power in the state. The invocation of the law as the sole sovereign and the dictum that sovereignty is "a government of laws and not of men" make it superfluous to mention that, in reality, men do rule, even when they rule within the framework of the law. Hence, the supremacy of the laws of Parliament forms the center of the constitutional doctrine only as long as the middle classes are able to wield decisive influence in Parliament. As soon as this influence wanes, there appear new natural-law doctrines which are designed to reduce the predominance of a Parliament in which representatives of the working classes also exert influence. At the same time, the doctrine of the supremacy of Parliament hides the weakness of the middle classes. The dictum that social changes can be attained only through laws enacted by Parliament, and that administrative agencies and judges may only apply law but not create it, is an illusion which also serves to deny the law-creating capacity of extra-parliamentary forces. This doctrine clearly reveals the ambivalent position of modern man—the emphatic asser-

tion of the autonomy of man is accompanied by the equally passionate insistence on the rule of the state.

The rule of law is, moreover, necessary as a pre-condition of capitalist competition. The need for calculability and dependability in the legal system and in administration was one of the motives for restricting the power of the patrimonial princes and of feudalism, leading ultimately to the establishment of Parliament with the help of which the bourgeoisie controlled the administration and budget while participating in the modification of the legal system. Free competition requires the generality of law because it is the highest form of formal rationality. It requires also the absolute subordination of the judge to the law and therewith the separation of powers. Free competition depends upon the existence of a large number of competitors of approximately equal strength who compete in a free market. Freedom of the commodity market, freedom of the labor market, free selection within the entrepreneurial class, freedom of contract, and, above all, calculability of the decisions of the judiciary are the essential characteristics of the liberal competitive system which, through continuous, rationalistic, and capitalistic enterprise, produces a steady flow of profits. It is the primary task of the state to create such a legal order as will secure the fulfilment of contracts. A high degree of certainty of the expectation that contracts will be executed is an indispensable part of the enterprise. However, this calculability and predictability, if the competitors are approximately equal in strength, can be attained only by general laws. These general laws must be so definite in their abstractness that as little as possible is left to the discretion of the judge. In such a society the judge, therefore, is forbidden to have recourse to *Generalklauseln*. The state, if it intervenes in the individual's disposition of his liberty or property, must render its interventions calculable in advance. It may not interfere in a retroactive manner, for that would negate all existing expectations. It may not intervene extra-legally because such an intervention would be unpredictable. It may not intervene by individual measures because such an intervention would violate the principle of the equality of competitors. The judge, moreover, must be independent and litigations must be decided without regard for the desires of the government. Hence there must be a separation of powers which, quite apart from its political significance, is of the greatest importance for the organization of the competitive system since it pro-

vides for a division of competences and fixes the limits among the various activities of the state, guaranteeing thereby the rationality of law and its application. This scheme solves the apparent contradiction in the liberal attitude toward legislation. This contradiction, which Roscoe Pound detected in the attitude of the American Puritans, consists, on the one hand, in the negative attitude toward every kind of legislation and, on the other hand, in the firm belief in legislation associated with the rejection of customary law and the law of equity. This is the attitude not only of Puritanism but of liberalism as a whole. The latter postulated the superiority of parliamentary legislation in order to prevent legislation or, as far as that is impossible, to make this legislation serviceable to the interest of the bourgeoisie. In principle liberalism always disliked state intervention.

The theory of the rule of general laws has, of course, never been fully realized in any stage of the development of competitive capitalism. Liberal society is not a rational one, and its economy is not planfully organized. Harmony and equilibrium are not, at any given moment, automatically restored. Measures of the sovereign and "general principles" are, at all stages, indispensable. The contract becomes the instrument for dislodging free competition, terminating therewith the rule of the contract and of the general law on which the contract in the economic sphere is based. According to the legal theory of liberalism (and there it is in opposition to Adam Smith), freedom of contract implies the right of the entrepreneur to form organizations, cartels, corporations, syndicates, employers' associations, and finally the monopolistic trust which dominates the market. Since the legal theory of liberalism discarded the social postulates of Adam Smith's classical liberal theory—namely, his objection to unrestricted competition,<sup>11</sup> his demand that the competitors be equal, his fight against monopolies, his declaration for the unification of the capital-providing and the managerial functions in the same individual—i.e., in the property-owner—and, accordingly his fight against the joint stock company—it arrived unanimously at the conclusion that freedom of contract meant nothing but the freedom to conclude freely any kind of contract if there were no express legal prohibitions, even such contracts as would mean the end of free competition. The transformation of the concept of the freedom of contract from a social concept, implying the exchange of equal values among equally strong competitors, into a

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formal, juridical concept contributed to the development of the system of monopolistic capitalism, in which contract and general laws were to play a strictly secondary role.

