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THE PROBLEM OF FEDERALISM

THE PROBLEM OF FEDERALISM

A STUDY IN THE HISTORY OF POLITICAL THEORY

by

SOBEI MOGI

VOLUME TWO

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CHAPTER IV

FEDERAL IDEAS OF VARIOUS GERMAN SCHOOLS OF THOUGHT

§ 1

The "dogmatic completeness" with which Brie applied the juristic "method" in his *Theorie der Staatenverbindungen* in 1886 marked the climax of positivist predominance.

The general trend of political and legal ideas in Germany began to be from formalistic positivism to philosophical theories of jurisprudence and political science. This tendency produced a revival of the early ideas of the nineteenth century and a return to metaphysical idealism, to neo-Kantism on the one hand and neo-Hegelianism on the other.

From the time that Auguste Comte set up a philosophy in which he gave a "positive" interpretation to every phenomenon in our human world—it was "a naturalistic corollary of Spinoza's pantheism"—and Herbert Spencer applied, though inadequately, the idea of evolution to the principles of law and government, the rise of sociological schools in politics and jurisprudence not only in France and England, but also in Germany, led to fresh political and legal ideas.

At the same time the historical interpretation of law and the state continued, and was even given new impetus in German legal speculation and political science, not only by the still prevailing influence of Savigny, but also by the new materialistic interpretation of history by Karl Marx and his school.

The result of the conflict between German socialistic and realistic views of state and society was the foundation of a new sociological school of German legal and political theory.

The *Genossenschaftstheorie*, evolved by Otto Gierke from his historical and sociological studies, cannot be described as more than a torch lit by him to illuminate the obscurity of German *a priori* methods.

Before entering upon the discussion of the *Genossenschaft* theory it is not necessary to examine German legal philosophy, but in order that the federal idea may be elucidated I will give some account of the work of the most distinguished writers in the

various schools of thought—the neo-Kantian, neo-Hegelian, social utilitarian and sociological schools, as well as a brief description of the Marxian principles.

Hermann Cohen deduced from Kant's fundamental philosophy his theory of purpose and law, and adopted as his own basis the doctrine that in critical philosophy purpose entered "only when causes have been exhausted, but analysis of causes should in reality never cease," and that purpose was "extension" of the "cause."

He assumed in his work, *Kant's Theorie der Erfahrung*, that the categorical imperative was developed under the influence of this conception of *Zweck*, or means to an end, and developed, no matter whether that theory were adequate or not, the notion of freedom, by which he meant "not an exemption from the law of causality, but an exemption from any intermediate mechanism or any purpose limitation."

Like Kant, he regarded ethics as the study of duty, of things as they should be, but he took a step forward in his assumption of moral law derived from "pure will."

On this basic conception the "objective motives" of imposing pleasure and pain as material conditions of will were no doubt objectionable to him as being merely empirical considerations.

He assumed that the form of generalisation considered as the sole condition of pure practical reason was "the community of autonomous beings" which was "thought of and utilised as an end and never merely as a means." Thus an *a priori* aim was to be found in the community, and this formal *a priori* procedure ought to find such realisation that the "moral nature of the individual appeared to be derived from the fact that it was common to all moral natures."

Therefore he argued that the moral law consisted "in the conception of such community," and admitted that the spirit of Kant might be psychologically and practically realised in moral law with due allowance for human nature.[1]

On this assumption he raised the idea of moral law to that of humanity, and considered man, not in the psychological sense, but in the conception of humanity, "as a participator in immortality."

Moral consciousness was therefore the highest maxim of human community, and accordingly "justice" was of the highest importance and must be maintained "as the guide to virtue," and its

[1] H. Cohen: *Kant's Theorie der Erfahrung*, 1871, pp. 231–233.

continued progress was possible "only through the instrument of law and government."[1]

The state was therefore "a self-conscious expression" and created "unity of subject and object in the will." It united men in "an ideal unity of all" and "this unity of universality forms the state. This moral . . . and political conception of the state rested upon the unity formed by this totality."[2]

The state accordingly, "as the instrument of justice, was guided solely by moral conscience." The Platonic conception of the state led to the conclusion that there was a synthesis of the self-consciousness of the state and its members, and justice made universal happiness and brotherhood the self-appointed purpose of mankind.

Natorp's philosophical definition of "real will" in contrast to instinct was "the highest concentration of practical activity," and to him, as to Cohen, justice was the "individual basis of social virtue."[3]

Justice was the cardinal social virtue which embraced all the rest. This social justice was regarded as the highest power of command, to render to each his own, and in principle of law the maintenance of the same law to all, a "just participation on the part of each in education, in government and in service, jointly in their inherent and established relation to one another."

As an advocate of Kant's philosophy he argued that social regulation was a higher legal standard required for the formation of practical reason. Although the establishment of the law was indispensable for the "adjustment of the idea to experience," yet the rational ordering of social life could be realised only "by means of social regulation which represented the formal will of social life."

Therefore the root of the law by its very nature was *a priori* based on the existence of consciousness. Like Kant, he assumed that "the idea of the universal valid functional connection among the essential factors of social life" was based on "community of method," and must ultimately establish a comprehensive relation "in human consciousness between laws to which the ideas were subject and the general law of nature."[4]

These two early Kantian attitudes towards law and state were entirely different from the positivistic conception of law, the

[1] H. Cohen: *Ethik des reinen Willens*, 1904, pp. 270–306, 569.
[2] Ibid., pp. 7, 21, 173, 241, 242, 595.
[3] Natorp: *Sozialpädagogik*, p. 135.
[4] Ibid., pp. 180, 182, 192, 200, 202–214.

validity of which was to be derived not from law itself, but from the fundamental manifestation of self-consciousness.

Rudolph Stammler developed Kant's social philosophy into a critical philosophy.

In his early work, *Wirtschaft und Recht*, published in 1896, as a real founder of neo-Kantism he based his fundamental notion of law not only on jurisprudence, but also on that aspect of economic science which was derived from social life as a whole.

He insisted on the need for the formulation of some definite general principles, some "essential law of social life," to serve as a test of institutions and of the necessity of fresh law-making; that is to say, for a social philosophy which means a scientific inquiry into the problem: "Upon what fundamental principles of law is the social life of mankind based?"

Therefore every attempt at the critical formulation of a science of society must start from the conception of human association and social life, and in order to get that it must make an intelligible description and exposition of principles which shall be of general validity.

As to the method by which this can be done, Stammler rejected as insufficient the much-favoured method of generalisation from historical data. The object of social philosophy is to set up a "systematic co-ordination of several phenomena under a comprehensive principle,"[1] and as regards social science he argued that the critical philosophical survey was of great importance in order to obtain a clear view of social conditions.

Though Stammler admitted that there was some merit in the materialistic interpretation of history, in which social materialism was a "systematic method" attempting to explain the orderly development of human society on the basis of economic phenomena, he did not agree with the Marxist dictum that "the movement of society which is directed towards the collective ownership of the means of production is to be welcomed and helped because it is sound in principle and right in practice," because, as he said, the determining words in that dictum are not scientifically proven.[2]

Opposing the analogy of sociology to natural science which Herbert Spencer put forward, Stammler observed that social life was far more than "physical and gregarious," and must be

[1] Stammler: *Wirtschaft und Recht*, 1896.—"The object of social philosophy is the ordering of the social life of man as such," while that of social science is "the determination of the common content of different legal systems."

[2] Ibid., p. 633.

regulated externally by social regulations which might differ from ethical principles.

It is necessary to distinguish between: (i) an ethical code—a guide to objectively right will and action, dependent for its authority solely upon the conviction felt by those who follow it as to its truth and objective validity; and (ii) social rules—regulations for outwardly correct conduct, which are binding without regard to the motives of those who observe them.

Defining "social life" as "the living together of men in communities governed by external binding rules," he divided these social rules into two classes: law made by the state and claiming compulsory allegiance, and "conventions" arising from social intercourse and claiming obedience only by an appeal to the consent of those conforming to them.[1]

Endeavouring, then, to determine what is the actual content of this social life, he pointed out that this formal regulation, which is the essential characteristic of the social existence of mankind and makes its unique nature possible, must correspond to some actually regulated subject-matter.[2] And he assumed that this external regulation, which is the basic condition of social life as a special subject of perception, does not apply to nature, but only to human beings living and working together, and has as its subject-matter their relations one to another.

And he bridged the gulf between social and economic life by saying that "the whole action and efforts of mankind are directed towards the satisfaction of human needs"; consequently social life is "human co-operation directed to the satisfaction of needs."[3]

On this principle the social rules do not regulate nature so as to modify its process or influence the possibility of a technical mastery of nature; but they regulate human co-operation. And this regulated co-operation of mankind for the satisfaction of its needs Stammler considered to be the subject-matter of social science or social economics. This attitude towards society was a new conceptional direction, in which economic needs had a greater share in determining the social life of men.

From his fundamental philosophical position "monism" as applied to social phenomena sought "a unitary basis of causal relations in a solidarity of social life." Thus he assumed that, through this monistic view, the legal order and social economics were a "form and content of one and the same phenomenon," and that "all social movements, including the directive causes

[1] Stammler: *Wirtschaft und Recht*, 1896, p. 128.
[2] Ibid., p. 136.
[3] Ibid., p. 137.

of changes in the law, as they rise and become effective, are comprised in one and the same orderly principle." Therefore he objected to the idea of "natural law" having no *a priori* basis in terms of its positive contents.

His interpretation of social life required the determination of a principle in which there existed both "causality" and "purpose."

Differing from Kant's metaphysical notion of *causality*, Stammler emphasised *purpose*. He explained that whilst conformity between law and causality provided only an insufficient basis, the actions of our own selves or of others are to be considered "either as causally produced from outside or as due to an agent." This latter case implied a purpose, and this purpose, in his philosophy, was "an object to be effected; the conception of object as something to be effected brings it within the sphere of the will."

Will to him was not "a force," but "a direction of consciousness." Objecting to the "psychological law of causality" to which Ihering adhered, he held that the law of purpose was not causal, but teleological.

The will exercised according to the direction of the ideal and accepting universally the valid point of view of purpose was "good will."

From this notion of purpose and will freedom of action was a cardinal precept in the law of action.

Freedom of will in Kant's sense was explained by him as embodying not an exemption from the law of causality, but an independence from "the subjective content of the end to be attained."

He indicated that freedom of will was "regulation of desire" and "the thought of an unconditioned goal as the standard for the determination of purpose," and added that it is "the idea of an absolute final purpose which imparts to every individual-sought end a unity and universality."

Although he admitted that the conception of good was produced from human experience, he, as a Kantian, insisted on the objective test of endeavour and conduct by the standard of the universal law of approved desire.

This justification of the categorical imperative brought about his fundamental order of the social life in reference to form and regulation. The principle of such a social order was a supreme unity of purpose in the embodiment of all individual ends of the social order.

Coercion in the social regulation was only justified legally and

historically "as a necessary means to the establishment of the principle of order in the social life of men."[1]

As the spirit of the legal order embodied the attainment of a certain form of co-operation and mutual relation of men, the justification of the positive legal construction was determined by the successful finding in its material embodiment of the right measure to the right end of the social life of men.

Thus this ultimate goal of social existence (*Dasein*) was to be based on the "formal idea," "which in its unconditionality appears as judge over all individual purposes, which applies to them all, and from which each one purpose can obtain only the attribute of the legal social will for its special empirical characteristic."[1]

But there is no *a priori* state purpose. The question of the latent purpose of social life can never be answered by reference to any one particular empirical achievement. For all the objects which may present themselves for social co-operation and associated life are temporary and conditioned; they arise out of concrete circumstances, and relate to quite definite and empirically solved problems. All social rules are directed towards determining human conduct. If they are to have any single unitary basic idea, it must be one which is equally explicable to all the persons who are bound by the rules. The unconditional law for mankind is that of "good will"; that is the only direction and determination of all empirical aims which can claim general validity. The absolute goal, an idea to be striven for as a governing consideration, even though it may never be realised in practice, is "freedom." Inner freedom is the same thing as all-sufficiency in the pursuit of its aims.

Apply this to the life of men in society. There we have externally regulated life together and co-operation. The will of each person in the association must be regarded as all-sufficient and uncontrolled. Consequently, "the conformity of social life with the law can exist to the ideal extent only in a society regulated with a comprehensive regard for all who are subject to the law, so that each is treated and ruled as he would wish to be were he free."[3]

On this basis Stammler concluded by saying that the "community of men whose wills are free is the unconditional final goal of social life."[4]

In relation to his ideal of the community based on his theory

[1] Stammler: *Wirtschaft und Recht*, 1896, pp. 547–551.
[2] Ibid., p. 573.
[3] Ibid., p. 575.
[4] Ibid., p. 576.

of the monistic unity of social life he urged that the idea of the community of free human beings was the sole governing principle which made it possible to form a conclusive opinion as to the objective justification of any social movement or effort, and at the same time could show clearly to the legislator his right course amid the fiercely contending individual claims.

In this, his fundamental thesis, Stammler set up the "social ideal" which was "a unitary formal idea" to serve as "the criterion and guide for all empirical efforts in social life."[1]

The spirit of the social ideal was the spirit of the community of free agents, and in the application of the social ideal there must be such regulation of the social life as would bring about a state of affairs in which man could live in accordance with the ideal of a community of free agents.

In his famous work, *Die Lehre von dem richtigen Rechte*, the extent to which the central regulation should control, and to which the members of the community should set up the rule, could not be laid down on general principles, but only in concrete cases by reference to the desired end of establishing the just law.

The cardinal norm of the law of justice was the "social justice of the community of free agents." Stammler set up the mission of law on the purely idealistic basis that "the ideal of the law of justice was not itself empirically conditioned but of general validity"; in other words, in "the co-relation of the empirical material with the universal truth of the social ideal." Therefore the "ideal of justice" in formula and function was based on the ideal of just law.

Rejecting the validity of natural law and positive law in their general universality, he set up the constructive community of the ideal on the model considered by the law of justice, that is, "the principle of a selected community."

This notion of formula and function in the just law in accordance with the ideal of justice was the creation of neo-Kantism, and from the categorical imperative Stammler derived the idea of select community, which involved that every participant might demand of every other consideration and participation.

This principle of consideration and participation was upheld in the legal relation of a number of persons bound together by a juristic bond.

This mission of the theory of justice was co-ordinate with sociological considerations and the attitude towards social history

[1] Stammler: *Wirtschaft und Recht*, 1896, p. 588.

was not causal but teleological, and only through the standard of justice and the real co-operation of community was the purpose of evolution realised.

The cardinal goal of neo-Kantism was the "social ideal" in which all political institutions must teleologically co-ordinate to form themselves into a "community of free agents."[1]

From this formula of the social ideal Kelsen developed the legal idea of his *Norm-Satz*. Along with these neo-Kantian expositions of *Rechtwissenschaft*, Lasson's publication of his *System der Rechtsphilosophie* in 1882 laid the foundation-stone of a philosophical edifice based on Hegel's metaphysics—Joseph Kohler made use of the phrase that "Lasson's 'Philosophy of Law' alone gives us cause for rejoicing."[2]

Joseph Kohler's own attitude towards Hegel's philosophy made a new road for neo-Hegelianism.

He rejected the theory of natural law, long as had been its predominance, because of its dogmatism and rigidity, because it had long ceased to adapt itself to culture and further its advance.[3] He rejected Kant's philosophy because in it (and to him this was its chief error) "the difference between subject and object is exaggerated until it becomes monstrous."[4] In Kohler's view the ego (subject) and non-ego (object) belong to one great world whole, and consequently agreement must exist between them: there must be a synthesis of all phenomena in mental activity. He also disliked the arbitrary assumption by Kant of the "categorical imperative"; and generally regarded Kant's whole system of thought as a "maze"—an offshoot of Scottish thought, which it is futile to follow, though Kant "lavished on it the highest powers of his gifted mind that still showed clearly traces of Scottish descent."[5]

He condemned the return to Kant, preached by neo-Kantians, as possible only in an "age of philosophic barrenness," and strongly urged the synthetic combination of subject and object into a whole.

Kant's dualism was replaced by the "admirable completion" by Hegel of the identity philosophy which had started with Descartes and been developed by Schelling, and reconciled the difference between being and non-being through the principle of becoming (*Werden*).[6]

[1] Stammler: *Die Lehre von dem richtigen Rechte*, 1902, pp. 271–311, 596–598, 601–627.
[2] J. Kohler: *Philosophy of Law* (trans.), p. 27.
[3] Ibid., p. 10.
[4] Ibid., p. 14.
[5] Ibid., p. 19.
[6] Ibid., p. 20.

Kohler asserted that the philosophy of the twentieth century must take Hegel for its starting-point, and "Hegel's fundamental idea, evolution, as the scientific principle of all mental science, of our whole history, and of everything that lives and moves in our human culture."