IV

Yet general laws and the principle of the separation of powers have still another function. This function is ethical in character and is most clearly expressed in Rousseau's philosophy of law. The generality of laws and the independence of the judge guarantee a minimum of personal and political liberty. The general law establishes personal equality, and it forms the basis of all interferences with liberty and property. Therefore the character of the law which alone permits such interference is of fundamental significance. Only when such interferences are controlled by general laws is liberty guaranteed, since in this manner the principle of equality is preserved. Voltaire's statement that freedom means dependence on nothing save law<sup>12</sup> refers only to general laws. If the sovereign is permitted to decree individual measures, to arrest this man or that one, to confiscate this or that piece of property, then the independence of the judge is extinguished. The judge who has to execute such individual measures becomes a mere policeman. Real independence presupposes the rule of the state through general laws. Generality of the laws and independence of the judge, as well as the doctrine of the separation of powers, have therefore purposes which transcend the requirements of free competition. The basic phenomenon underlying the generality of law—namely, the legal equality of all men—has never been disputed by liberalism. Equality before the law is, to be sure, "formal," i.e., negative. But Hegel, who clearly perceived the purely formal-negative nature of liberty, already warned of the consequences of discarding it.

All three functions of the generality of laws—obscuring the domination of the bourgeoisie, rendering the economic system calculable, and guaranteeing a minimum of liberty and equality—are of decisive importance and not just the second of these functions, as the proponents of the totalitarian state claim. If one views—as, for example, Carl Schmitt does—the generality of laws as a means designed to satisfy the requirements of free competition, then the conclusion is obvious that with the termination of free competition and its replacement by organized state capitalism, the general law, the independence of judges, and

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the separation of powers will also disappear, and that the true law then consists either in the Führer's command or the general principle (*Generalklausel*).

V

The juridical forms which were created by the competitive society of the nineteenth century were different in Germany and England. The specifically German phenomenon is the *Rechtsstaat*; the specifically English phenomenon is the supremacy of Parliament combined with the rule of law.

The idea of the *Rechtsstaat* is perfected in Kant's system. There it appears as the creation of the German *Bürgerstum*—an economically ascending but politically stagnant class. This class was content with the legal protection of its economic liberty and was resigned to its exclusion from a share in political power. The essence of this concept of the *Rechtsstaat* consists in the distinction of the legal form from the political structure of the state. This isolated legal form, independent from the political structure, was to constitute the guaranty of freedom and security. This was the fundamental difference between German and English theory. In the former the *Rechtsstaat* did not develop into a specifically juridical form of democracy, as was the case in England. It rather assumed a neutral attitude toward the form of the state. This indifferent attitude is most clearly expressed in the writings of Friedrich Julius Stahl. "The state should become a *Rechtsstaat*. This is the solution of our problems and the motivating force of our age. . . . The state should define and secure the modes and limits of its own activities as well as the citizens' sphere of freedom in strict accordance with law. It should not realize the ethical idea directly (i.e., in a coercive manner) beyond the limits of legality—which means it should, in this sphere, not attempt to do more than the most indispensable 'fencing in.' The concept of the *Rechtsstaat* does not mean that the state merely manages the legal order without administrative aims nor that it merely protects the rights of the individual. It does not refer to the goal or content of the state's activity at all but only to the mode and character of their realization."<sup>13</sup> Stahl's definition was accepted even at times explicitly by the liberal theorists of the *Rechtsstaat*: Gucist,<sup>14</sup> Robert von Mohl,<sup>15</sup> Otto Baehr,<sup>16</sup> and Welcker.<sup>17</sup> This conception of the *Rechtsstaat*, which Stahl elaborated in passionate criticism of de

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Maistre and Bonald, culminates in the denial that the monarch is the Lord's representative on earth and concludes with the assertion that the monarch may rule not against the law but only together with the representatives of the people and only by means of the bureaucracy. Stahl's definition reveals two things distinctly: (1) the state also has administrative tasks which are not controlled; (2) the legal form, on the other hand—i.e., the rule by law—is independent of the form of the state.