Kohler, as a neo-Hegelian, deviated from Hegel and endeavoured to reconstruct his teaching. For he could not acquiesce in Hegel's "dialectic," namely, "that the development of the history of the world is sociological and that everything goes forward in three-part time"; on the contrary, he found a great deal that was "illogical and unargued," and "human progress by no means always corresponds to the development of our thought."[1]

Firstly, the logic of the world's history is mixed with much that is "illogical," and we cannot so construe the course of progress that everything unfolds in accordance with a definite logical spirit. And, secondly, multiplicity in evolution makes it impossible to set up a definite form of development by which universal history may be judged, so any process seeking to deduce the future from the past by logical inference is entirely inadmissible.[2]

In his objection to Hegel's excessive logicism, Kohler was influenced by the opposition of Schopenhauer to Hegel, and especially by Nietzsche's philosophy. His own metaphysical system accepted Hegel's philosophy of identity and doctrine of evolution, but rejected that three-part time development which formed Hegel's logical interpretation of history.

He took this as the starting-point of neo-Hegelianism, and proclaimed that the development of idea becomes, as regards man, the development of culture. Culture constantly progresses, with interruptions and irregularities it is true, and becomes the "mental security of nations"; the highest aim and final goal of human community is the culture of knowledge on the one hand, and that of new production and new activity on the other.[3]

Kohler regarded the period following Hegel as one of tremendous decline for the philosophy of law. He had nothing but contempt for Ihering's doctrine of the purpose of law (*Zweck im Recht*), as superficial and unphilosophical, and he rejected equally Stammler's doctrine which started from Kant and "proceeds as if Hegel had not existed at all." Stammler was

[1] J. Kohler: *Philosophy of Law* (trans.), pp. 20, 21.
[2] Ibid., p. 21. [3] Ibid., p. 22.

right in recognising that law must change, and that consequently all discussion of a perfect or complete law must be in a purely formal sense, but he was entirely mistaken in attempting to represent this formal law as a system of justice through law, determined by "definite requirements of individual or social life that exist once for all." This is a return to the non-historical basis of Kant, a return which, e.g., leads Stammler to the proposition that "at no stage of human culture has slavery been just."

Thus from the history of culture Kohler argued that "the totality of humanity's achievement is culture, and in this culture it is the part of the law to promote and to visualise, to create order and system on the one hand, and to uphold and further intellectual progress on the other." From these metaphysical assumptions he drew the conclusion that the "principal lever of cultural life throughout the evolution of human society is the constant alternation of individualism on the one hand and of collectivism on the other."

The course of humanity's development is that first "mankind acts in groups, in which the individual is absorbed." The law is the law of the group; all institutions are group institutions (group marriage, communal property and common labour); all gain is common, man does not work for himself, but each for a larger or smaller community.

Gradually tribalism is displaced, and there appears instead of the community the individual family, monogamy and family property—and communalistic sentiment changes into individualistic feeling, "one of the greatest forces that inspire human effort." But the more intense the individual development, the more multifarious it becomes; and the more the individual limits himself to a particular field, the more he needs to associate with others. Common effort again becomes necessary.[1]

This evolutional transformation from individualism to collectivism is modified, and the reconciliation of the individual and the community is effected, by the aid and with the supervision of the state.

To Kohler the technique of the law is part of the philosophy of law, and any technique that fails to produce on culture the effects that legal philosophy demands is a failure.[2]

"The law may invest either an aggregate of men or a unity of interests organised for the purpose of carrying out some definite aim with legal subjectivity, and give them the

[1] J. Kohler: *Philosophy of Law* (trans.), pp. 51–53. [2] Ibid., p. 67.

possibility of having rights and duties and undertaking legal acts."[1] The setting up of this "constructive legal subject was necessary in order that the legal order might have a lever which enabled it to operate in all directions for its own ends, not only for a time but permanently."[2] To him the juristic person need not actually be a living person, although a reality in a legal point of view; but in certain cases, as for instance administration of finances, the legal personality, i.e. trustee, must necessarily have a "human organ."

Kohler held that "rights in one's own person, or rights of personality, must be the starting-point of every legal system," and that "this right of personality expressed itself in particular in the activities of personality both in and outside the law."[3]

With regard to the state as a whole, he defined it as "a community organised into a personality which by virtue of its own law takes upon itself the task of promoting culture and opposing non-culture," and does so not "only in certain respects, but in all the directions of human endeavour and development."[4]

The state in its origin appeared as "a totem state," and through the evolution of various stages of group institutions the state based on community of race was transformed by the addition of a foreign element into the state based upon territorial boundaries.

This idea of the state was that of "a legal personality" existing for the purpose of advancing the chief cultural efforts of men within certain spheres.[5]

The state was therefore, as Kohler explained, "a state of culture," and this idea appeared in another phrase when he termed the state the realisation of the rational idea. Nietzsche went still further in asserting that the state was responsible to no one for its actions.

Kohler contrasted the "culture state" with the notion prevalent at the beginning of the nineteenth century of the "legal state" (*Rechtsstaat*), and emphasised that as culture "had created not only law but also rights," so the "state should not overthrow these rights and trample them underfoot," since the sole mission of the state was to realise and establish law.

His solution of the conflict between culture and legality was to be found in "the institution of expropriation," that is, in the possibility of destroying a right by giving suitable and

[1] J. Kohler: *Philosophy of Law* (trans.), p. 67.
[2] Ibid., p. 68.
[3] Ibid., p. 80.
[4] Ibid., p. 207.
[5] Ibid., *Einführung in die Rechtswissenschaft*, second edition, p. 110.

adequate compensation.[1] Expropriation is the "real nerve" of the legal state in relation to the culture state, and its justification lay in the fact that it furthered cultural progress even though it diminished "the conservative stability of the legal state."

As culture was the final goal of the state as a legal personality, and men could not act effectively without collective unity, it might be put forward as a *desideratum* that the individual state should only be a subordinate member of one great whole. His ideal of human society was to realise a "world-state" by drawing closer together the individual states, and achieving the embodiment of the community of cultural endeavours in common legal institutions,[2] for the general interest of humanity.

The state as the realisation of culture and of the moral idea possessed "sovereignty," that is to say, authority over individuals limited only by "the direction of the state's aim and mission of culture."[3]

This standpoint, which makes the state the highest instance, is the result of historical evolution. It dates from the disappearance of the idea of a world empire. And the division of mankind into states was "indispensable"; only by becoming a national entity (state) can a national group develop its own life and abilities to the fullest extent.[4]

But culture in any one state would remain stationary unless it received a new impulse in knowledge and activities from without. If, however, each state was based on the principle of sovereignty and no law existed between the states, a condition of anarchy was bound to arise, and this could not be allowed to continue side by side with the great cultural mission of humanity.

In this respect Kohler explained that even in the Orient there had been the assumption of a "higher law than the state law," a universal divine law. And since these laws of God had certain points in common, they had served as the bases of treaties of peace or of justice.

Then the Roman law, which predominated right through the Middle Ages, by its imperial nature shattered these first faint beginnings of international law, which did not actually begin its existence until after the destruction of the Roman imperial idea and the rise of the modern state. Then, although there was no world state standing above the nations, and owing

[1] J. Kohler: *Philosophy of Law* (trans.), pp. 208–209.
[2] Ibid., p. 209; and *Grundlagen des Völkerrechts*, 1918, p. 8.
[3] Ibid., *Philosophy of Law* (trans.), p. 294.
[4] Ibid.

to differences of religious belief no religious law could bind the world uniformly, yet there was "a super-national law that regulated the relations of the nations to one another."[1]

This idea of a super-national law standing above the sovereignty of the state appealed to the nations the more because of the rise of two formations. One was the federation of states—agreements between states led in some instances to the creation of associations of states undertaking a number of enterprises in common. There was also the institution called the "real union," where two states placed themselves under one and the same monarch. And then arose the idea of the federal state.

Kohler did not examine fully all the forms of *Staatenverbindungen*, but, though an Hegelian, he admitted that the state was not an absolute entity, for its sovereignty and activities could be limited and altered not only by its own will but also by the super-national law.

His consideration of federalism was concentrated on the federal state.

He asserted that the idea of the federal state was that of the "state community" formed by a number of states that joined one another to form a "unified state" in which the members of the states were "members of the whole state."[2] And he asserted that the formation of the federal state makes "it necessary for the individual states to give up something of their sovereignty, and limit themselves in their state authority in favour of the unified state."[3]

The federal state is calculated on the one side "to give strength and solidarity to the whole, and to make it possible for great enterprises to be undertaken, for commerce with foreign countries to be properly protected, and for the individual to occupy a position of respect abroad." On the other side, it gives to the individual state "the possibility of cultivating the special relations that are suited to the character of its population, and to develop its own life within its own borders."

He pointed out that a reality in the federal state was "the combination between unified strength and the preservation of the peculiarities of the different circles of the population," which is "possible in the single detached state, but is frequently in danger there."

Therefore the federal state gave the states the possibility of maintaining their identity by forming a part of a unified state,

[1] J. Kohler: *Philosophy of Law* (trans.), p. 296.
[2] Ibid., p. 297. [3] Ibid.

and yet of joining together and forming a federation by conceding only a part of their rights. "The federal state is extremely productive of unity, and hence also promotive of culture."[1] Kohler pointed out that the idea of the federal state became fruitful mainly because of the example of the United States. The idea, unknown in the Middle Ages, may, Kohler believes, lead to the formation of a United States of Europe which will realise the mediaeval dream of unity.

The federal state so unites the states that the citizens of the individual states are members of the federal state, and at the same time of the individual states. This is of great importance because the federal state offers "a number of possibilities for development in the directions both of individualisation and unification." The excessive development of collectivity brings with it the danger of extreme centralisation, and the best check on this is to be found in some form of federation.

From the legal standpoint the relation between the federal state and the individual state was "one not of international but of national law." Kohler held that in the federal state the member states have "no sovereignty, but are subordinate to the whole state, just as are the citizens of the states." But the relations between the individual states are relations of international law in so far as the whole state has not taken those relations into its own charge.

Therefore Kohler asserted that the federal state suggests "international law to this extent, that here too a super-national law exists,"[2] because the individual states are subject to the law of the whole state. But this super-state law (*Ueber-staatliches Recht*) is itself "a state system; and it is the law of the whole state, not a system of law beyond the state and rooted in a legal order that lies outside."[3]

The formation of a united state of all nations would be the ideal of cultural progress. Such a state was almost realised in the great Roman Empire and in the great Christian Empire of mediaeval Europe. But these collapsed and there developed a system of independent nations; international law, as the super-national standard, creates legal relations between them. And the growing closeness of those legal relations is shown by the idea of establishing an "areopagus of the nations," or at least a court of arbitration for the settlement of disputes.[4] This desire for peace is a desire for the achievement of culture.

[1] J. Kohler: *Philosophy of Law* (trans.), p. 298.
[2] Ibid., p. 299. [3] Ibid. [4] Ibid., p. 300.

This is the theoretical justification for super-national law. Peace represents fraternalism among the nations, at least a negative fraternalism which may become positive.[1]

But Kohler asserted that "even the boldest glance into the future in this direction can see at the most only state alliances, or federations of states, under the protection of which the individual states would stand, and in which the super-national law would find its support."

As to this super-national law Kohler raised one question of great importance. Does law, created in this way, and in so far as it is a law among the nations, also create indirect rights of individuals? There seemed to him to be two possibilities, either the international law only obliges the individual states to conform to the agreement, while the individuals of the states still remain subject only to their own legislation; in this case the duty of the states is to adjust their legislations in conformity with the super-national law. If it does not the individual cannot enforce the fulfilment of the international legal duty.

The other possibility is indicated by the tendency of modern law "to determine that such a super-national law also grants rights to the individuals which are independent of the legislation of individual states." That development is still in progress, but "no state should cherish the idea that it is completely isolated"; each forms a "part of the great community of states in and with which alone it can operate."[2]

Therefore he asserted strongly that "super-national law without the support of a super-state (*Ueberstaat*) cannot of course be true legislation." But it can be customary law, that is, law developed in legal custom, universally recognised.[3] In this way the time would come when the sovereignty of the individual states would obey unconditionally the authority of super-national law, and the subjects would be treated according to "the international law."

Kohler's ethical justification of the supreme validity of the super-national law above the national law was dependent upon the fact that the state would still be "a great cultural institution," and the nations would "no longer work alone but in a collectivity to bring about the supreme aims of culture."

However metaphysical and monistic neo-Hegelianism might be, the cardinal maxim of this school was the attainment of the supreme aim of culture through the evolution of the political

[1] J. Kohler: *Philosophy of Law* (trans.), pp. 300–301.
[2] Ibid., p. 303.
[3] Ibid., pp. 303–304.

community. Their justification of right and personality in law and state was not confined within the sphere of positive law or the legal assumption of the state, but was guaranteed through the realisation of the law of culture in law and state form.

Therefore Kohler's ideas of federalism or of the world federal state, and of the recognition of the legal supremacy of international law, were the fruit of the idealistic jurisprudence freed from dogmatic positivism.

His attitude towards the ideal of federalism, although he was opposed to the neo-Kantians' categorical formula, was not much different from his application of the law of culture to all the institutions of the human community. Kant's ideal of federation of the states was on parallel lines with Kohler's ideal of the "super-state."

§ 2

An important feature in the history of German legal theories was von Ihering's theory of purpose and use. As Bentham set up the utilitarian philosophy of the "greatest happiness of the greatest number" against the predominant influence of Blackstone's dogma of naturalism in law, so Rudolph von Ihering proposed the theory of social utilitarianism against the dominant historical school of Savigny and the philosophical doctrine of Puchta.

The law of "purpose" was to Ihering a "lever" of all phenomena in the universe. Like psychology and the law of causality, purpose was the motivating incentive of human action and will; i.e. in his well-known formula: "No effect without a cause, namely no volition or, which is the same thing, no action, without purpose."[1] In "cause" the object on which the effect was produced was "passive," whilst in "purpose" the thing which was set in motion appeared as "self-active."

Either in psychological will or in action of experience the practical capability was "the realisation of purpose," and consequently in the concept of life it was "practical application, by way of purpose, of the external world to one's own existence."[2] Internally, the act of the faculty of ideas and, externally, the impulse given to performance by outside influence brought about the relation of purpose to action.

From the law of purpose, that no action existed without

[1] von Ihering: *Der Zweck im Recht*, Vol. I, 1884, pp. 4–5. [2] Ibid., p. 9.

purpose just as no effect exists without cause, action and acting purpose were "synonymous." Therefore he assumed that the existence of the law of purpose deserved to be called law if its realisation was absolutely necessary, or to be designated as rule if it was exceptional and unconscious.

According to utilitarian logical development he urged that "man" acts not only with a purpose but also for a reason, apart from unconscious action.

The purpose must be expressed by reason in accordance with the facts which justified the distinction between egoistic self-assertion and physical, economical and juristic self-assertion, and the theory of morality was accepted as "the ideal condition of life of the subject—complete identity of subjective purpose with the objective."

In the relation of egoistical self-assertion vis-à-vis the inter-relation of the individual interest with that of all others, every phase of human life, either in society or state or any other institution, must be dependent upon social purpose. Ihering, like a later English utilitarian, admitted that the direction of desire exclusively to self-interests produced property for the purpose of men's physical self-preservation, and the right and duty of the law were created for the protection of property.

The right of personality for oneself in legal and ethical expression, the right of ownership and the right of self-existence, produced the state in which the legal expression for the subservience of the state to purpose was "citizenship."

The three statements—i.e. "I exist for myself; the world exists for me; I exist for the world"—were the basis of the system of law; in other words, an artificial justification of the power of the state.[1]

Therefore he assumed that the conception of law contained the two elements: the system of purpose and the system of realisation.

As "life and property presupposed" the law, "so the law presupposed the state." The law must affect the person on all sides of his existence. This assertion of law was what he called "juristic assertion of person."

Therefore the law had a power of coercion in the realisation of individual human existence for the purposes of the whole, i.e. the ultimate purpose of "culture of humanity."

In this assumption the sphere of force was coincident with that of the law and the state. The state in the modern sense

[1] von Ihering: *Der Zweck im Recht*, 1884, p. 67.

had the purpose not only of the preservation of physical and economic self-assertion, but also of the promotion of culture. Society in the sense of modern community was the "actual organisation of life for and by others, and as the indispensable form of life for oneself, i.e. the form of human life in general."

In his social utilitarianism human life and social life were "synonymous," and the conception of society [1] was identical with that of the state, in so far as the latter required external intervention for the realisation of this social purpose.

Differing from the Benthamite "calculus" of ethical aim on the principle of the greatest happiness of the greatest number, Ihering's calculus was tested by the value of the "social purpose."

He designated the sum of impulses and compelling powers over the human will as "social mechanics." This social mechanics, like the physical mechanics which move a machine, was the "principal lever of social motion." To him there were four such levers; two of them had egoism as motive and presupposition, and they were designated by him "reward" and "coercion." And he assumed that without them the social life could not be thought of, since no commerce existed without reward, and no law or state without coercion.[2]

In economic self-assertion there was the reward as a compensation in the equilibrium of the interests of parties by means of the fair competition of trade, but this principle of the idea of justice in trade was eclipsed by the prevailing tendency of the combination movement, and consequently the need of social regulation became an important problem. Thus the coercion of the state and law was necessary for the fulfilment of the social purpose in that law was governmental coercion organised, side by side with the unorganised "social form of coercion of morals."