In English constitutional theory both factors—sovereignty of Parliament and the rule of law—receive equal emphasis. This was already visible in Blackstone. The English middle classes, in contrast to the German, safeguarded their economic freedom not materially, i.e., by establishing barriers against the legislation of Parliament, but genetically, i.e., through participation in the making of laws. The English theory is, however, not really indifferent toward the structure of the concept of law (cf. Dicey's famous *Introduction to the Study of the Law of the Constitution*). The German theory of law had little interest in the genesis of laws and concerned itself with the interpretation of positive laws regardless of their origin. The English middle classes took an essentially political interest in the genesis of laws. The German theory is liberalist-constitutional; the English theory is democratic-constitutional. The English bourgeoisie expressed its preference through the medium of Parliament; the German bourgeoisie found the laws of constitutional monarchy in existence and systematized and interpreted them in order to secure a minimum of economic liberty in the face of a more or less absolute state. In the English theory, therefore, there is no serious discussion about the formal structure of laws, while German theory is replete with investigations into the nature of law.<sup>18</sup> The German theory, in the views of its foremost representative, Laband, whose ideas also became those of the dominant circle of legal theorists, clearly manifests the political weakness of the German bourgeoisie.

After 1848 the independence of the judge was no longer contested. He applied the laws literally. Discretion, which is most visible in "general principles" (*Generalklauseln*), plays no role. In the first thirty volumes of decisions of the Supreme Court, "general principles" are hardly ever mentioned.<sup>19</sup> The police article of the *Allgemeine Landrecht*, the most important "general principle" of administrative law,

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likewise had fallen into oblivion. As late as 1912 the Second Congress of German judges adopted the following resolutions:<sup>20</sup> "(1) The power of the judge is subordinated to the law. The judge, therefore, is never allowed to deviate from the law. (2) Ambiguity of the content of a law does not entitle the judge to decide according to his own discretion; doubts are to be dissolved by interpretation of the law with regard to its meaning and purpose, and, wherever possible, by analogy. (3) If a law is subject to divergent interpretations, the judge has to give preference to that interpretation which corresponds best to legal understanding and to current social needs."

This attitude of the judges toward the law during the period of William II is understandable. The state, then, knew how to retain its influence over the judge despite the latter's independence. The social position of the judge was definitely fixed. He began his career as a reserve officer and thus learned the significance of obedience and discipline. Chief justiceships and court presidencies were almost exclusively filled by former state attorneys, who, in contrast to the judges, had previously been public officials controlled by orders from above. Having become court presidents, they still knew how to fulfil the wishes of ministers, even when these were not distinctly expressed. Finally, the Prussian judge, especially if compared with his English colleague, was a poorly paid official. He had to wait for years before he was finally appointed, so that only members of the moderately well-off middle classes could afford to enter the profession. The judge of this period exhibited all the characteristics of the class of his origin: resentment against the manual worker (especially when he was organized and well paid), reverence toward throne and pulpit, and, at the same time, complete indifference toward financial capitalism and monopoly capitalism. The judges represented the alliance between crown, army, bureaucracy, landlords, and bourgeoisie. Their interests and those which sprang from the constellation of the above strata were identical, and since the laws corresponded to these interests, there was no reason to apply them in any but a literal manner. Neither was there any room for any kind of natural law. The German bourgeoisie was satisfied with its relations with the state. Judges and jurists no longer had to appeal to a natural-law system in order to fight a system of positive law which was hostile to them. Hence, both natural law and philosophy of law disappeared. Positivism was victorious not only as regards the applica-

tion of law (in that respect it was progressive) but also as far as the theory of law was concerned, which amounted to doing away with all legal theory and uncritical acceptance of supine relativism. The complete repudiation of natural law during the second half of the nineteenth and the beginning of the twentieth centuries was most definitely voiced by Windscheid:<sup>21</sup> "Yes, we do not mind saying it: The law which we have and which we create is not the law. In our eyes there is no absolute law. The dream of Natural Law has been dissipated." This striving for legal security was sharply expressed by Karl Bergbohm when he remarked that whoever thinks of a law "which is independent of human creation" has been "corrupted" by the idea of natural law.<sup>22</sup>

Even though it represented the coalition of the ruling classes, the Rechtsstaat was not, however, a despotism. The generality of the law and the independence of the judge both contained elements transcending the functions of obscuring the actual distribution of power and the maintenance of calculability. The separation of powers was, it is true, not only an organizational division of powers; it was, at the same time, a distribution of political power among the various groups of that coalition. Yet this class rule was calculable, predictable, and, hence, not arbitrary. Furthermore, owing partly to the fusion of the Prussian-conservative proponents of the police state with large-scale industrialists and partly to the concessions which the state had to make to the proletariat which was increasing in strength, the poor and the workers benefited to a large extent from the rationality of law. This was all the more true after the development of a system of law permitting poor persons to sue without cost which after 1918 experienced an extraordinary expansion and made the legal system of the Weimar period the most rationalized system in the world. It was rational not only in the sense of creating calculability but also in an eminently social sense, in so far as the advantages of rational law also benefited the working classes and the poor. This evolution represents a contrast to England, where even today a rationality which favors the status quo is guaranteed by the totally inadequate development of the poor law and by the fact that owing to the extraordinarily high costs of legal proceedings and the concentration of the administration of justice in the High Court of Justice the broader strata of the population are practically without legal protection. The legal system of the period under discussion thus centers around the following elements—personal, political, and eco-

nomic liberties which imply the priority of these liberties vis-à-vis the state. The structure of the system may be summarized as follows:

1. The formal structure of the legal system.—These liberties were guaranteed by formal, rational law, i.e., by general laws and by their strict application by independent judges, by the rejection of legislation by the judiciary, and by the opposition to "general principles" (*Generalklauseln*).
2. The material structure of the legal system.—This legal system was oriented, economically, toward free competition. It found expression in the auxiliary guaranties of private property and in the freedom of contract and enterprise.
3. The social structure of the legal system.—Socially it was oriented toward a situation in which the working class did not constitute a serious threat.
4. The political structure of the legal system.—Politically it was oriented toward a system in which the separation and distribution of political power prevailed: in Germany toward a situation in which the bourgeoisie did not play a politically decisive role; in England, on the other hand, toward one in which the bourgeoisie determined the content of the law and in which the power of Parliament was distributed among crown, aristocracy, and bourgeoisie.

## VI

During the period of monopoly capitalism, which in Germany began with the Weimar Republic, legal theory and legal practice have undergone a decisive change. In order to facilitate an understanding of these legal changes, it is more useful to consider the political structure of the Weimar democracy than to describe economic developments which have moreover been extensively treated elsewhere. The decisive political characteristic of the German republic was the significance of the workers' movement after 1918. The middle classes were no longer able to ignore the existence of class conflicts as the earlier liberals had done. It had rather to acknowledge this conflict and to try somehow to construct a constitution in the light of it. Here, too, the contract was the technical means used since it alone makes possible the necessary political compromise. The contention that civil society originated in the social contract implies the insight that contractual relations represent a deeply important component in the functioning of society. Modern

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society does, indeed, exist in large measure through contractual relations and not only in the economic sphere. Powerful social groups unite, make their interests appear as the only legitimate ones, and thereby sacrifice those of the population at large. The formation of the German republic laid bare the true function of the social contract. The republic began with the following contracts: the most important one was the contract between Ebert, on the one hand, and Hindenburg and Groener, on the other hand (its conditions have been outlined by Groener as one of the witnesses of the "stab in the back" trials at Munich). This contract provided, on the positive side, for the re-establishment of "peace and order," and, on the negative one, for the fight against bolshevism.<sup>24</sup> The so-called Stinnes-Legien Agreement of November 15, 1918, was to effect the same result in the social sphere; employers promised not to tolerate "yellow" labor unions and to recognize only independent unions, to co-operate with them, and to fix working conditions by means of wage contracts. Actually this agreement not only meant the end of bolshevism but it also meant the end of the possibility of any kind of socialism and provided the basis of the system under which Germany lived from 1918 to 1930. On March 4, 1919, the Social Democratic party of Berlin and the Reich government agreed on the introduction of factory councils and the legalization of their position in the Constitution. It was made clear that such factory councils would have nothing to do with the revolutionary workers' and soldiers' councils or Soviets. By the agreement of January 26, 1919, between the Reich and the federal states, the federal set-up of the Reich was preserved. The fifth and final contract (which really included all the preceding ones) between the three Weimar parties—the Center, the Social Democratic, and the Democratic parties—provided for the preservation of the old bureaucracy and judiciary, rejected the Soviet system, stabilized the political power of the church, sanctioned civil liberties, even though they were somewhat restricted by new social fundamental rights, and introduced parliamentary democracy.