The state must have force to put the social purpose into effect through the coercive organisation of law. The state therefore was "the society exercising coercion," in other words, "the organisation of social coercion."

The cultivation of the law was the "vital function of the state."

The quality of the law externally was "force" and internally "its normalising of power." As the law meant order and equality, so the inner guarantee was the sense of right, and external security was the administrative law.

[1] von Ihering: *Der Zweck im Recht*, 1884, pp. 87–88.—Ihering's definition of society was that it "is the realisation of the principle that everyone exists for the world and the world exists for everyone." [2] Ibid., pp. 95–96.

The "norm" and activity of law were the factors of law, the value of which was weighed and proved by the requisite measure of social purpose, that is, not the *a priori* balancing of right and wrong, but the empirical test of ultimate social justice. The state was the coercive body, and the law was the norm and power to realise the social purpose.

However logically and psychologically Ihering's theory of purpose left a great gap in which the stream of criticism could penetrate, the utilitarian justification of state coercion for the social purpose gave a dim light to the idea of German political science.

But it was very much to be regretted that he endeavoured to clarify his theory in regard to the relation of the law and the state in jurisprudence, but did not extend his application of the principle of the social purpose to political science and public administration, as did Bentham, who was the real founder of the English constitution in the reform of 1832.

The neglect of the study of federalism by Ihering greatly diminished the value of his work.

Nevertheless he asserted that international law and the regulation of sovereignty in public law had no legal character, but only that of moral precepts and duties.[1]

Social utilitarianism in its theoretical nature might be able to establish the adequate principle of federalism. But Ihering's departure from the usually accepted system was his theory of social purpose from which he looked down on the rights and liberty of individuals, in contrast to Bentham and J. S. Mill, who looked upon social reason from the individualistic view-point.

Ihering's theory of coercion as the "monopoly of the state" had less validity than Kohler's assertion of super-national law in the theoretical and practical justification of federalism, despite the former's adequate background of utilitarianism.

No matter what criticism may be made of his social utilitarianism, in the shift of political ideas from individualistic to social utility in our time his contribution certainly marked a considerable advance of utilitarian political ideas.

Roscoe Pound, in America, described Ihering's work as "of enduring value for legal science," and added that "the old juristic theory of law as a means to individual liberty, and of law as limitation upon individual wills to secure individual liberty, divorced the jurist from the actual life of to-day."[2]

[1] von Ihering: *Der Zweck im Recht*, 1884, pp. 323–324.

[2] Roscoe Pound: *The Spirit of Common Law*, p. 205.

§ 3

The works of Karl Marx and Engels, together with the remarkable contribution of Lassalle, gave an entirely unique development to German socialism and an immense impetus to the general progress of social science in Germany.

The material interpretation of history on the basis of Hegelian dialectic presented the new conception of society which was sharply divided into two classes, free men and slaves in the Grecian and Roman states, lords and vassals in the feudal state, master and men in the mediaeval guild society, and now bourgeoisie and proletariat in our capitalistic community.[1]

Society up to the present day was formed by the divergence of expropriating and expropriated classes. Not only economic, but also legal culture, religious and all social institutions, were the fruit of the bourgeois community through which these functions were carried into effect by means of the usurpation of the surplus of wealth which was the one and only product of labour. In the Marxian theory the modern state was the organ of coercion for the betterment of the successively declining numbers of a certain class, to wit, the bourgeoisie.

The Communist Manifesto of Marx and Engels in 1848 was a strong incentive to the formation of the conception of the communistic state. Marx departed from the Hegelian philosophy by a different historical interpretation and diversity of metaphysical conception, but established an economic and scientific method on the basis of Hegelian dialectic, and replaced the Utopian doctrine of Proudhon's communism by "scientific socialism" based on the apparently incontrovertible logic of thesis, antithesis and synthesis.

The state, therefore, was a body politic to utilise the surplus value of labour for general human activities, not only in law or government but also in economics, culture and every other social institution, consequently functional in nature.

In the bourgeois society the state was a product of the expropriating class to coerce the mass of the people by law and government, and to use by far the greater amount of the surplus value of labour for the benefit of the minority privileged class.

[1] Karl Marx and Friedrich Engels: *Communist Manifesto* (*The Communist Manifesto of Karl Marx and Friedrich Engels*, with an introduction and explanatory notes by D. Ryazanoff in 1930, pp. 25–26).

The application of the Marxian theory produced two channels of development, those of socialism and communism.

The revolutionary call to capture the state for the good of the proletariat who had "nothing to lose but their chains," was to be the prelude to the sudden transformation from the intolerant "bourgeois state" to the "proletariat state."

Marxian communism gave birth to a strategy which produced the centralised state and the rule of dictatorship. But Marxian socialism together with the teaching of Lassalle was revealed in the formation of the policy of the "social democratic" party and the parliamentary reforms of the federal constitutional state.

Marx's attitude in jurisprudence was manifested in 1843 by his essay *Zur Kritik der Hegelschen Rechtsphilosophie*. His main condemnation of the German idealistic philosophy was that its horizon was so limited as to exclude philosophy from the realm of German actuality "unless it imagines philosophy to be implied in German practice and in the theories subserving it."

But the formation of the link between the real vital force of the people and philosophy was of great importance, and the critical struggle of philosophy with the German world was the main struggle of his time.

He pointed out in regard to Hegel that the criticism of German jurisprudence and political philosophy "had received through Hegel its most consistent, most ample and most recent shape as at once the critical analysis of the modern state, and of the actuality which is connected therewith," and, "in addition, the decisive repudiation of the entire previous mode of the German political and juristic consciousness whose principal and most universal expression, elevated to the level of the social science, is speculative jurisprudence itself."[1]

He emphasised the view that this speculative jurisprudence placed the modern state as an "abstract and exuberant process of thought," but also made the conception of the modern state an abstraction of a real personality, "because and in so far as the modern state itself makes abstraction of real men or only satisfies the whole of men in an imaginary manner."

His main protest against the hypothetical doctrine was that "theory becomes realised among a people only in so far as it represents the realisation of that people's needs."

Therefore he sought political emancipation from the *Ancien*

[1] Karl Marx: *Zur Kritik der Hegelschen Rechtsphilosophie* in *Deutsch-Französische Jahrbücher*, 1844.

Régime of the German *status quo* and economic freedom from the German bourgeois state. Poverty was not a "natural circumstance," but "artificially created, not masses who are held down by the weight of the social system, but the multitude released by the acute break-up of the society, especially of the middle class, which gives rise to the proletariat." If the proletariat proclaimed the dissolution of the *status quo*, it was merely announcing the secret of its own existence, for it was in itself "the vital dissolution of this order of things," and if it desired the "negation of the private property," it merely elevated to "a general principle of society what it had already involuntarily embodied in itself as the negative product of society." He argued that just as "philosophy finds in the proletariat its material weapons, so the proletariat finds in philosophy its intellectual weapons" for the attainment of the ultimate goal of the emancipation of mankind.[1]

"The head of this emancipation," he said, "is philosophy and its heart is the proletariat."

His materialism was the real foundation in a total relationship of production and the social-economic structure, in that legal relation and political forms were to be conceived neither from ourselves nor from the so-called universal development of the human mind, but were to be found rooted in the economic life.

He asserted that this mode of production in material life determined the general character of the social, political and spiritual processes of life.[2] And he added that "it is not the consciousness of men that determines their existence, but, on the contrary, this social existence determines their consciousness."

This attitude of Marx produced the philosophy of historical materialism, and gave a strong incentive to the social class interests in the state and society.

Marxian politics aimed at the formation of a centralised unitary state, whose functions should absorb all the branches of social and human activities under the guidance of the social consciousness. In his numerous writings his only condemnation of centralisation was his indignation manifested at the abolition of the Paris Commune in 1871.

The Marxian state was, in the principle of communism, based on centralisation by force, but, as Engel's famous phrase was that the state will not be abolished but will "wither away," the state was the transformation from the principle of force

[1] Karl Marx: *Zur Kritik der Hegelschen Rechtsphilosophie*, in *Deutsch-Französische Jahrbücher*, 1844. [2] Ibid.: *Critique of Political Economy*, Preface.

to that of consent after the proletariat state had been consolidated. The revolution of the Paris Commune proved the need for a state function in which "from the members of councils of the commune down to the humblest worker everybody in public service was paid at the same rate as the ordinary working class"—a new proletariat democracy. The notion of participation by a share of the workers in state management was the notion of a new Soviet system which proceeded from a federal conception in function and territory.[1]

That the Marxian doctrine was an essential contribution to the class struggle in our bourgeois state is impossible to contradict by any alternative theory in our political or social movements of to-day.

In the highly developed capitalist state Marx's prophecy of the centralisation of capital has been realised to-day in the form of centralised management of economic processes by combination and trust. The Fordian principle of high wages for the increase of purchasing power was not easily applicable for the defence of the large-scale capitalist states like that of the United States of America of to-day. The highly developed capitalist combines vis-à-vis the strongly organised working-class associations led the politics of the modern state to the absolute justification of Marx's prophecy of class conflict.

Marx's principle of "the expropriation of the expropriated" was gradually consolidated in the development of the capitalist economic regime, and brought about the solidarity of the socialist and labour parties in various capitalist states.

Centralisation in economic functions and organisation has become a predominant characteristic of the modern community.

The progress of the huge scientific systems of the trust, either vertical or horizontal, within states, and the growth of the international cartels or combines in various lines of production and distribution, especially the rise of rationalisation, have brought about a new conception of "economic federalism." At the same time the consumers' co-operative societies and trade union organisations with the numerous professional associations have had an immense development nationally and internationally on a federal system.

Not only these, but also all social political institutions in every line of human activity, have opened a new road from national to international federal organisation.

Marx's *Capital* was no doubt of the greatest significance in

[1] Cf. Vol. II, Part III, Chap. VII, pp. 845–852.

economics and also in politics in the present day, just as Rousseau's *Social Contract* was the main issue in the eighteenth century for the emancipation of the human mind so long subservient to the mediaeval supremacy of the *raison d'état.*

But the real basis of Marxian philosophy was the principle of monism and of *a priorism*, and the ideal of the Marxian state is not the federative republic but the unitary republic. Marx's main contribution to the modern state theory is, I think, his breakaway from the old hypothesis of the so-called democratic state. He suggested to us in the last quarter of the nineteenth century the very root of the evil of the modern capitalist state on his economic interpretation. In order to bring about the reconstruction of the social structure, he demanded the *raison d'être* of the state and a "leviathan" state of the proletariat dictatorship. But it is quite true, as Laski has pointed out, that "neither Marx nor Engels meant the abandonment of the democratic ideals or the use of terrorism upon the scale the Russians were willing to attempt."

Just as the Rousseau theory of social contract seemed to justify the excesses of the French Revolution, so did the Marxian doctrine become the fundamental maxim of the communistic revolutionary system and its ideology might become "more and more dogmatic and unprogressive, repeating its sacred *credo* and issuing its disregarded orders to the proletariat of the world."[1]

So the Marxian theory produced constitutional socialism on the one hand and revolutionary communism on the other. The main question to which one wants an answer is not as to the state of the proletarian dictatorship in the transition period from the downfall of the capitalist state to the establishment of the ideal communist society, but the method it is to use to attain its end; that is to say, is it possible to create the ideal communist democracy evolved from rule of dictatorship? The main controversy which exists in our time between communists and socialists is not so much due to Marx's economic doctrine, as to the political strategy and tactics which that doctrine is made to serve in the communist creed.

It is interesting to note that the conflict between the socialistic federal constitution and the Soviet council system was the main issue in the formation of the new federal constitution of the German Republic in the Revolution of 1919.[2]

German socialism was evolved from the Marxian doctrine in German trade unions as well as in the Social Democratic

[1] H. G. Wells: *The Open Conspiracy*, p. 87. [2] See pp. 841-860, 1081-1083.

Party in the German *Reichstag*. The champion of this movement was Ferdinand Lassalle, whose efforts bore the stamp of great sincerity.

Lassalle was a brilliant orator and a political agitator who was not an adherent of the Marxian idea of class struggle in Germany, and had an immense effect on the political part of socialism and the practical side of the labour movement, especially in the direction of the economic and political representation of the interests of the working class in the state.

His famous speech at the Central Committee of the German Labour Congress at Leipzig was an appeal to the workers of Germany against the state. "I have already furnished you," he said, "with the proof that the state is nothing else but the great organisation, the great association of the working classes, and therefore the assistance that the state gave to those smaller associations would be nothing more than complete social self-promotion, entirely legitimate by nature and law, which the working classes in their capacity as a greater association grant to their members as single individuals."

He added that "once more I repeat that the free individual association of workers—but yet a free individual association rendered possible by promotion and support of the state—is the only way out of the wilderness into which the working class has been thrown."

He addressed the representatives of the interests of labour in these terms: "Therefore the universal and direct right of election is not only your political right, it is also your social fundamental principle, the essential condition of all social assistance. It is the only means of improving the material condition of the working classes."[1]

He expressed the view of natural right in his socialistic politics that "the worker must not be exploited, that no human being had the right to wear out another human being."[2]

Speaking on the nature of the constitution, he set out his view of the state and the system of law. He differentiated "between fundamental law and law, in that the former must be the basis of all other laws and in the conception of the basic law there is embodied the idea of active necessity, of a vital

[1] F. Lassalle: *Oeffenes Antwortschreiben an das Central-Comitee zur Berufung eines Allgemeinen Deutschen Arbeiter-Kongresses zu Leipzig*, in *Reden und Schriften*, Vol. I, ed. by G. Hotschick, p. 55.

[2] Gumplowicz: *Geschichte der Staatstheorien*, 1926, p. 381.

force, which is bound to make that which is formed by it into what it actually is."[1]

He remarked that if the constitution was the fundamental law of the land, it was either something that could be more clearly determined or an active power which was bound to make all other laws promulgated in the country into what they actually were. Thus he asserted that this definitely active power was no other than "the actual relations of power which exist in any given community."[2]

This actual relationship of power was "that active working force which determined all laws and legal dispositions of this association in such a manner that they could not deviate in essentials from what they actually were."

On this sovereign authority of the constitution he based a strong appeal for the right of German citizens politically and economically to participate in the working of the constitution, and said that the problems of the constitution were not original "questions of law, but questions of power." He asserted that the "actual constitution of a land existed only in the actual relations of power prevailing in the century."

The state was thus based not on the arbitrary power of the ruler, but on the relationship of power legally directed by fundamental law and emanating from the people.

In his work *System der erworbenen Rechte* Lassalle set up the conception of law on the principle of "non-retrospection" (*Nichtrückwirkung*).[3]

He disagreed with the juristic empirical theories and the idea of the natural law, and emphatically asserted that the Hegelian synthesis of will was merely the concrete manifestation of thought; thought was the theory and will was the practice. On the basis of Hegelian metaphysics he admitted that the notion of the *Nichtrückwirkung* was based on "nothing else than the conception of the subjective freedom of the spirit."[4]

Departing from the Marxian conception of historical materialism he, like the neo-Hegelians, adhered to the idea of the *Kulturstaat*, namely, that culture was the creator of social institutions and the embodiment of this culture was the state.

[1] F. Lassalle: *Ueber Verfassungswesen*, in *Reden und Shcriften*, Vol. I, p. 63.
[2] Ibid., p. 64.
[3] F. Lassalle: *Das System der erworbenen Rechte*, Vol. I, 1880.—The principle is: (i) no law may be retrospective which affects individuals only through the intermediary of action of will (voluntary acts); (ii) every law should be retrospective which affects an individual without the intermediary of such voluntary acts.
[4] Ibid., p. 52.

In opposition to the Marxian idea of communistic revolution he advocated trade union movement promoted by parliamentary democracy. Universal suffrage and parliamentary control by the working class were the greatest needs for the welfare of mankind.

The real source of right in human society was "the common consciousness of the whole of the people, the universal spirit (*der Allgemeine Geist*)."[1]

His main requisite, in regard to the conception of this right, was that it is only necessary that public opinion be informed of the sphere of right, i.e. the spiritual content as well as the substance of its own will. This was his theory of acquired rights, in complete harmony between individual acts of will and the universal spirit.

In his discussion of the Ròman and Germanic law of inheritance he assumed that the state was the evolution of family and social institutions.

In the socialist proposals as to constitutional reform Bebel advocated the emancipation of women and the opportunity to free themselves from unreasonable exploitation and the domination of the capitalistic state, and Bernstein was the first introducer of Fabianism in Germany as opposed to the Marxian theory of "catastrophe," and as a revisionist was in favour of Proudhon's federalism.[2]

Rodbertus, however, strongly maintained the Marxian theory of increment, adhering to the Ricardian conception of the state in which social distress must be remedied by the state by means of standard laws of work and a standard output.[3]

Among Marxian socialists Kautsky was an outstanding figure in promoting harmony between Marxian principles and the socialistic trend in order to further the development of German socialist politics.

But even then the political programme of the Social Democratic Party contributed nothing material to the federal movement of Germany, except that urge towards emancipation of the monarchical-federal state, which was later transformed to a federal republic.

[1] F. Lassalle: *System der erworbenen Rechte*, 1880, pp. 164–165.