The Weimar system has been called "collectivist democracy" because, ostensibly, the formation of political decisions was to be achieved not only through the summation of the wills of individual voters but also through the agency of autonomous, social organizations. The state was to remain neutral vis-à-vis these free organizations. To the extent that this occurred, the Weimar state fulfilled the program of

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political pluralism.<sup>24</sup> The sovereignty of the state was no longer to be exercised by an independent bureaucracy, by the police and the army, but was supposed to rest in the hands of the entire populace which, for this purpose, would organize itself in voluntary associations. This pluralistic system did not ignore the class struggle but attempted rather to transform it into a form of inter-class co-operation. Hence, the Weimar democracy rested to a decisive extent on the idea of parity—a parity between social groups, between Reich and states, and between the various churches. Although this phenomenon occurred in its purest form in Germany, parallel tendencies existed in England and France.

A contractual system can exist only as long as the parties exist, as long as they desire to maintain the contracts, or if, in the event that they do not wish or are unable to fulfil them, there is a coercive agency which can enforce their execution. In Germany, however, the Democratic party disappeared almost completely. New parties—above all, the National Socialist party—were founded which, by 1931, surpassed the old parties in numerical strength. The developing crisis made it impossible for the capitalistic partners to the contracts to fulfil their contractual obligations, especially those bearing on the maintenance of the social institutions. A neutral coercive power naturally did not exist, the idea of the neutral state being only a fiction. As already mentioned, in the sphere of public law as well as in that of private law, the contract necessarily produces power. In other words, the system of contracts, in the political sphere too, contains within itself the elements of its own destruction. The proponents of pluralism who seek to realize the "people's state" by reducing the part played by the independent bureaucracy, by the army and the police, and by handling the affairs of the state through agreements of voluntary associations, increase in reality the power of bureaucracy, reduce the political and social significance of the voluntary associations, and thus strengthen the tendencies which lead to the authoritarian state. In Germany, by 1931, the system of wage bargaining had almost ceased to function. While compulsory arbitration by the state was, according to the original intention, to come into play in the relations between employers and employees only when, in exceptional cases, the parties were unable to agree, state intervention actually became the normal case and voluntary agreements were reached only in order to avoid compulsory intervention. Moreover, structural changes in the organization

of production and distribution—e.g., the rationalization and mechanization of industry—had powerful consequences for the working class. The balance of power shifted and the decisive position of the old unions of highly skilled workers passed, on the one hand, to the foremen and other supervisory workers, and, on the other hand, to the large mass of unskilled and semiskilled workers, who were more difficult to organize. This development, of course, impaired the power of the labor unions very considerably. They were further weakened by the economic crisis and by the strength of their monopolistic adversaries. Strike statistics demonstrate how little will to fight they retained. The equilibrium of the classes had found its constitutional expression in the second part of the Reich Constitution which bore the title: "Fundamental Rights and Fundamental Duties of the German Citizenry." There the old classical and the new social rights are juxtaposed in an unrelated manner, so that it was justifiable to say that the Weimar Constitution was a decisionless constitution.<sup>20</sup> Structural-economic changes in conjunction with the increasing impotence of Parliament added tremendously to the strength of the bureaucracy. The increment in strength was especially great in the case of the ministerial bureaucracy.

These changes in the economic and political structure were accompanied by profound changes in legal theory and legal practice.<sup>20</sup> It has been stated already above that, under the influence of Laband, German legal theory had discarded the concept of the generality of laws and had set up instead a division into formal and material laws. Suddenly, however, the postulate of the generality of laws was revived, particularly in the writings of Carl Schmitt and his school. Schmitt asserted that the term "law," as far as it had been used in the Weimar Constitution, referred merely to general laws, and that the Reichstag, therefore, could only create general laws. The legislative power of the Reichstag consequently was restricted by its inability to decree individual measures. In order to prove his thesis he referred to the historical developments mentioned above, and to Article 109 of the Weimar Constitution which states that all Germans are equal before the law. The theory that the state may rule only through general laws applies to a specific economic system, namely, one of free competition. But it was exactly with respect to the economic sphere that Schmitt's theory indicated the postulate of the rule of general laws. The political meaning of this

renaissance is not difficult to perceive. Schmitt himself developed this thesis at first for the purpose of showing that the laws providing for the expropriation of the German princes had been unconstitutional because they violated the principle of equality before the law and the postulate of the generality of laws. Yet Schmitt's theory presupposes that the principle of legal equality relates not only to the administration and the judiciary but also to the legislative power, i.e., in Schmitt's opinion the principle did not mean only what it had meant formerly, namely, that promulgated laws must be dutifully applied by state officials regardless of differences in the status of citizens, without hatred, and without prejudice. For Schmitt it also meant that the principle binds the legislative power itself and prevents it from creating laws in which equal situations were differently treated. It is of course true that Haenel, the liberal constitutional jurist and politician, once supported this thesis in his arguments against Bismarck's laws expropriating the Polish minority. But his thesis had been universally rejected. Now this old idea was revived in order to add new checks to the sovereignty of Parliament in addition to those which were already provided by constitutional clauses concerning changes in the Constitution. Heinrich Triepel was the first to try to prove that the principle of equality would prohibit, in the case of the federal decree concerning gold balances, depriving stockholders of the value of their shares. Soon an enormous literature arose in order to prove that this principle of legal equality, at bottom, represented the basic fundamental right and that the Parliament was as much bound by it as were the administration and the judiciary.

But even if the principle of equality before the law is also supposed to be binding for the legislative, it does not at all follow that such equality is attainable only through general laws. The assertion that equality can be realized only by general norms is a reiteration of Rousseau's demand which, in his case, is reasonable and intelligible because he was discussing general law with reference to a society in which there was to be only small property or common property. Private property, which is sacred and inviolable, according to Rousseau, is property only to the extent that it remains an individual and particular right. "If it is regarded as common to all citizens, it is subject to the general will [*volonté générale*] and may be infringed on or denied by this will. Thus the sovereign has no right to touch the property of one or several

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citizens. But he may legitimately seize the property of all."<sup>27</sup> On the other hand, Rousseau also postulates the rule of general laws for situations in which property is socialized, as he has described it in his projected Corsican Constitution. "Far from desiring that the state be poor, I prefer on the contrary, that it should possess everything and that individuals share in the common wealth only in proportion to their services."<sup>28</sup> Thus Rousseau believed that the *volonté générale* could be expressed in general laws only in societies with equally distributed small property holding or with socialized property. The rule of law really obtains in Rousseau's system, and there is no room for force since in the social system which Rousseau postulated the state has no functions. "Since individual property ownership is so slight and dependent, the government has little need for force and controls the citizenry with gestures of the finger, so to speak."<sup>29</sup> In a monopolistically organized system the general law cannot be supreme. If the state is confronted only by a monopoly, it is pointless to regulate this monopoly by a general law. In such a case the individual measure is the only appropriate expression of the sovereign power. Such an individual measure neither violates the principle of equality before the law nor runs counter to the general idea of the law, as the legislator is confronted only with an individual situation. Thus in the economic sphere the general law presupposes economic equality within the capitalist class. German legislation between 1919 and 1932 did indeed create special measures with regard to individual monopolistic enterprises; the emergency decree of the president of the Reich of July 13, 1931, prohibited the application of the regulations concerning insolvency to the insolvent Darmstaedter Bank, and therewith ordered a special regulation for one powerful monopoly because only this one vital bank was in danger. The postulate that the state should rule only by general laws becomes absurd in the economic sphere if the legislator is dealing not with equally strong competitors but with monopolies which reverse the principle of the free market. The renaissance, under the Weimar democracy, of the notion of the generality of laws and its indiscriminate application to personal, political, and economic liberties, was thus used as a device to restrict the power of the Parliament which no longer represented exclusively the interests of the big landowners, of the capitalists, of the army, and of the bureaucracy. Now the general law, within the economic sphere, was used in order to preserve the existing property

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system and to protect it against intervention where such was regarded as incompatible with interests of the above-named groups.

Before 1914 the discussion concerning the formal structure of laws was exclusively theoretical, because, as has been stated, the examination of laws on the part of the judge (judicial review) was not permitted. Now these theoretical discussions became political questions of great practical importance because the German supreme court suddenly accepted the principle of judicial review. In its decision of April 28, 1921,<sup>30</sup> the supreme court asserted that it had always upheld its right of examining whether or not laws were constitutional—an assertion which, as the technical literature stated almost unanimously, was a sheer falsehood. At any rate, the recognition of judicial review represented a redistribution of power between state and society. The greater the power of the state, the more readily will the judge submit to its authority. The weaker the state, the more he will try to realize his private class interests. The recognition of judicial review operated favorably to the existing social order. This is unmistakably shown by an analysis of all those decisions which affirmed the court's power of review.<sup>31</sup> All these decisions dealt with the question of whether or not a particular law violated Article 153 of the Weimar Constitution, which guaranteed the security of private property. The supreme court likewise accepted the theory that the principle of legal equality bound the Parliament, so that "arbitrary" laws were to be considered as being unconstitutional. Thus, in both theory and practice Articles 109 and 153 of the Weimar Constitution served to prevent interference with the existing property system.