[2] Bernstein: *Die Voraussetzungen des Sozialismus und die Aufgaben der Sozialdemokratie*, 1899. Bebel: *Die Frau und der Sozialismus*, 1899.

[3] Rodbertus: *Der Normal-Arbeitstag*, 1871. *Das Kapital*, 1913.

§ 4

The general attitude of socialism towards law and state had an immense effect on the general trend of ideas in politics and jurisprudence, and especially on the sociological school.

Lorenz von Stein explained the nature of society and state on the basis of sociology independent of economic socialism. He conceived that society was something more than "an unorganised and accidental aggregate," and was "an independent and characteristic expression of human interests."[1] Every association in his conception was a society, and all societies, however different, must have a common factor.

He characterised human society in the following manner. "The order of society conditioned by the participation of human life (problems) and things (advantages), and maintained by the protection of the law and by property and family," was "the human society." On this assumption he asserted that the conception of society was expressed in the conception of "individual personality."

Admitting the struggle between the power of labour and that of capital, i.e. of money and industrial wealth, modern human society was to him the "organic unity conditioned by the distribution of wealth, mediated by the organisation of labour, sustained by human needs, and fixed by legal institution and family tradition."[2]

He assumed that there was "a life of the state" besides the action and deliberation of the state—that is, "the society."

The law and function of the state was therefore based on the society which was the life of the state.

§ 5

Rudolph Gneist's contributions of the notion of "self-government" and of state and society were noteworthy in the development of the German federal idea.

At an earlier period philosophy sought to lay down the nature of the state and the theory of political economy tried to establish the elements of society; but in view of the inter-

[1] von Stein: *Der Sozialismus und Communismus des heutigen Frankreichs*, 1842, p. 15.
[2] Ibid., *Die Volkswirthschaftslehre*, 1878, p. 458.

dependence and mutual reactions of these two aspects of human life, the traditional conception of the state must be modified. Even in his time all differences between kinds of trades and professions were becoming less distinct, and it was fast becoming impossible to demarcate between workers and owners. And it was noticeable, in every political movement, that in society there was life independent of the state, but yet affecting the state life.[1]

Social groups were outwardly united in the absolute state which made no allowance for "independence and self-responsibility of the other association classes."[2]

It was quite true that in theory the constitution recognised the participation of all classes in the state. In reality the only principle firmly established in the complicated organisation of property was that any kind of possession necessitated the dependence of the non-possessor, that this dependence permeated family relations and family life, and that the domination enduring through generations imbued the state with an element of servitude.[3]

In this state of society, especially in the modern mechanical world, the struggle for one's self and one's class in the higher or co-ordinate groups of owners as well as of labour was the natural outcome of "the various groups of society to protect their own interests."[4]

The struggle to emerge from a state of domination was begun by the church and continued by the rise of the German free towns; the spiritual freedom thus acquired was due to the Reformation and intellectual freedom to the revival of "classical literature" in the period of Germany's highest literary achievement.

But Gneist asserted that the spirit of moderation, which permeated this state formation in its multitudinous forms, was "the spirit of justice which together with its strong claims to the independence of the individual could acknowledge and respect the individual freedom of others."

He designated as *Rechtsstaat* that organisation which undertook to restore to a distracted society civil freedom, and to maintain it, and discussed this theory in some detail.

Gneist firmly believed that as the individual should by the exercise of his own free will master the conflict of his impulses and desires with his duties, so it was the eternal task of human

[1] Rudolph Gneist: *Der Rechtsstaat*, 1879, p. 2.
[2] Ibid. [3] Ibid., p. 3. [4] Ibid., p. 4.

society to master the conflict of interests and overcome oppression by the establishment of law and justice.

Gneist asserted that the union of men in the state was not merely requisite for the better attainment of individual ends, but the state existed "independently in the ethical nature of men, just as society is based on the system of his material needs."[1]

Material welfare is merely a means to an end. This he claimed to be the standpoint of German idealism, maintained by the successive conflicts of the Middle Ages, of the Reformation period and of his own time.

Whilst in the so-called "Age of Enlightenment" opposition to the state as it existed in France led to the formation of theories which arose out of the requirements of contemporary society, the critical tendency of current German philosophy began to test the state by its utility to the individual. The conditions were totally different from those in France—monarchy in Germany had an idea of its vocation quite different from that taken by the Bourbons, and in Prussia the Hohenzollerns had begun a new organisation of state and society. And consequently in Germany the legal conception of the state became predominant and was elaborately developed. From the time of Pufendorf and Kant it became one-sided, and almost regarded the state as a coercive instrument for the realisation of law (*Recht*).

The nature of this conflicting element in society, after the downfall of the hegemony of the Roman and Carolingian Empire and the Reformation, caused the rise of the "territorial state" which was the characteristic of our own generation.

The outbreak of the French Revolution brought the collapse of the existing social order in Germany. The unity of Germany was the result of the conflict between Prussia and Austria. "The new German federal state could complete its development and consolidation on a uniform social and national basis."[2]

His special contribution to German federal ideas was his introduction of the English idea of self-government. As long as there was an "antagonism between the collective organism of the society and the organism of the state," all the achievement of the state with its character of enforcement and its strong aims stood permanently against the very interests of the association. Therefore every group of society as such had a participation in the will of the state by means of class rights. Therefore he asserted that: "If society forms in this direction

[1] Rudolph Gneist: *Der Rechtsstaat*, 1879, p. 28. [2] Ibid., p. 25.

a connected organism, so there is need of a state counter-organism which subordinates the social interests to itself, combines them and by constant exercise forces and accustoms man to fulfil his state duties. State and society must first be bound together, connectedly and permanently (organically), from below, in their individual members, in order that a people may be given the faculty of self-government, i.e. freedom in the system."[1]

This state antagonistic organism was according to him "self-government," which "divided the personal obligation and burdens necessary to the exercise of the internal order of the state according to the ability of the various social classes. It grouped the personal obligations and monetary payments according to the nature of the locally active state authority in the district or communal unions as the holders of the legally determined state functions."[2]

Therefore the state, especially in its service as communal self-government, served to unite the interests of society.

This school of thought, which may be called "sociological extremist," gave a new idea to functional federalism.

Ludwig Stein, a sociological idealist, published a detailed study of the sociological argument in social and political philosophy in his work *Die Sociale Frage im Lichte der Philosophie*, 1897.

The principal characteristic of his theory was the rejection of the hedonistic principle and the introduction of the theory of "social optimism."

History was the manifestation of the progress of the human idea. Assuming Hegelian ideas as well as those of Leibnitz and Hartmann, his "evolutional optimism" illustrated the fact that any development of ideas followed in an upward and spiral, but not in a circular, course.

Admitting the development of "capitalist collectivism" by the agency of syndicate or trust, he advocated social evolution of state or municipal enterprise, and of various other social associations, such as the Workers' Union or the Anglo-American trade union.[3]

Like Proudhon, he objected to the extreme individualism of Nietzsche and the Manchester liberals, and also to the communistic idea if carried to extremes.

[1] Rudolph Gneist: *Das Self-Government in England*, 1871, p. 881. [2] Ibid.
[3] Ludwig Stein: *Die Sociale Frage im Lichte der Philosophie*, 1897, pp. 568–571, 576–577, 579–581.

He believed that social reform could be advantageously aided by state confiscation of all sources of potential wealth, such as mines, of all water power, and, finally, by means of state exploitation of all future inventions.

In the relation of the socialisation of the social function to individual freedom and equality, the law must be an "inherent form of the imperative" which secured "the absolute equality."

He asserted that "before the law, and only before it, can in a legal and cultural state all citizens be absolutely equal."[1]

The original equality which derived from all other conditions by means of the "social evolution and property" produced its *ultimum refugium* in the law. In this alone absolute equality was "possible only in our present-day evolutional phase."[2]

Since the highest aim of evolution was the refinement of human culture, the mission of politics was, to Stein, to make civilisation prevail universally. In this respect he suggested "European confederation" which, like that of the Swiss confederation, should ensure harmonious co-ordination.

His idea of "social optimism" led to his conclusion that the highest world culture could only be realised through a "world federation."[3]

He argued that the political constellation of mankind must be manifested through world religion, world morals and world laws, in the harmony of social ethics, and in political freedom and legal equality for all.

Stein's ideal was universal federalism in politics for the realisation of his principle of "social optimism."

§ 6

The sociological school attained to a distinctive position when Schäffle and Gumplowicz contributed the thoroughgoing study of the sociological idea of the state.

The main maxim which they put forward regarding the state was the abandonment of the conception of the state as a mere aggregate combination or a totality of individuals, and its replacement by the idea that the small or large groups and collective associations in which men were associated at the outset developed and consolidated into a state through the conflict

[1] Ludwig Stein: *Die Sociale Frage im Lichte der Philosophie*, 1897, p. 605.
[2] Ibid.
[3] Ibid.: *An der Wende des Jahrhunderts*, 1899, pp. 392–410; *Die Sociale Frage im Lichte der Philosophie*, pp. 551–562.

between the groups as the result of social and economic circumstances.[1]

Albert E. F. Schäffle, in his work *Bau und Leben des Socialen Körpers*, 1875, sought to expound a general system of sociology—that is, "a philosophy of the special social sciences," so far as the contemporary state of social studies permitted, and to re-state the bases of the social system in accordance therewith.

He depicted the body social as a complex, highly developed and differentiated organism analogous to the natural organism.[2]

Outstripping Spencer's evolutionary ideas, Schäffle acquiesced in the views of the rationalist Lotze with regard to the organic social system. While accepting "the final results of this empirical rationalism," Schäffle declared that even the conditional acceptance of these, for purposes of exact investigation, did not ignore the spiritual value either of the individual or of the body social.[3]

The body social in his view included "the inorganic and organic bodies as the material of its structure."

He asserted that in particular the highest production of organic creation, the spiritually animated human body, became "the instrument of social life, the active constituent and the most delicately articulated machinery of the social body."[4] The latter appeared to him as a complexity of persons and external values—"a higher integral and differentiation of all inorganic and organic bodies and movements."

Also the body social employed its person and property elements in particular combinations and activities, these elements not being isolated, but existing only as components of personal associations and of collective properties capable of acting as units. Thus he assumed that the simplest social unity was the "family without which no human being could come into existence, develop and propagate, and was already an articulated entity of persons and property, of physical and intellectual activity."

Moreover, the more connected social arrangements and institutions became gradually transformed through an inter-weaving of persons and properties into a more simple and a more consolidated "social tissue" and "social organs," from the latter of which there eventually developed "a kind of ethical organism."[5]

Social institutions were to be considered partly according to form and partly according to the different method of their arrangement: the former led to the "theory of forms of

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. I, pp. 1, 12, 13.

[2] Ibid. [3] Ibid., pp. 16–17. [4] Ibid., p. 18. [5] Ibid., p. 142.

organisation or of social personality," and the latter to the "theory of social institution, or of social organisation."[1]

The organs of the body social have a great diversity of form, especially of legal form.

He observed that the choice of form for every organ is not determined "at haphazard, but by the nature of its content or the function which it has to serve."

The most fundamental difference is due to the contrast between those conditions which are organic and physical and those which are entirely ethical.

To the physical group belong the institutions connected with the family life, but most social organs were arbitrary and artificial creations. They were either individual institutions (founded and governed by individuals) or collective institutions (*Verbände*).

He divided the collective institutions further into two large groups, namely, the "independent public institutions—the corporations—and the institutions of free private unions."

Legally (but only as the result of a very gradual historical development) there are three fundamental classes of collective institutions: (*a*) family establishments; (*b*) establishments set up by free private unions; and (*c*) corporations and public establishments. The first are phenomena of relationship (*Verwandtschaftserscheinungen*); and the latter two classes are "free institutions."

The essential distinction between the corporation and the "free union" is that the former is based on "personality," and as an independent whole superior to its parts has a quite different structure from that of the "free" union, which has for its purpose merely the strengthening of the private personalities of all the associates.[2]

He showed that in the corporation the individual acts as a subordinate and co-ordinate part of the whole, whereas in a permanent or temporary "free" union the individual remains independent and submits himself voluntarily to certain limitations, usually for the sake of advantage to himself. As a member of a corporation or of the state (regarded as a corporation of corporations) the individual remains always a part of an independent and public social being, and is therefore subject to the public law, whilst as a participant of a "free" union he is only in the relationship of private law.

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. I, p. 142.
[2] Ibid., p. 143.

Externally the corporation as a juristic personality has a completely independent existence over against other equally independent social organisations; internally the individuals belonging to it must be regarded only as members of the independent whole, and therefore as subjects of public and not of private law. This difference is due to the unbridgeable gap between an independent corporation and a free private establishment of persons and property; the former is based on social interests and the latter on private interests.

Schäffle divided "free" unions into the following three classes: (*a*) purely private interest associations, especially associations formed for purposes of gain, such as joint stock companies, and limited liability companies (*Kommanditgesellschaften*); (*b*)" interest associations" (generally for gain or private economic purposes), with internal solidarity of the members, the so-called corporations, e.g. for production, trade, insurance; and (*c*) unions for the representation of the communal interests, without consideration for, or at least without restriction to, the exclusive interests of the members of the association or corporation.

Functionally corporations and unions (including under the latter term societies, guilds and associations) are specially adapted for the carrying out of special tasks. But as to the value of these corporations it must be recognised that the old class and vocational corporations cannot be regarded as any longer of utility. But it does not follow that corporations representative of vocations and businesses, and many other institutions (*Anstalten*) having the spirit and forms of public law, are and will be always unutilisable and should be set aside. For there are some manifestations of every ideal or material function of social life for which a permanent and authoritative organisation maintaining the dominance of the collective purpose over the arbitrary individual will—that is, some form of corporation—is requisite.[1]

This shows itself in the community, the state and the church. Schäffle placed the state in the same category of corporation as the community and the church.

Thus Schäffle held that the ideal and material sphere of interests is a special sphere in which neither the speculation of private interests nor the power and coercive authority of public corporation can alone offer an effective solution, but there is always need for both forms of union and corporate establishment. There is need also for the political unions—that

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. I, p. 146.

is, associations whose purpose it is to exercise a moral influence upon the formation and operation of the collective will of which the state is the representative and expression.

In the corporation, in which the whole comes before and is superior to the parts, the members can exercise a great influence upon the conduct of all the affairs of the corporation, if it has a liberal constitution, but they do this not as individuals actuated by private interests, but as members having obligations as well as rights.

Therefore the internal life of the corporation is within the sphere of public law, i.e. it is an independent juristic person. Thus for a corporation to be legally constituted it must be formed in accordance with the provisions of public law and with the prescribed formalities; only so can the personal and institutional independence of the corporation and its supremacy over its parts be established.

These corporations can be brought into being either compulsorily (as, for instance, when a territorial corporation possessing legislative power brings new corporations into existence and bestows on the latter constitutions and the power to levy taxation), or if a community which is desirous of becoming a corporation obtains its recognition as a corporation by the state in accordance with the current provisions of the law—a process which is called "incorporation." Thus we have "compulsory" corporations and "voluntary" bodies corporate.

The continuance of the corporation and its institutions is independent of the private desires of the members as it possesses a "juristic personality."[1]

Schäffle held that the corporation is "a need of all times" both present and future; its form will, and must, vary from time to time.

Originally the family or tribe or race was a substitute for the corporation, but the corporation developed from this natural organised basis of the human association. But unity of race cannot be permanently the basis of human association: with the change from the nomad state to settlement, in part the community of locality and land, and in part the community of vocation, assumed far greater importance for the division of the human race.

Corporative institutions are especially adapted to the fulfilment of a collective purpose of a general (universal) nature, but some special public interests require special independent

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. I, p. 154.

institutions. So there are "universal" and "special" corporations. Schäffle asserted that "we recognise corporations of a universal kind in the local district, provincial, state and imperial communities; that is to say, complete and many-sided communities representative of collective interests are the outcome of territorial unity. Consequently, the universal corporation can be described shortly as the *territorial* corporation which is permanent, universal and independent."

These institutional corporations of far-reaching and permanent scope become naturally organs to give effect to the collective will and power—that is, they become the political centres of the collective life of the body social and of all its parts, from the empire and state down to the local communes.[1]

Just as "special" organisations and "special" institutions serve to give effect to the common will of the "special" organs of the material and moral life of the people, so the unitary will and action relating to the whole life of a people—in both its internal and external manifestations—are served by a "universal" or all-comprehending corporation—that is to say, at the present day the state with its communal bodies. Historically it is the corporations with a territorial basis which have become the representatives of this common will and the agents for this common action—that is, have become "universal" corporations. And the combination of unitary will with unitary power has proved to be essential. For supremacy of power—or internal (spiritual) authority and external (physical) force—was necessary to overcome the internal and external opposition of individual will and action. Without that power the state organs would be powerless against the popular will, would be useless and would break down.[2]

But the whole social will does not become vested in the organs of the unitary will and power. These organs constitute rather, in relation to the sum of the wills and actions of the innumerable social units which operate independently, merely a central machinery of control, modification and co-ordination. But even so there are a great many reflex workings of these units of which the central organs never have cognisance.

Thus Schäffle held that communes and states are not central organs (*centrale Organe*) for all the spiritual (*geistige*) activities of the collectivity, but only for that "universal" unitary will and power which serves the purposes of the collective life. There

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. I, p. 155.
[2] Ibid., Vol. II, p. 427.

must of course be close relations between these central organs and the central organs of other institutions which serve the spiritual life of the people, but normally the two sets of organs are not identical.

The state then is the "regulating central machinery for the co-ordination of all forms of social collective action and an instrument for positive intervention to secure the maintenance of the whole."[1]

The task of the state is "the unitary integration of all social deliberation and action in the interest of the preservation of the whole and all the essential members thereof." Therefore Schäffle asserted that in the central "universal" corporation—that is to say, in the state—the whole people became a unity and attained to individuality.

Schäffle divided these manifestations of social will and action into three main categories: (i) Those which are normally entirely withdrawn from the positive and direct influence of the central stimulating and restricting organs. Those which constitute by far the greater part of the collective activities in a given society (whether those of individuals, families, business concerns, communes or associations) normally are left by the organs expressive of the will of the whole state and by the unitary will and power organs of the provincial or other divisions of the state to take their own way. (ii) Those which are subject only to the supervisory influence or control of the highest organs, operating for the purposes of control, co-ordination and assistance. This intervention is based on the supreme rights of *inspectio* and *advocatio* inherent in the state and essential if the various movements are not to be in conflict, and can be modified to meet changing conditions. (iii) Those decisions and actions which constitute the direct activities of the state. These are of two kinds: (*a*) those general rules made by the unitary organs of the will of the sovereign community for the conduct of all persons subject to their authority, i.e. constitutional and other general laws, decrees and orders of the state legislative, executive and administrative bodies; and (*b*) those decisions which result in direct action by the central organs themselves. The higher the development of the state, the less need is there for the support of the central power to the other (subsidiary) organs; on the other hand, even in the most decentralised states there must remain some matters which can be dealt with only by central organs. Consequently, when one speaks of the

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 428.

"unitary" or "collective" organs of the will and action of the body social it must be constantly borne in mind that these terms are used only in a relative and not in an absolute sense.[1]

Their limitation has three consequences. (i) It is impossible to anticipate—at any rate for a very long time—the cessation of sovereignty in the sense of international law; consequently, the guidance of human civilisation depends not upon some organ of a supreme will, but upon the agreement and interaction of a number of state powers. (ii) In the same way the decisions taken by the governing powers in the individual state are not the outcome of any single organ of will, but are in large measure the result of conflicting forces seeking to obtain the support of a whole complex of representative and governing organs, constitutionally entitled to share in the taking of those decisions. (iii) Under the central organs there continue in being organs which can will and act for the whole life of the territorial associations—that is to say, communal unitary organs which establish rules for their own more restricted spheres, and act in the collective interests of the inhabitants within the limits legally prescribed for them by the central organs.[2]

These partial and locally limited will organs were formerly themselves sovereign or semi-sovereign;[3] now they are merely members of the state organism, and act on behalf of the central organs within the sphere allotted by it to them. But they possess also their own sphere of activity independent of those central state organs, and are in themselves territorial corporations for self-administration—that is, subject to the supervision, assistance and stimulus of the state power, and distinct from the self-administration of special institutions, such as those for the promotion of transport and transit, trade, education, science, art and religion.

Schäffle defined the commonwealth (*Gemeinwesen*) as the content of state and communal institutions, as the organ set up to bring about and maintain the unity of the national will and power.

The purpose of the state is the maintenance by the creation of unitary will and action of all those interests of the community which are common and can be secured only in common.[4]

The development of society into the state, or rather of many groups into states, the development of the innumerable early concentrations of will and power into independent political

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 430.
[2] Ibid., pp. 430–431. [3] Ibid., p. 431. [4] Ibid., p. 433.

centres, and the subordination of a multitude of petty state formations under a few great states—all this is to Schäffle the inevitable consequence of an internal and external struggle for existence. The rise and development of the state, and the changes which its nature has undergone, are to him not accidental or arbitrary, or even due to the will of the members of the community. They are inevitable; the makers and overthrowers of states affect only the *manner* of formation and change, but not their *nature*.

From this analysis it results that the content of the state activity is firstly the positive direct fulfilment of purposes of the collectivity, and secondly, the regulation of the independent action of all the self-active members of the society.[1]

Schäffle laid down that for the structure of the state the primary necessaries are land (as a territorial basis), property (whether obtained by gift, purchase, taxation or expropriation) and population (including subjects or citizens and aliens). In form the state is an externally consolidated but internally complicated system of basic institutions, including a definite system of settlement (*Niederlassungswesen*), provision for national defence (in which Schäffle included not merely fortresses, arsenals and warships, but also prisons, hospitals and dykes), the administration of finance and of the state property, technical departments of all kinds, and the institutions necessary for the cultural activities of the state.

Passing next to the organs of state life, Schäffle divided them into two groups: (*a*) those which are invested by the constitution with the powers of the state, and (*b*) those which by their influence upon the constitutional organs affect the state life. The first he called the "organs of state power," the second "the political public." The "organs of state power" fall into two categories—the authorities, i.e. the government and the administrative organisation, and the representative bodies or the electorate. As regards the "political public" he meant by this the whole community so far as it interests itself in the activities of the state, whether that interest manifests itself occasionally and incidentally, or in the organised action of political parties.

But the most interesting part of Schäffle's whole discussion relates to the division and unity of the state authority. Having shown that in the life of the state the most diverse political forces act and react upon each other and work together, he pointed

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 435.

out that there is division and union of work for the single state purpose, but also division in the sense of organised conflict and rivalry; he asked which of the two, "unity" or "division" of the state power, is the best and most expedient method to adopt. And to this question he thought no absolute and generally applicable answer can be given.

The law of natural selection by a process of conflict governs the development of the state; without it there would be no political progress; the state is in fact in a constant state of conflict. But this political struggle must find means for a peaceful decision. Any dualism of state power must be so devised as to ensure final agreement. Subject to this condition the conflict of parties, and even the division and rivalry of the state powers, is not merely a tolerable, but is even a desirable, form of national selection in the political sphere.

Accordingly, the term "division of power" is a doubtful one when used to describe the fact of the demarcation of different fields of governmental authority, the establishment of a system of political equilibrium, and the enforcement of co-ordination. The political collective power of an organised people is not the power of a machine, but a moral (*geistige*) collective power, to be set free by the moral co-operation of all its distinct and independent forces.

Accepting this doctrine of natural selection, the introduction of dualistic factors, the compulsion of co-ordinated organs to secure agreement, does not mean "powers" in themselves but simply parts, working partly in subordination and partly in co-ordination, of a great state collective force, members of an indivisible state power. And so Schäffle remarked that these parts must not be so related to the whole as to cause irreconcilable differences between the various sections of the social organism, but they must be so related to it that all contribute in the full measure of their ability to the common peaceful and agreed discharge of the political tasks laid upon them.[1]

Proceeding next to consider the organisation, Schäffle distinguished, in what he called "simple" states, between the unitary state and the union of states or consolidated state, which could also be called the *Staatenstaat*—that is, the state formed from a number of member states.

He held that public authority in the unitary state was divided not only between the organs of government, administration and representation, but also between the state as the central

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 466.

commonwealth and the communal bodies. Thus he assumed that the central organisation as a commonwealth could itself be divided into many internally co-ordinate and subordinate parts or member states.

In these consolidated states also the division of authority was settled similarly according to established principles. He included in the consolidated (*zusammengesetzte*) states federations, i.e. collective states such as federations, alliances, confederations and federal states, and personal unions and states with colonies.

The groundwork of Schäffle's argument was in fact that the state unions in their actual manifestation were constructed on a sociological rather than on a legal basis. Of these unions the alliance came near to being a mere transitory combination of a purely international character. This kind of union might be concluded not only for military purposes and the demonstration of superior strength, but also for common administrative interests. An instance of the latter kind was the German Customs Union. But the military purpose is always predominant. The alliance has no independent organ, but the governments and ambassadors of the allied states, or in certain circumstances the allied generals, carry out the allied purposes. The alliance, as a union of equals, generally comes into being where there is need for great military or other strength, but there is no independent super-authority which possesses that strength. In fact, alliances have been historically substitutes for a broken-down imperial authority, as in Germany at the close of the Middle Ages.

They often were the first stages in the formation of federal unitary states, for example out of the *Zollverein* there developed the German Empire.[1]

Secondly, the next stage of federation is the confederation, which differs widely from the purely international combination, since it is a permanent formation and with a greater number of common purposes than the alliance, e.g. the Swiss Confederation before 1847, the American Union from 1776 to 1787 and Germany from 1815 to 1866.

The main purposes of the confederation are common defence against foreign states, maintenance of public peace, prevention of interstate hostilities, reciprocal equality of treatment of subjects in every state, and safeguarding of supreme rights and of certain civic rights.[2]

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 467.
[2] Ibid., p. 468.

Schäffle, like all other federal thinkers, noticed that the weakness of the confederation is the lack of an independent federal government, federal legislation, federal representation of the people, federal administration and federal jurisdiction, and even though "elementary forms and simulacra" of these things may exist, in reality the confederation as such lacks independent organs, and is therefore weak in the military, diplomatic, legislative and administrative sense in so far as the actual power of the individual states composing it does not support its particular interests. The so-called federal authority is therefore an assembly of the ambassadors of confederated states voting according to instructions, and with power to decide only by a prescribed majority.

He thought that in spite of these weaknesses "the confederated conglomeration is better than complete disorder."[1]

He assumed that the confederation is always "the outcome of definite stages in the process of social selection."

Sometimes it is the rudimentary remains of a former unitary state or an empire, and sometimes it is the first stage in the formation of federal and unitary states.[2]

Thus Schäffle asserted that the formation of the federal union is the result of "natural selection." The question whether the idea of natural selection in the formation of unions is applicable or not is the most interesting problem not only in sociological discussion, but also in the criticism of political science.

Then Schäffle discussed the nature of the federal state as being one in which a closer union is enforced by the monarchies and republics composing it. An example of the monarchical federal state is the German Empire after 1870: another is the dual state, Austria-Hungary, after 1867, with its common sovereign, imperial government and the delegations. Types of republican federal states are Switzerland since 1847 and the United States of America since 1787.

The federal state possesses not merely a greater and fuller range of common state purposes, but also it obtains an independent governmental, legislative and in part even administrative organisation, a unitary military system, common or exclusive diplomatic representation, a representation of the people of the collective state either by delegations from the state parliaments or by direct election, a body of law which can be extended by majority decision, and supreme judicial courts.

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 468.
[2] Ibid.

Thus Schäffle, like Rüttimann, defined the federal state as "an independent state entity," and in comparison with the component states it is a higher state formation, as it is an integral political organ occupying a higher position than the component states in politics, legislation and administration.

At the same time the member states with the independent governmental, legislative and administrative powers remaining to them revert to the position of administrative bodies, which are, however, made use of as "the basis of the imperial state authority" or utilised as "organs of assigned imperial functions."

Vis-à-vis the collective state the member states are public, self-governing, self-legislating and self-administering bodies of the higher order and repeat, only on a lesser scale, the characteristic features of the self-government of a unitary state. They do not present any contradiction either in theory or in practice.

In the federal states of history, and at different epochs in the history of each, the totality of these bilateral powers has been very variously divided. The federal state sometimes approximated to the confederation, sometimes to the unitary state, sometimes to the empire with dependent or subject territories, sometimes to the personal union.

Schäffle held that it must be regarded as constantly changing, as being always either falling back or advancing towards stages of integration.

The federal state will become a unitary state as soon as the development of intercourse, the spiritual and linguistic unity of the people, the lack of distinction between the federal and state competence, the unifying force of a dominant or hegemony state, and the position of foreign affairs are favourable.

In these conditions the federal state is only a brief transition stage in the movement towards the unitary state with provincial self-government, i.e. it is a unitary state in *statu nascenti*.[1] What it has of a federal nature is only the last vestiges of its growth out of the confederation or of the overthrow of the former coequal members of the union, who have sunk to the dependent position of the allies (*socii*) of ancient Rome.

Another collective state formation is the empire with domination over dependent, protected, tributary and colonial territories. This is, as a rule, "a work of the military, fiscal and commercial policy of conquest, and unites in an empire countries of very different degrees of civilisation."[2] The relationship between the

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 470.
[2] Ibid., p. 471.

mother country and the colony is the relationship between dominant and subjective states, or of a powerful minority to the majority of the subjects. This organisation is a "hard and avaricious military and bureaucratic authority of the dominant state."[1]

But after all this Schäffle concluded that these hard-worked terms, such as unitary state and federal state, confederation, real and personal union, are not sufficient to indicate the multiplicity of forms of state development. They cannot be used as a bed of Procrustes. We must accustom ourselves to consider every internationally sovereign state in every epoch of evolution as a political individuality. Its individual power determines its individual form; in other words, substance and form are the product of external and internal conditions and events.[2]

All state forms are determined by "the favourable or unfavourable conditions at any given time of the external and internal struggle for existence."[3]

Schäffle's idea of federalism was that it is the necessary product of state existence in the relationship between state and state. The extent of co-ordination and subjection in the evolution by "social selection" to him was the main line of demarcation between the different forms of unions of states. But this distinction was not of any *a priori* or categorical validity, but a mere outcome of the internal or external conditions and events in the course of the struggle in "social selection." His theory of natural selection did not mean complete absorption, but it was inevitable that social selection whilst permitting the existence of self-governing bodies should entail on them subordination to a higher power.

Thus is it possible that the true federal idea can be embodied in the idea of selection? Is subordination acceptable as the main concept of federalism? If the idea of federalism is based on compromise, then Schäffle's conception of social selection can hardly be accepted as valid, but nevertheless his notion of the corporation as a personality and of the state as a corporative organism was a real contribution to fundamental federal ideas.

His sociological theory of politics was more precisely and clearly set out by Gumplowicz.

Ludwig Gumplowicz, a champion of the modern sociological school, adopted a new attitude towards the theory of the state based on purely sociological argument.

[1] A. E. Schäffle: *Bau und Leben des Socialen Körpers*, 2nd ed., 1896, Vol. II, p. 471.
[2] Ibid., p. 472. [3] Ibid., p. 473.

To Gumplowicz the idea, long prevalent and still widely held, that when we speak of moral science and natural science the term "science" has different connotations, appeared utterly false. Every science is the collection and examination of a mass of facts and conditions, and the search for the general laws of which they are the manifestation. That is as true of "moral" and "political" sciences as of the "natural" (or as they are often called "exact") sciences. The dualistic conception and the consequent division of science is based on the belief in the difference and antagonism between the physical and the spiritual universe, a belief which is passing away. The distinction is no longer of importance. Every "natural" science is a "moral science." As the natural philosopher has to deal with the phenomena of the physical world, so the historian, the political philosopher, the legal philosopher has to deal with the phenomena of history, of the life of states, and of law, to classify them and to seek the laws which have governed their development. Regarded in this way, political science becomes not a body of doctrines deduced from some arbitrary *a priori* principles, but a body of conclusions drawn from the observation of concrete facts. The discredit into which political science and jurisprudence had fallen would be removed if they left the narrow track of unfruitful dialectic and took the broad highway of empirical observation and research—that is, of science. This was being done by the "historical school."

His sociological doctrine, like that of Auguste Comte, was expressed in the assertion that "we must take things only as they are, without any accretion and unaffected by imagination." We must assume no more than history gives us; we must keep to the actual and real. If we do this it will not be difficult to erect a truly scientific edifice of general state law.

Up to his time the theory of the state was generally regarded as a theory of "purpose," and was therefore the means employed for a particular and definite purpose to justify or condemn a particular form of state organisation. Science is itself "the purpose" and is degraded if employed as the means. Therefore he sought to discover which were the natural powers that had produced human coexistence in the state and controlled it—to establish the "law which determined the evolution of these state relationships."[1]

Thus he assumed that the theory of the state must be "a daughter of practical politics" and of the history of states.[2]

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, p. 6. [2] Ibid., p. 8.

Criticising Hegelian idealism and the idea of natural right, he considered state and law as phenomena in the sphere of the social world, and was convinced that the existence of law was "thinkable only in the state."[1]

His empiricism led him to say that "we know the state because we live in it; because we feel its control at every step, enjoy its protection and call upon its help."[2]

Thus he inquired what a man has as his greatest possessions besides bare existence. He assumed them to be freedom and property, his family and his personal rights, all of which he owed to the state. It is not only the individual who receives the "highest gifts of life" from the hand of the state, but the collectivity of men who form the state owe to it an existence worthy of man. The state alone can make possible the striving for and attainment of the highest culture.

His simple and direct conception of the state was that of "ruler or ruling on the one hand and ruled on the other"; governing and governed are the permanent, unalterable and immutable characteristics of the state.[3] No state can exist which does not contain these antitheses.

Whatever benefits the state can create, whatever high purposes it may attain, all its tasks and its functions are after all conditioned by the relationship between the ruler and ruled which permeates the entire organisation of the state from top to bottom.