This recourse to the ideas of legal equality and generality is really a disguised revival of natural law which is now fulfilling counterrevolutionary functions. The older system of positivism would, in the period after 1918, have imperiled the position of monopolies because the positive legal order no longer corresponded with the interests of the monopolies. Hence the existence of a system of natural law was now openly discussed. Carl Schmitt, by adopting the American theory of the "inherent limitations upon the amending power," tried to distinguish between amending and violating modifications of the Constitution. He was of the opinion that amendments to the Constitution could not assail the "Constitution as a basic decision." Constitutional amendments might modify only certain aspects of the Constitution.



The fundamental decisions regarding value preferences which the Constitution embodies, Schmitt thought, could not be modified even by the qualified parliamentary majority which had the power to amend the Constitution. The members of the supreme court were moved by a similar thought when, during a meeting in 1924, they commented upon the revaluation decree (which was the first emergency taxation decree). They decided: "This notion of good faith [*Treu und Glauben*] stands beyond individual laws and beyond individual positive-legal provisions. No legal order which deserves this title of honor can exist without this principle. Hence, the legislator, by his power, cannot obstruct a result which is imperatively demanded by good faith [*Treu und Glauben*]. It would be a grave offense against the prestige of the government and the sense of justice if someone who based his claim on a new law would be dismissed by a law court because his appeal to the law violated the principle of good faith."<sup>22</sup> The judges of the supreme court likewise announced that a contractor of a mortgage who would base his claim on the above-mentioned emergency taxation decree would lose his case because his defense against the mortgagee would have to be considered as violating the principle of good faith. James Goldschmidt, professor of criminal and civil procedure at the University of Berlin, supported the judges of the supreme court, and in order to prove the correctness of their decision he invoked the old principles of natural law and the right of resistance of the people against the unlawful exercise of power by the state.<sup>23</sup> Hermann Isay even went farther and conceded to the judge the right of examining each law as to its compatibility with the popular sense of justice. A vast body of literature was written on the subject, and a new kind of natural law seemed to be in the process of establishment.

However, a kind of secret natural law had been continuously applied throughout this period. The period from 1918 to 1932 was characterized by the almost universal acceptance of the doctrine of the "free law" school, by the destruction of the rationality and the calculability of law, by the restriction of the system of contracts, by the triumph of the idea of command over that of the contract, and by the prevalence of "general principles" over genuine legal norms. The "general principles" transformed the whole legal system. By their dependence on an extra-legal order of values they negate formal rationality, give an immense amount of discretionary power to the judge, and eliminate the

line of division between judiciary and administration so that administrative decisions—e.g., political decisions—take on the form of decisions of the ordinary civil courts. Before the war of 1914-18 the "free law" school had conducted an energetic but hopeless battle against legal positivism.<sup>24</sup> According to this school, law is not exclusively contained in statutes and the legal system is not closed and free of gaps. The filling of these gaps, then, must be accomplished through legal norms, for the decision of the judge must be a legal one. And the norms must have a general character because the administration of law must follow the principle of legal equality. These norms are to be created by the judge, who has therefore not only the task of applying law but also that of creating it. This free-law theory of legal sources is usually connected with a new policy in the application of law. This postulate is most clearly stated in the famous pamphlet of Hermann Kantorowicz (*Der Kampf um die Rechtswissenschaft*, Heidelberg 1906.) and in the numerous publications of Ernst Fuchs. It demands that the freedom which must be conceded to the judge with regard to legal provisions must be as vast as possible so that the free discretionary power of the judge may be elevated to the rank of the basic principle of the application of law. These two aspects of the "free law" school, the theoretical and the political one, must be strictly distinguished. To the extent that the "free law" school demands a new theory of the application of law, it demands the substitution of formal-rational law by "general principles." Kantorowicz, the founder of this school in Germany, in his later writings focused his attention more on the theoretical problems of the school. His disciples, however, who were less qualified in theoretical matters, dealt rather with its policy for the application of law and insisted, as in the case of Ernst Fuchs, that the German civil code contained only one good passage, namely, there where it ceases its abstract treatment of cases and erects a signpost with the inscription: "Entrance to the free sea of legal needs." This passage is Section 242, and for Fuchs it is the Archimedian point permitting the old legal system to be transformed. It was this practical aspect of the doctrine of free law which became dominant.