Therefore he emphasised that "if this relationship between ruling and ruled confronts us as the constant and inevitable characteristic of all states, and if it is a condition, a *conditio sine qua non*, of all its welfare works and enterprises, then we shall not be mistaken if we define the state as a natural growth of organisation of domination for the purpose of upholding a definite system of law."[4]

Like his predecessor Schleiermacher, he laid down the sociological notion of the state as "a division of labour made and maintained by coercion among a number of social elements originally united into a whole."[5]

Considering the relation between social evolution and the nature of the state, he conceived that the state is a social phenomenon which came into existence by the natural action of social elements and developed its activities only by social actions.[6]

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, p. 17.
[2] Ibid., p. 23. [3] Ibid. [4] Ibid., p. 24.
[5] Ibid.: *Die Soziologische Staatsidee*, p. 55.
[6] Ibid.: *Allgemeines Staatsrecht*, 1907, p. 27; *Grundriss der Soziologie*, p. 94.

The rise of social groups from the deep unconscious impulses of humanity to the clear daylight of consciousness and understanding, however painful and catastrophic at times the process may be—this rise and decline makes no change in the structure of society, which remains always a "pyramid" in which culture becomes more intensive and stronger upwards and more extensive and weaker downwards.

This was his notion of the facts of social development which is accompanied by individual psychological reactions to social stimulus, which present themselves to us as connotations, ideas, belief, science and art.[1]

He conceived that social development proceeds by means of a perpetual conflict between social groups, not only "between dominations and subordinations," but also between "co-ordinate groups." The first are predominantly political conflicts, the second are predominantly economic.

Therefore he asserted that "the development of this composite unity proceeded by a struggle among its constituents for the purpose of determining their relative powers—the issue in each case being expressed in law and statutes."[2]

Mankind believe that their actions are determined by idealistic motives; actually they are governed by the natural law of struggle between their groups. This is the sociological explanation of history; this is the explanation of abominable "social" (i.e. group) actions which the individual would not consciously and deliberately commit. The horrors of war and revolution are of this kind. The individual condemns them; the group commits them.

In the natural and perpetual conflict of the groups the state offers the means to secure for the victors the spoils gained from the vanquished. But the social conflict does not cease in the state; it proceeds, but within limits prescribed by law. But if it continues as a process of nature, it must, like every such process, have a result which accords with natural law. That result is, unquestionably, "culture"—by which Gumplowicz meant "a manner of life for the upper classes of society made easier and more refined by a far-reaching division of labour."[3]

This is the goal of every state; the difference between the more cultured and less cultured state depends on the extent to which the various classes participate in this easier and more refined life. The tendency of all and every state towards a cultural goal is "an indubitable empirical fact."[4]

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, p. 29.
[2] Ibid. [3] Ibid., p. 31. [4] Ibid.

This progress towards culture is facilitated by the co-operation of classes; the greater the co-operation the better the progress. The co-operation becomes more effective as the classes approximate to a common level. This approximation means that in the state and by means of the state the culture becomes unitary and national. If in any state racial differences among its people are so great that "nationalisation" is not possible (as may be the case if a state has been formed of a number of territories in which a national culture had already developed), then these territories will strive for independence, either complete or within a federation.[1]

Consequently, although the state is a prerequisite for the development of human culture, and to that extent is an organ of development, it does not control that development but is controlled by it, in the sense that it must adapt itself to the requirements of that development, both in internal organisation and in external relations. The development of human culture, extending over state boundaries, may often necessitate the breaking up of an individual state or a change of its territory.

This process cannot go on without internal and external conflict. A multitude of interests, individual and social, are bound up with the maintenance of the structure of the state as it is at any particular time. But the process of social evolution takes no heed of these; it has created them, and in course of time destroys them.[2]

But it cannot be expected that all the sacrifices required by social evolution from the state and its parts will be made voluntarily. Gumplowicz's sociological views led to the conclusion that in all existence the struggle for self-preservation holds sway not only in physical organisms but also in all social beings, and therefore in the state and all its social parts.[3]

Thus to Gumplowicz the constructive factor of the state was not the individual and not the family, but the social group embodying the dualism of the ruler and ruled. He asserted that the state has built itself up not out of human atoms, or from family cells, but out of human groups and races; in them the state originates and through them it continues. Those who emerge from the struggle as victors form the ruling class; the conquered and subjugated form the labouring and serving class.[4]

So he developed in his later works the idea that each and every state is "a content of arrangements in which one has the

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, p. 32.
[2] Ibid., p. 33. [3] Ibid. [4] Ibid., 1897, pp. 116.

power over the others and the power is exercised by the minority over the majority"; in other words, the state is "an organisation of the power of the minority over the majority."[1]

As to the relationships within the social formations, he considered the state as their political aspect, and the church as their religious aspect.[2]

The state is a social institution divided into majority and minority and evolved from the social struggle of the group. Gumplowicz conceived that the theory of state forms was as unstable and uncertain as the theory of the state. And after criticising various classifications of states made by political scientists from Aristotle to Bluntschli, he set out his own doctrine that "every state was and is the necessary practical consequence of a particular relationship of power," and that consequently it was necessary to determine the social elements from which the state takes its rise, and how the relations between these determine the form of the legal order and of the constitution.

Gumplowicz applied these principles in a survey of state forms, from the patriarchal state to the modern culture state (*Kulturstaat*). This latter, like all states, is primarily an organisation of government for the maintenance of a particular legal system. But the course of many centuries has modified the form of government; its basis is no longer slavery but freedom. Its chief characteristics are three. First, the coercive power and the authority of the state is not exercised arbitrarily but in legal form. Secondly, not only the middle class but also much larger classes of people take a share in the most important parts of government, that is, in legislation and administration, and do this through a representative body. Thirdly, the government is not limited to the mere collection of duties and taxes from the subjects and the conduct of war for dynastic purposes, but is concerned with the welfare of the people in all directions.

Examining next the states of to-day, he divided them into groups, the unitary states on the one hand and the consolidated states or *Staatenstaaten* on the other.

A great state like China was the product of thousands of years of conquest and maintained a large number of independent states within its realm, and a large state like Russia, in spite of centralisation in administration and unified laws carried out by despotic governments, could not be called a unitary state.

The unitary state to him was a state in which "the tendency

[1] Gumplowicz: *Grundriss der Soziologie*, p. 97.

[2] Ibid.: *Allgemeines Staatsrecht*, 1907, p. 164.

towards the unification of originally independent states and governments had in the course of centuries and under favourable circumstances been successful, and had caused the characteristic differences between the individual provinces to vanish, and so has hastened the formation of a unitary nationalism."[1]

In Europe the model of a unitary state so formed was France, and to some extent Italy and Spain also furnished examples. But the United Kingdom is a consolidated state, when the three parts England, Scotland and Ireland are concerned, though England by itself is a unitary state.

The typical form of the consolidated state was the Austrian Empire, in which not only was the monarchy made up from two states, Austria and Hungary, but each of these two was formed by a number of once independent states and provinces, which up to Gumplowicz's time had kept their historical-political individuality.[2]

But the boundary between the unitary and the consolidated state is hard to draw; the line of demarcation is almost the same as that between the mono-racial and poly-racial state. Even to this there are exceptions; despite unity of race and language, the inhabitants of part of a state may have little in common with, and may even be antagonistic to, the rest (as, for instance, Tyrol in Austria and Hanover in Prussia).

He assumed that the same interests, partly economic and partly purely political, which formerly led nations into waging wars of conquest against their neighbours, led, when there was anything like a balance of power and wars of conquest were out of the question, to the formation of unions which took varying forms, according to time and circumstances. There are three main forms—union, confederation, federal state.

The union is the association of two states under the rule of a single monarchy, whilst retaining their individuality and independence. If they have nothing in common beyond the person of the collective ruler, and have their own legislative authorities and are administered by entirely separate governments, then this is a "personal union." If, on the other hand, they have some common legislative and administrative matters which are dealt with by permanent joint bodies or by bodies meeting from time to time, then there is a "real union."[3]

Secondly, if a number of states form a union for the joint promotion of their common economic interests and for their

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, pp. 254–255.

[2] Ibid., p. 256.

[3] Ibid., p. 257.

mutual political protection, but every state retains complete sovereignty and the common affairs are administered by a common body or officials delegated from all the confederated states, the union so formed is a confederation.[1]

If the states so united give up any sovereign rights to a common central government which exercises these sovereign rights and powers in the name of all the associated states, the result is a federal state.[2]

He rejected the German notion of divided sovereignty as a *contradictio in adjecto* because "a not-whole sovereignty" is "no sovereignty."[3]

The want of clearness of German theory Gumplowicz ascribed to the want of clearness as to the actual position in the German Empire. The old elective German Empire was compatible with the complete sovereignty of all the individual states; whereas in the new German Empire an hereditary imperial office was difficult to reconcile, either in theory or in practice, with that sovereignty.

Finally, Gumplowicz thought that in republics the relations between the states and the union were much clearer. The collectivity of states (as in the United States of America and Switzerland) has all those rights of sovereignty to which the individual states do not lay claim. Nevertheless, the latter keep full sovereignty, are equal between themselves, and are not subject to any higher authority in which they have not equal shares.

Gumplowicz's determination of the mechanics of federalism added nothing to the prevailing theory. No novelty was contributed by his sociological study of the state, except the doctrine that social conflict—group-conflict—is the dominant cause of federalism, and that federalism, in social evolution, is based on the relationship of co-ordination and subordination.

But the antagonism between the government and the governed is the characteristic of his conception of the state, and his theory of "minority over majority" in the social evolution of the state is in contradiction to the whole notion of federalism.

But if the idea be that the subordination is based on the mutual consent of both the superior and the subjected states, and on the participation of the ruled states in the determination of the law of the superior state, then federalism is not altogether in conflict with that relationship of subordination which is an

[1] Gumplowicz: *Allgemeines Staatsrecht*, 1907, p. 257.
[2] Ibid., p. 258.
[3] Ibid.

essential of social evolution. But if the idea of subordination in the state was due to the control of the minority over the majority regardless of the participation of the majority in the minority rule, then the federal idea would be entirely at variance with sociological theory.

As to the *Kulturstaat*, the idea of subordination as a result of social struggle was also contrary to the federal idea. Nevertheless, Gumplowicz's sociological idea of society and state relations, and the empirical basis of politics and jurisprudence, was more allied to the federal idea than his definition of the state as an organisation of minority over majority.

CHAPTER V

GENOSSENSCHAFTSTHEORIE AS FEDERALISM. GIERKE AND PREUSS

§ 1

Otto Gierke's publication of *Das deutsche Genossenschaftsrecht* in 1868 was one of the greatest contributions to German political and legal science. Prior to his presentation of the *Genossenschaftstheorie*, Beseler in his work *Volksrecht und Juristenrecht*, in 1843, and especially in *Das Recht der Genossenschaft*, established the basic conception of *Genossenschaft*, in the technical sense, that every German social institution, based on free association, was, in its character as union, invested with independent legal personality, and that in the wider sense the commune and the state were included in this conception of *Genossenschaft*; but at the same time they were something more, and therefore were to some extent outside the conception.

But all these communes and states developed in Germany on the one hand from an "involution of the association idea," and on the other hand from the involution of its opposite; they have maintained and developed within themselves the elements of association to a degree which has varied greatly from time to time.

These elements had almost completely disappeared in the eighteenth century and their revival had been a characteristic of the nineteenth. So state and commune came within the sphere of association in a dual respect, as to their origin and as to their internal structure.[1] And Beseler realised that the *Genossenschaft* consisted in "a certain organic quality which enabled it to participate permanently in the life of the state and the law."

The *Genossenschaft* idea could be considered from two points of view, the sociological and the legal. Gierke's association theory was no doubt a corollary to sociology in his detailed study of the origin and development of human association from the historical and legal points of view. Four volumes of *Das deutsche Genossenschaftsrecht*, and numerous works and essays, especially his *Deutsches Privatrecht* and *Die Genossenschaftstheorie*,

[1] Beseler: *Volksrecht und Juristenrecht*, Leipzig, 1843 (*Das Recht der Genossenschaft*, pp. 158–194; *Begriff und Arten der Genossenschaften*, pp. 161–169). Gierke: *Das deutsche Genossenschaftsrecht*, Vol. I, p. 5.

and articles on *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, which were published in Schmoller's *Jahrbuch* in 1883, were the greatest contribution to political and legal ideas which had ever been made in the formation of a basic conception of a new German federalism.[1]

Gierke's political idea was first manifested in his numerous works on the historical and legal study of jurisprudence. In the dense atmosphere of Germanic positivist conception of law, Gierke dispersed the cloud of dogmatic positivist formalism, and showed on a wider horizon the new conception of the *Genossenschaftstheorie*.

Gierke's attitude was clearly shown by his declaration that "a true philosophy of law is possible only if it has an historical basis."[2] But this fundamental regard for historical development was very different from the one-sided historicism which ignored the transcendental, *a priori* basis of law. He frequently and forcibly contrasted the idea of law and the historical forms in which it had found expression. "The study of the historical development of law," he wrote, "needs to be enlarged by a philosophical theory of its basis, nature and purpose."[3]

This philosophical theory of law was the kernel of Gierke's whole system and the crown of his work, for he was, almost without knowing it himself, essentially a legal philosopher and perhaps the greatest legal philosopher of our time.[4]

He studied early theories and histories, and criticised mediaeval theories and their practice, from which he perceived the value of the descent of law, and acquired, more thoroughly than had yet been done, a knowledge of modern German legal philosophies from Kant to Fichte. Moreover, he even investigated the Neo-Kantian idealism of Stammler, in order to utilise all sources of knowledge in the formation of his epoch-making theory of *Genossenschaft*.

Gierke has been generally recognised as the chief modern exponent of the "organic theory" and often himself grouped his dominant ideas under that term. His critics (as Gurwitsch

[1] Gierke's *Works*: *Das deutsche Genossenschaftsrecht*, Vol. I, 1868; Vol. II, 1873; Vol. III, 1881; Vol. IV, 1913. *Deutsches Privatrecht*, Vol. I, 1895; Vol. II, 1905. *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887. *Laband's Staatsrecht und die deutsche Rechtswissenschaft* in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft. Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien*, in *Zeitschift für die gesamte Staatswissenschaft*, 1874.

[2] Otto Gierke: *Die historische Rechtsschule und die Germanisten*, 1903, p. 34.

[3] Ibid., p. 34.

[4] Georg Gurwitsch: *Otto von Gierke als Rechtsphilosoph*, in *Logos*, 1922, p. 87.

has pointed out)[1] mostly used the word "organic" in an empirical-naturalistic sense of their own, which was very far from the sense in which Gierke used it.

Gierke fought vigorously against "positivist formalism" and was opposed to abstract individualism, but admitted the existence of juristic individualism as a widespread phenomenon in the history of thought in every epoch from Roman law and the conception of the law of nature up to the modern Neo-Kantian idealism of Stammler. The juristic positivism which had been brought into the theory of the state, especially by Gerber and Laband, and into jurisprudence by Bergbohm, Ihering and Merkel, and limited itself to the generalisation of positive rules of law and entirely neglected any philosophical principles, dominated the jurists of the second half of the nineteenth century. Gierke was the first to recognise clearly its dangers—he condemned it as a "barren positivism whose ultimate result is the elimination of all general conceptions of law"[2]—and he opposed it, firstly, because of its limited duration and, secondly, because it was alien to philosophical conceptions.

He conceived that the positivist formalism which "threatened the juristic idea at the very root" was based not on the conception of law, but from the formal side on the obvious fact of commanding power, and from the material side on "the commonly understood conception of utility."

The idea of a single, inherent human thought as the guiding spirit of law is so essential that "the banner of this conception must be raised high against its destruction by the conception of utility and authority."[3]

On the basis of this argument he emphasised the enduring merit of the *Naturrecht* theory, which maintained the law of nature to be the highest expression of the conception of law, above positive law, and one never to be sacrificed to "empty positivism or mere utilitarianism."[4]

In this way Gierke also strenuously opposed the positivist explanation given by the historical school in their criticism of *Naturrecht*. He pointed out that the great error of the natural law school lay in confounding the conception of law with actual law and establishing the dualism of natural and positive law.

According to Gierke, "dualism of law" was for ever impossible,

[1] Georg Gurwitsch: *Otto von Gierke als Rechtsphilosoph* in *Logos*, 1922, p. 87.
[2] Otto Gierke: *Naturrecht und deutsches Recht*, 1883, p. 11. [3] Ibid., p. 122.
[4] Ibid.: *Recht und Sittlichkeit*, in *Logos* VI, Heft 3, 1916, p. 245.

and "without the guiding star of an idea of law no real achievement of law is possible, and in this manner only can the idea of justice attain that position of independence which is sought for it in the theory of the "law of nature" as well as in the theory of "positive law."[1]

With this principle the idea of law becomes "a leading thread" in positive law, and he considered the law of nature to be not an idle invention of human imagination, but a world historical force which won lasting gains for the conception of law.

In the argument as to positivist legal formalism he denounced the realistic doctrine of Max Seydel, who, starting from the positivist formalism of Gerber, reached the theory of authority in a definitely materialistic conception of law, i.e. law as the will of the ruler, with an entire disregard of its character except as a mere fact.[2]

He also disagreed entirely with the methodological juristic analysis made by Laband's legal formalism.

More precisely and more clearly in the idealistic philosophy of law than G. Jellinek and Hans Kelsen, Gierke pointed out the basic misconception of the juristic method, in that the formal juristic development entirely overestimated the power of formal logic.

He emphasised the error that "logical description was identical with the contents—logical collective order was compatible with the mental synthesis" and "formal logic is not only the indispensable companion of every mental operation, but has to play an independent role in the material sphere."[3]

Gierke unhesitatingly asserted, in his rejection of Laband's view, that what science needed was philosophy; the juristic methods, in so far as they are to be equal to the highest task of legal science, cannot dispense with either the historical or the philosophical method of treatment.[4] And he added that "the scientific theory of the constitution without a philosophical basis will always be unthinkable," and "the particular constitution in its present circumstances would not exist without the general theory of constitution; at every step it has to do with the

[1] Otto Gierke: *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, 1880, p. 318.

[2] Ibid: *Die Grundbegriffe des Staatsrechts*, 1915, pp. 22–25.

[3] Ibid.—*Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, pp. 14–15. "From formal validity of the proposition it pretends to be able to derive the actual truth, and in an outwardly cogent argument, it sees a sufficient basis for practical decision."

[4] Ibid., p. 22.

philosophic conception which it could never work out from its own substance alone."[1]

Thus "according to internal necessity," said Gierke, "a general theory of constitution has been involved in the logical operation with the metaphysical and ethical problems which envelop the question as to the fundamental nature and purpose of state and law."[2]

Without an idealistic background or the participation of a philosophical principle in the idea of state and of law, no real positivist juristic basis was valid.

Gierke concluded his controversy with Laband with the following eulogy of the idea of law as the source and purpose of law: "Immortal, supreme over all authority, unconquerable by any events, guide amid all the confusion of life, in perpetual harmony with the claims of the ethical conscience and the needs of political, social and economic life, the idea of law sits firmly enthroned in the hearts of mankind."[3]

The idea of law was, in fact, far more than in any modern system of law, the nucleus of the whole theory of jurisprudence built up by Gierke.

Nevertheless he did not agree with the theory of natural law and pointed out its mistake in identifying the idea of law with law in general. Certainly natural law was superior to positive law, but Gierke asserted that the idea of law was not itself in any way law, and it stood outside the sphere of operation of law and formed "its guide, its source and goal, the spirit from which must emanate all positive laws, however unequal those laws may be, and all their changing forms."[4]

Gierke asserted that the idea of law is "the idea of essential justice, which is as little identical with the moral idea of good as it is with the religious idea of faith or with the idea of beauty." Any body of law cannot be a purpose in itself, it belongs to the "hierarchy of purposes" (we may say rather of values) "in which each independent purpose serves as means to a higher purpose."[5]

The value which Gierke upheld as the "guiding star" was that moral basis of value in the individual and community which formed the real basis of ethics.

He said that the nature of law is that it sanctions and limits the external control of the human will in human society. So soon

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 22.

[2] Ibid., p. 23.

[3] Ibid., p. 94.

[4] Ibid.: *Recht und Sittlichkeit*, in *Logos* VI, p. 245.

[5] Ibid., pp. 244–246.

as there are a number of wills striving for realisation, then a body of law becomes necessary. But there is another social function which regulates the will and prevents its ruthless enforcement. That function is morality, but morality imposes a purely internal check; it addresses itself to the individual and implants in him the idea of obligation—it seeks the harmony of the will with the spiritual nature of mankind.[1]

On this assumption Gierke laid down the fundamental basis of controversy as to the theories of individual and universal ideas of value, i.e. the organic conception of personal and super-personal ideas. It concentrated on the question of the reality of community, or of collectivity, as "an independent super-personal form of value."[2]

He minutely analysed and criticised individualism and universalism, pointing out that individualism denied the independent value of collectivity, a value which was simply related to the agreement of self-determined individuals, whereas universalism admitted "the collective life as the life of super-personal personality," but did not recognise the independent value of personality.[3]

Ethical individualism, which Gierke criticised in various parts of his works on Roman jurisprudence and on the law of nature, conceived of the individual moral personality "as an isolated self-contained will-unity only restricted from outside,"[4] and he observed that collectivity is "an individualised and equalised sum of free and equal individuals."[5]

The individualistic conception recognised only separate relations, and consequently held that the "self-contained and self-determined unit" was merely the expression of "an externally and purely mechanical connection between self-contained spheres of wills"; in other words, the community is nothing more than a merely formal unit made up of a number of parties.[6]

He criticised in detail the idea of Roman jurisprudence, especially that of Bartolus, in that it set up the idea of *Universitas* and had recourse to the "arbitrarily applied fiction of the mere unification of a plurality."[7] And he also examined all

[1] Otto Gierke: *Die Grundbegriffe des Staatsrechts*, p. 102.
[2] Ibid.: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, p. 23; *Das Wesen der menschlichen Verbände*, pp. 1, 2, 10.
[3] Ibid.: *Die historische Rechtsschule und die Germanisten*, p. 8.
[4] Ibid.: *Das deutsche Genossenschaftsrecht*, Vol. III, p. 36.
[5] Ibid.: *Naturrecht und deutsches Recht*, p. 29.
[6] Ibid.: *Die Genossenschaftstheorie*, p. 175; *Laband's Staatsrechts*, p. 32.
[7] Ibid.: *Das deutsche Genossenschaftsrecht*, Vol. III, pp. 34–106.

the ideas of the natural law theorists from Althusius, Grotius and Hobbes, to Spinoza, Rousseau, Kant and Fichte.[1] He found that the theory which they advocated was simply that of community by contract between individuals, which resulted in a "mechanical aggregate unit" whose life was derived only from the life of its parts, and whose purposes were limited to the purposes of the individuals who composed it.[2] This atomistic mechanical conception of community could hardly go beyond the conception of "the complete abstraction of all difference between legal subjects and their absorption of species."[3]

Gierke made the striking assertion that there is no such thing as an *abstract* union of individuals, and that the principle of the "common (*gesammte*) hand" obtains a definite content first from the particular content of the union which comprises its subjects.

Thus he contended that a community was "a whole reality and unitary fact"; he even defined it as "a spiritual and ethical organic whole."[4]

The organic whole or "organism," in so far as collectivity was an "actual duty," denoted that in dealing with the community we were not concerned with species of a general value, but with a positive unity of collective value.

The first sentence of his *Deutsche Genossenschaftsrecht*, that "man owes what he is to the association of man with man," was the fundamental basis of the organic theory, together with the entity value of the community as one independent, ethical being.

The organism included an ethical entity, and might be considered from the point of view of its ethical, spiritual value, but it had no connection with any natural-science notion of an organism.[5]

At the same time, from the points of view both of the entire isolation of the individual and of the complete subordination of the individual to the collectivity Gierke emphatically asserts that "we must ascribe to the human individual as well as to the human community a full, complete and unitary personality."[6]

Thus the main outcome of Gierke's philosophy was the reconciliation of individualism with universalism, which never before

[1] Otto Gierke: *Das deutsche Genossenschaftsrecht*, Vol. IV, pp. 276–541.
[2] Ibid. [3] Ibid., Vol. II, p. 30.
[4] Ibid.: *Die Grundbegriffe des Staatsrechts*, p. 93; *Recht und Sittlichkeit*, p. 219; *Das Wesen der menschlichen Verbände*, pp. 10, 12.
[5] Ibid., *Das deutsche Genossenschaftsrecht*, Vol. I, pp. 1, 6; Vol. II, pp. 16, 40–42, 128–130; Vol. III, p. 1; *Die Grundbegriffe des Staatsrechts*, pp. 93–102.
[6] Ibid.: *Die Grundbegriffe des Staatsrechts*, p. 93.

in the history of philosophy had been set up definitely as the aim of its exponents, though Plato and Aristotle could point to conciliation between the moral value of individuals and that of the community; so too Hegel, so too the Roman jurists and the natural law theorists.

It was obvious to the modern thinker that the concrete method of evolution was quite unable to grasp the "entity value" and "individual value" and lead to the synthesis of individualism and universalism.[1]

Thus the principle which Gierke put forward as the *Genossenschaftstheorie* was the first original conception of an organic whole as a personality and unity, which not only included, but even demanded and required, the independent existence of a plurality of parts as positive individual personalities, and in which unity and plurality were mutually supported and harmoniously mingled.[2]

The justification of a harmoniously reciprocal relationship between unity and plurality was in fact the postulate on which all his teaching was based.

He declared that man does not attain complete knowledge of himself until he recognises his existence not only as an individual but also as a member of a community.

His remarkable phrases—"Without you there is no I, without I there is no you," and "Man owes what he is to the association of man with man," were his main claims for the *Genossenschaft* conception. He urged that "association as a person is not merely legally qualified, but also deliberately and actively capable"—that is to say, capable of a unitary decision of will and a unitary confirmation of will by legal activity.

Thus if the association is a unitary personality it is also a collective personality whose component parts form plurality.

Therefore Gierke's postulate of the harmonious mingling of unity with plurality in the community is the fundamental basis of his whole scientific structure, in recognition of the fact that "the relationship of unity and plurality in the German community is in no sense one of antagonism, but of interdependence."[3]

This *Zusammengehörigkeit* is the peculiar characteristic of the German *Genossenschaft* as contrasted with the Roman *Universitas*. As to the purpose and organism of these personalities, "unity and plurality" are, in their mutual interdependence, aim and

[1] Otto Gierke: *Das deutsche Genossenschaftsrecht*, Vol. II, pp. 32–42; Vol. III, pp. 109–110, 112.

[2] Ibid.: *Die Genossenschaftstheorie*, pp. 74–332. [3] Ibid., Vol. II, p. 906.

means. The organised *Zusammengehörigkeit* is determined by the legal relationship between them.[1]

Thus Gierke sought ethical value in the personalities of both unity and plurality. The union of individuals into a community is not for merely egotistic purposes, but has a higher and innate ethical purpose, and at the same time the individual is not a mere means for the formation of the community, but has a first purpose and value within himself. So the final and ultimate goal, by which we realise the ethical justification of the community and the individual purpose, is "the harmonious concord" of unity and plurality.[2]

Gierke's life-work, the development of the *Genossenschaftstheorie*, is a bold "attempt at a complete reconstruction of the theory of the legal nature of association. Its final aim is the replacement of the dominant Romanist corporation theory by a modern theory of the social body developed from Germanic ideas of law."[3]

The starting-point of his *Genossenschaft* theory is the attempt to set up a completely real associative personality vis-à-vis the fictitious, juristic, shadowy personality of the formal positivists and of Ihering, Brinz and Hölder. And he fought bravely against the traditional influence of Roman law and the prevailing, latent power of natural law and individualism.

He supports the theory of the reality of the associative person by a comparison with the analogous associative union in man of psychic and physical elements, and he has been blamed for the anthropomorphism of the legal person as a natural living unit.

In this way is set up the "reality of the associative person, in the sense of its objective validity as an independent being"; and the "social will-power of the corporeal, spiritual, living unity of association is maintained as the actual basis of the legal personality."

This claim to a material-philosophical basis in the origin of law is scientifically applied to practical purposes in communal life. But however characteristically this theory of association may be founded on an ethical basis of historic forms of association, and however important the historical-sociological basis of argu-

[1] Otto Gierke: *Das deutsche Genossenschaftsrecht*, Vol. II, p. 906.

[2] Ibid., p. 42.—"We think of the relation of the whole to its parts and the parts one to another as a relation of complete mutuality; here the principle of unity and plurality is established as equal and necessary elements in the whole divine existence" (Vol. III, pp. 109, 110).

[3] Ibid.: *Die Genossenschaftstheorie*, p. 4.

ment may be against individualism, he upholds the true existence of association, and of collective and individual personality, quite apart from empirical actuality, but with "objective validity" as an independent, legal being vis-à-vis the individual, just as the assertion of the reality of the total value of association means the assertion of an independent nature of super-personal value vis-à-vis the personal value.

And he is opposed to a juristic, ethical nominalism, from the standpoint of the reality of the ethical value in the associative person, just as the mediaeval realists were opposed to the nominalists.

Thus his "realist association theory" sets up the reality of collective persons for associations in which plurality and unity are harmoniously united in a community absorbing all the plurality of members. And a distinction is made from the modern methodologists, such as Binder and Kelsen, whose "associative personality" is the ideal character of legal subjectivity, and individualistic, abstract personality.

Thus from this super-personal point of view Gierke established his system of law on the organic theory.

In the history of mankind law is based on the co-ordination of individual law and social law.

Individual law is law which governs the human individual will in its relationship to other human wills; social law is law which rules the conduct of the human individual will in its relationship to the community.

Individual law applies to the relationship of co-ordination and has its origin in the non-union of subjects, while social law treats the individual as a member of a higher unity—the human union, as the community as a whole applies to the relationship of order (superiority and inferiority) and has its origin in the union of subjects.

At the same time he separates private law from public law. In his view of the Germanic and modern conception of law, association was not created in the state, but came into being by the recognition of various forms of communities, each with its inherent life purpose—the family, the church, the community, the association and the international community.

Many forms of social law are not constitutional law, because the state, as a sovereign group, assigns to social law an importance which varies according to the importance which the state attaches to the common life (regulating the social law for its own life).

Thus he assumed that private law includes all individual

law and those social laws which are not incorporated into public law by constitutional act, such as family law, association law and the corporation laws of individual unions. But he defined public law as comprising all state law and law which concerns the state as a whole and recognises the human individual, as well as the union, as members of the state, and the social law which is recognised as public vis-à-vis the community governed by it—ecclesiastical law, community law, the law of public association and international law.

And he divided the legal relationships of the corporation to the individuals incorporated in it into three kinds: (i) Extra-corporation relations. (ii) True (or internal) corporate relations. (iii) Relations based on a special law of corporation.[1]

As regards the first category, in matters which are not the concern of the corporation as such, the relations between the corporation and its members are the same as those which prevail between individuals, and are governed by the same rules of law. Harmonious combination between unity and multiplicity is entirely disregarded.[2]

But as regards matters which do fall within the sphere of the corporation, the corporation and its members stand to each other in the relation of a collective personality and its constituent members. The law which prevails between them is social law. The rights and duties of the members are purely relations arising from membership (*Mitgliedschaftsverhältnisse*),[3] and are derived from the statute (*Ordnung*) of the corporation.

The corporation and its members form a "unitary totality" in which the individuals appear as "organic persons of a lower order welded into a whole."

Associative persons appear as collective persons, and associates and individual persons as member-persons of many ranks and organic personalities; that is to say, rights and duties in this kind of community are not based on individual law, but either directly on the constitutional law of the union or on the concurrence of communal life constitutionally formed by such a power.

Therefore within the corporation these purely social laws manifest themselves especially in "the relationship of superiority and subordination which culminates in the subordination of all the activities of the members to the collective activity."[4]

[1] Otto Gierke: *Deutsches Privatrecht*, Vol. I, pp. 533-550.
[2] Ibid., p. 534.
[4] Ibid.: *Die Genossenschaftstheorie*, p. 183.

Accordingly, the harmonious co-relation of unity and plurality is given full play in this sphere of the idea of association.

Thirdly, by reason of the corporation principle German law and modern law have developed a multitude of "mixed relations" which lie partly within and partly without the sphere of the corporation. In these the corporation and its members stand towards each other at one and the same time as a collective person and its members, and as individuals. The consequences are the intermingling of social law, and in the case of public corporations, of public law and private law.[1]

The idea of a system of law originating in the conception of the *Genossenschaft* theory is one of Gierke's greatest achievements, as indicating the line of cleavage between liberty and law in the federal state.

Against Jellinek's objection that all law is social law and in the sphere of law there is no place for individual law, Gierke asserts that this is a mistaken idea which arises from overlooking the fact that all laws are of a super-personal nature, and therefore individual and social laws are only two abstract forms of one and the same unitary system of law. This division of the abstract form is developed in order to obtain a basis for a legal standard.

This legal standard is formed either through the unity or through individuals. "By asserting on the one hand the unity which exists in every human being as the expression of his ego, and on the other hand the unity, formed by collectivity, which creates in a number of men one common ego, we reach the conception of beings that in the sphere of law manifest themselves as individuals and as collective persons."[2]

But Gierke is indifferent as to whether the personality be of groups or of individuals, and since he recognises the identity of a group of persons as an association, and regards it as "an unchangeable and metaphysical entity," he does not concern himself with its personal nature, whether it appears internally as "a subject of social law" or externally as "a subject of individual law."

He makes brave efforts to give to all group-persons of German law the status of association, as compared with the "corporation" of Roman law.[3]

The total value of association as an ethical organism and the legal substance of association contributed to the materialising of the association theory, and the persistent unity of the asso-

[1] Otto Gierke: *Deutsches Privatrecht*, p. 536. [2] Ibid., p. 471.
[3] Ibid.: *Die Genossenschaftstheorie*, p. 823; *Deutsches Privatrecht*, p. 467.

ciation were the foundation-stone of the legal system for all times.[1]

The symbolic mediaeval idea of the *corpus mysticum*—the organic whole of mankind—was of a total ethical entity to represent the all-embracing union of separate entities whose members consisted not only of territorial groups but also of groups attracted to each other and united on a basis of purely personal co-operation.