Before 1918 the "free law" school demanded discretionary power for the judge in order to infuse progressive ideas into a reactionary legal system. But already in 1911 Max Weber warned: "It is moreover not at all certain that the classes which today enjoy only negative privileges,

particularly the working class, can expect the gains from an informal administration of law that the jurists assume will flow from it."<sup>88</sup>

In order to point out the function of "general principles" it is necessary to examine the fields of law where "general principles" are invoked and the functions they fulfil there. To begin with, it may be stated that "general principles" are always invoked when the state is confronted by powerful private groups. Whenever parties which do not have the same rights engage in the exchange of goods and where one powerful party faces other less powerful private parties or the state, rational law ceases to obtain and "general principles" are resorted to. The decision of the judge then takes the form of a political or of an administrative order by which antagonistic interests are adjusted. This political order employs, however, the form of a court decision. It is interesting to investigate the utilization of "general principles" in the field of labor law which regulates the legal relations between employees and employers. The power of private groups is most clearly perceivable in the field of labor relations. According to German law, the legal admissibility of labor conflict was determined by the standard which is provided for in Section 826, BGB. This law provides that he who causes damage to someone else in a way which violates "good morals" is liable to the payment of indemnities. What violates "good morals" can never be decided in a universally binding way. The supreme court for many decades had employed the formula that those actions are contrary to "good morals" which contradict the sense of equity and justice of the whole people. This, of course, is a purely tautological definition which adds nothing to what the law has already expressed. A binding standard as to the legality of a strike is not attainable on this basis. An employer, at bottom, sees every strike as a disturbance of the sacred order, whereas an employee will regard no strike as a violation of "good morals." Every "concrete" formulation which the Reichsgericht has enunciated on this question is nothing but a reiteration of the tautological definition. Or, to discuss another difficult problem of labor law: if a worker accepts a lower wage than the contracted one, has he renounced the difference between the contracted wage rate and the wage actually paid? The supreme court always decided this question on the basis of Section 242, BGB, which provides that the debtor has to fulfil his obligation with regard to good faith (*Treu und Glauben*). The federal labor court consequently refused to decide unambiguously either way. It preferred

to decide each case on the basis of the concrete situation, to take into account all details which might have been relevant, above all, the question of whether the worker, when he accepted the lower wage rate, had been subjected to "economic pressure." Another central question of labor law was the question whether a worker who is willing to work loses his claim for pay when the employer cannot put him to use for some such reason as technical disruptions, fluctuations in the market, or such social disturbances as a strike in his own or in another's factory. This question is, as such, clearly dealt with by Section 615, BGB, which provides that the worker in such cases may claim his wages, the legislators having intended to fasten the risks on the entrepreneur. Both supreme court and federal labor court declined, however, to apply the unambiguous norm of Section 615, basing their decision solely upon Section 242, BGB. In this case, too, the specific individual circumstances are to be taken into account in each case. Following this decision, the federal labor court developed a number of principles which were of extraordinary juridical and political significance. It declared the Factory Council Law had created a "working and factory community" between worker and entrepreneur and that, consequently, the worker is to share in the fate of the enterprise. If the enterprise is shaken in its foundations by some disturbance, the worker has to bear the whole or part of the risk. There is another principle which was developed on this occasion and which is of far-reaching importance. If a plant is slowed down or shut by a strike in another plant or by a strike of certain workers in the same plant, the claim for payment of wages on the part of workers who are prepared and willing to work is to be denied because of the bond of solidarity among all workers: The responsibility for any strike, therefore, must be attributed to every individual worker who is not working because of it. These are only a few examples from the very important field of labor law.

The rediscovery of "general principles" serves to destroy a system of positive law which had incorporated many important social reforms; it destroys the rationality of law. The structural changes within the economic system led to important changes in the functions of "general principles." Having formerly been stepchildren of law, they now become its darlings. Section 1 of the law against unfair competition prohibits the use of unfair methods of competition by merchants. This prohibition has definite and specific functions in a competitive econ-