So he asserted that "the possibility of creating associations, which not only increased the strength of their contemporary generations, but above all, because they outlasted individuals, united past and future generations—this gave mankind the possibility of development; that is, of history."[2]

He saw on the one hand unity developing from multiplicity. "Out of the highest association which does not outlast individual life—marriage—grow families, races, tribes, nations, communities, states and unions of states in an abundant degree, and no limit can be perceived to this development unless perhaps in the far-distant future the whole of humanity be united into a single organised community and give visible expression to the fact that they are only members of one great whole." But this movement towards unity was only one side of social progress. If it, and it alone, prevailed, then all spiritual life, all human progress, would cease; within every unity there must be plurality, within every uniformity there must be diversity—that is, there must be freedom.[3]

The conflict between these two great principles caused one of the most potent movements in history. The effect towards the harmony of unity and plurality was Gierke's interpretation of the actual history of mankind.[4]

Gierke's study of the mediaeval German communities from the *Mark* to the federal Hansa League was the real perspective of the *Genossenschaftstheorie* and the federative structure of human association. The rise of the modern state was, according to him, threatening to the *Genossenschaft* social organisation.

Out of the mediaeval personal and local associations grew the *Landständische* corporation, just as the modern state was derived from *Landshoheit* and the doctrine of *Obrigkeit* was evolved from the corporative function of the *Landstand* under the influence of the idea of union. This *Herrschaft* union bore more distinctly than earlier associations the sign of collective personality. During

[1] Otto Gierke: *Deutsches Privatrecht*, p. 479; *Das deutsche Genossenschaftsrecht*, Vol. II, p. 865. [2] Vol. I, p. 1. [3] Ibid.
[4] Ibid., pp. 2–3; Laski: *Grammar of Politics*, Chap. I. Cf. pp. 1083–1092.

this period within and without the state the mediaeval community acquired an independent personality of *Land* and of people such as no modern association can hope to rival. Gierke defined the state as "the organisation of the collective nation—rulers and ruled—for political and juristic unity."[1]

This definition, however, is really an ideal theory of the state which the modern pluralist hopes to bring to realisation.

His first volume of the *Deutsche Genossenschaftsrecht* is nothing but a graphic picture of the German social structure seen in his *Genossenschaft* focus and is without doubt the greatest contribution which has ever been made towards inflicting a decisive blow on positivist formalism and the dogma of natural right and the absolute conception of sovereignty.

The rise of the modern state is entirely the product of the Roman fallacy of the *persona ficta* and the *a priori* doctrine of *Obrigkeit.* Therefore, when he tried to set up the conception of the state he held that the "state can be a corporation, but yet lack all corporative character."

But the corporation inevitably becomes a state as soon as it sets up the highest and most comprehensive union in the prescribed territory for the attainment of human association. This corporative state can be described as the state commonwealth, and the institutional state as *Obrigkeitsstaat.* But the "combination of the corporative and institutional elements, in many different ways, can also be a manifestation of the state idea."[2] Since the state has the dual nature of corporation and institution, he could not altogether deny that the state differs from other corporations by reason of its unique possession of the "authority which is the highest and differs from all other authorities by the specific characteristic that it is authority exclusively and entirely, and a will to which this authority corresponds is different from every other in that it is a sovereign universal and self-determining will."[3] But he already foresaw the growing predominance of the corporative elements over the institutional through the rise of the modern association, especially that of the economic corporation.

At the same time, when he analysed closely the nature of the modern state from his own theoretical standpoint, he could not entirely free his state-conception from the *Herrschaft* doctrine since it still possessed a dual character. His failure to evolve an

[1] Otto Gierke: *Das deutsche Genossenschaftsrecht*, Vol. I, pp. 575–576.
[2] Ibid.: Vol. II, p. 831.
[3] Ibid.: *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien*, 1915, pp. 96, 97.

entirely new theory of the modern state is not due to theoretical weakness, but to the necessity of deducing his results from actual state conditions of his time.

§ 2

As a result of his exhaustive criticism of earlier and contemporary theories Gierke produced his own conception of the modern federal state, and I will confine the following section to some study of Gierke's methods.

Gierke subjected Laband's conception of constitutional law and his notion of federal states to an exhaustive criticism.

He disagreed with Laband's legal conception on the grounds that the method which Laband had adopted was entirely juristic and that it led to the conclusion (reached by others before him, but expressed by Laband with greater emphasis and more far-reaching deductions) that constitutional law is "law and nothing but law."[1] Gierke, on the contrary, expounded the doctrine that the juristic method, inasmuch as it endeavoured to carry out the highest tasks of legal science, required the application not merely of the historical but also of the philosophical method.[2] From this fundamental diversity of basic legal conceptions there resulted an entire disagreement between Gierke and Laband as to the nature of state personality. Gierke attributed to the state a collective personality resting on a subjective basis; Laband considered the state to be an artificial juristic person with purely objective legal relations.[3]

Gierke submitted the theory of the federal state, as formulated by Laband and applied by him to the German Empire, to a searching criticism.[4] Laband, he said, took the view—which was in accordance with appearances and with customary language —that the federal state is a consolidated community in which both certain parts and the collectivity distinct from them are states;[5] and he rightly found the distinctive feature of the federal state to be the consequent relations of these several state personalities. Starting from this point Laband sought to determine the external differentiation between the federal state and other forms of state union or state division (*Gliederung*). But at this point

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, pp. 2–5.

[2] Ibid., pp. 6, 22.

[3] Ibid., pp. 29–34, 35.

[4] Ibid., pp. 61–76; *Das alte und das neue deutsche Reich*, 1874, pp. 3–35.

[5] Ibid., p. 61.

he was hampered, in Gierke's opinion, by the attempt to limit the legal subjectivity of the state to the narrow conception of the "juristic person." For the structure of the state personality is of great importance in the determination of the nature of the constitution of the union formation (*Unionsgebilde*), but Laband, who ignored all differences of kind among artificial subjects of law and reduced all such differences to mere matters of the nature and extent of their legal rights, put before everything else the question of the existence of juristic personality. So to Laband the distinction between the federal state and the confederation and all other forms of simple association of states lay actually in the fact that in the former the whole body always has, and in the latter it never has, state personality. When Laband sought to identify this distinction with that between the *universitas* and the *societas*, then Gierke pointed out that a simple international association can be organised on the lines of a *universitas*, and so appear as a "person"—not in constitutional but in international law, and possibly in private law also.

Conversely, the federal state differs from the unitary state with self-governing parts in that in the former the constituent parts have always state personality, whilst in the latter they never possess it; but in fact provinces and communes are also "juristic persons" in public law. And, finally, the difference between the federal state and other forms of consolidated state depends upon the difference in structure of the state legal subjectivity. Only in the federal state is there above the member states a collective state distinct from them all and, as an independently organised super-state, possessing an independent state personality, whilst in an empire formed by a main state with associated states one of the member states is the holder of an imperial authority dominating the state authorities. In the real union there is no super-state but only a plurality of states consolidated into a constitutional collectivity with a prescribed sphere of action.

Thus in the end every inquiry into the conception of the federal state comes back to the question of the difference between the *state* union-personality and that of every other union personality. And this problem of the juristic interpretation of this form of state comes down simply to the problem as to whether and in what manner at any given time the state characteristics of a whole and its parts are compatible with the conception of the state. Hence arises the dilemma from which no theory of the federal state can escape. The conception of the state, as a

doctrine, has been derived from the unitary state, and has therefore certain characteristics which are excluded by any dispersal of state legal subjectivity over a multiplicity of personalities. Consequently, either the federal state conception or the doctrinaire state conception hitherto prevailing must be abandoned.[1]

The first course has been taken by a number of modern writers, who have followed anew the line adopted by Pufendorf. With logical completeness they have shown that the conception of the state as it appeared for centuries in the textbooks, and even as persistently expounded by the advocates of the federal idea, left no room for any state structure intermediate between the union of states whose relationship is that of international law and the unitary state divided into a number of parts each enjoying the right of self-administration. Therefore they have classified existing federal states either as mere treaty relationships between sovereign states or as unitary states whose members, though bearing the high-sounding name of "states," are in fact no more than autonomous provinces. Gierke asserted that each of these conclusions gets rid at once of all difficulties; but each also leads to destruction. In the case of Germany the result of their acceptance would be to take away either from the empire or from the constituent states all state quality. And Gierke denied that jurisprudence was entitled to invert history in this way, to reinterpret the constitution and ignore the nation's consciousness of law (*Rechtsbewusstsein*).[2] Therefore only the second alternative remains. As the federal state exists as a state composed of states, it is necessary to reach a conception of the state which is applicable to it. There is no logical obstacle to doing so, for the conception of the state is an historical conception and therefore capable of development. From the standpoint of pure logic only one thing is requisite, namely, that the conception shall not be self-contradictory and shall be carried through without contradiction. But as regards content, the conception must satisfy two demands. First, it must give expression as clearly as possible to the fullest harmony between the actual relations of life and the consciousness of law; and, secondly, for the sake of the continuity of science it must be linked as closely as possible with the previous conception of the state. The two demands combine, for the development of the modern theory of constitutional law is itself an integral part of the life of the state.[3]

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 63.

[2] Ibid., p. 64.

[3] Ibid.

Gierke pointed out that the most recent attempts to interpret the federal state had—in the unavoidable transformation of the theory of the state—taken two paths. Of the traditional characteristics of state power they had abandoned either *unity* or *sovereignty*. The first of these paths was that taken by the theory originated by Waitz, according to which the state power in the federal state is divided according to its subject-matter, and consequently the collective state and the constituent states stand side by side as independent and sovereign bodies within their respective spheres. But Gierke thought that this theory of Waitz, which had long held the field, had by this time (1883) been very largely abandoned; it was not only inconsistent with the development of the modern theory of the state, but above all it was in direct conflict with the actual facts. And more and more the tendency was to take the second course—that is, the collective state and the constituent states were regarded as being in the relation of superiority and subordination; to the collective state there was ascribed the unitary and indivisible sovereign state power, whilst the constituent states were accorded a similar, but not sovereign, state power.[1]

Laband was one of the chief exponents of this doctrine, but Gierke pointed out that it gave rise to difficulty in distinguishing between the non-sovereign member state and the autonomous province or commune. If legal sovereignty is not an integral part of the conception of the state, there is obviously no principle on which the distinction can be based; and Gierke asserted that in fact all attempts to distinguish on such a basis between the state and the commune—as parts of a state—had failed. Laband had tried to do it on the basis of inequality of status; that is to say, he took the outstanding and decisive characteristic of the member state to be its participation in the sovereign central power. And this led him to some conclusions which Gierke regarded as of very doubtful validity. True, the participation of the member states in the formation of the organs of the collective state is in accordance with the nature of the federal state; but this is not peculiar to the federal state—it can be that in the unitary state the provinces and communes have the like advantage. Laband rightly realised that, if this was to be the test, something must be added, and thought that he had found two possible "somethings" which could be so added.

In the first place he laid special stress on the fact that in the

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenchaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 65.

German Empire the monarchs of the constituent states formed collectively the sovereign organ of the imperial power. But Gierke pointed out that this phenomenon is not characteristic of federal states generally; it was peculiar to the empire and due to the monarchical basis of the empire. Laband's argument that this "participation" in the sovereignty carried with it as a consequence the maintenance of the international status of sovereigns for the territorial lords and of sovereign states for the constituent states led to the logical conclusion that each of the electors in a republic can lay claim to a similar international status. Laband's doctrine that the consolidated state (the federal state) is in fact only a corporation of states to which the individual subjects and citizens belong and are subject only indirectly through the states, appeared to Gierke to be the greatest and most portentous mistake in Laband's whole theory—an opinion which he claimed was generally held. For Gierke argued that it is impossible to imagine the modern federal state without a direct authority of the central power over every individual member of the community and without the direct federal citizenship of every such member of the constituent states. Of course, such individual (subject or citizen), so far as his activities are controlled by the member state to which he belongs, is only in an indirect relationship with the collective state. But in the same way the citizens of a commune are, in respect of communal matters, only in indirect relationship with the state.

Just as the modern decentralised state is made up of provinces, communes and so on, and of individuals, so the federal state is made up of member states and of individuals. The individual as a Prussian is an indirect subject of the empire, as a German he is a direct subject, just as the individual citizen of Berlin is as such an indirect subject, and as a Prussian a direct subject, of the Prussian state.[1]

In the second place it is conceivable that the theoretical distinction between the non-sovereign member state and the commune could be found in the different ways in which they become entitled to corporate power. Laband suggested this, in that he ascribed to the member state in a federation its "own" right to the exercise of authority within the sphere of public law, but denied that right to self-administering bodies.

Other writers laid greater stress on this idea; and in particular Jellinek had replaced "sovereignty" as the essential characteristic

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, pp. 65–67.

of the state by this "own" competence to exercise authority within the sphere of public law.

But Gierke argued that all these attempts at a particular limitation of the legal right of the member states to the exercise of power succeed only at the cost of corporations generally, which must content themselves with a "derived right." And what is meant by "own" right? That question is not to be answered by reference to the origin of the right; in determining the manner in which a right is held, the fact as to whether it was or was not formerly held by someone else is only of historical interest. In reply to Laband's argument that the sphere of authority of the member states of the empire had not been transferred to them by the empire, Gierke pointed out that on the one hand it is quite possible to imagine the exercise by the member states in their own right of powers which had originally belonged to a unitary state, and been separated off, and that on the other hand the rights of many existing corporations had unquestionably never been transferred to them from the state. Gierke argued further that in the attempt to define the term "own right" the possibility or impossibility of the right being withdrawn gives no help; for in determining the nature of the present possession of a right it does not matter whether and in what manner that possession can be ended. In actual fact the state power of the individual German states was subject to the possibility of legal withdrawal by the empire, since the empire, like all modern federal states, had the right to enlarge its competence, and on the other hand there were corporations and even provinces to which the state had assigned spheres of action and undertaken that those spheres should not be withdrawn without their consent. Consequently, Gierke argued, Laband and Jellinek agreed that authority no more lost the character of "own right" by the risk that it could be withdrawn than the nature of "property" was affected by the risk of expropriation. Therefore the conception of an "own right" depends upon the mode of possessing it or, to use the usual phraseology, it depends on whether one has the right in substance or only the exercise of it. Admittedly the right to exercise the right derived from some other person is an "own right."

But in regard to any particular sphere of competence the distinction between "own right" in respect thereto and the exercise therein of a right derived from another has some validity. There is no doubt that the constituent states of a federal state, whilst in certain matters they exercise authority only as organs of the central power, yet to a large extent possess public law

powers in exactly the same way as the collective state has powers of its own. Exactly the same thing must be said of every public corporation. Even if in theory and practice the communal bodies and all other corporations, including the church, are treated as state establishments, and given a juristic personality and rights of property, but yet in all applications of their power exercise only rights of the state and therein act as its organs, it seemed to Gierke to be going much too far to put this idea forward at the present time as the logical consequence of the conception of the state and to ascribe it to the existing law, in contradiction to the ideas and needs of life.

But there is hardly any other way of keeping "own right" as the test of statehood. Gierke thought Laband was not far from this, although he reduced all the powers of the individual states to "self-government" and "autonomy," and, in a way that could hardly be commended, put them on the same footing as corporation powers. Jellinek, however, very clearly and definitely degraded the bodies corporate in this way; and as, in order to be able to show that all the powers of corporation are derived from the states, he had recourse to the arbitrary assumption that "own right" meant a right of which the exercise could not be controlled, he only showed in Gierke's opinion how impossible it was to reach the desired goal by the path under discussion.[1]

Thirdly and lastly, the principal difference between the non-sovereign state and the independent commune can be sought in the different content of their sphere of authority. But actually it is not possible to point to any particular powers essential to a member state but not to be found in the case of a corporation; and similarly there is no necessary difference between state and commune, if we have regard to the totality of their powers as a whole. It is the common characteristic of both state and communal associations that they are concerned with the purposes of human co-operation as a whole and consequently that there is no part of the social life of mankind that is not, in principle, within their sphere of activity. But both for the member state and the commune this comprehensiveness is merely a possibility, and in both cases the reality may be very different. And however great in the modern federal state may be the differences between the individual states on the one hand and the communes on the other in respect of the extent of the tasks assigned to them and

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 69.

their means of carrying out those tasks, yet when we look at the spheres assigned to the cities and provinces at other periods and in other lands this test does not offer any intelligible line of demarcation.

Consequently it appears vain to attempt to discover any conceptional distinction between the "state" and "communal" members of a state. But as, nevertheless, we do in actual life recognise the existence of such a distinction, which science cannot explain away, jurisprudence seems to do its particular work adequately by demonstrating that, according to positive law as determined by historical development and in accord with the expression of mankind's consciousness of law, some collectivities are states and some are not. In this as in everything else positive law is the irremovable basis of all legal interpretation. But in face of the movement of history and the multifariousness of life we must not attach too much value to the rational demarcations of jurisprudence. Yet that science cannot be content with such a conclusion. To console oneself in this respect with the though of the fluidity and change of concrete things is to forget that jurisprudence is concerned not with concrete things but with the ideas to which these things give rise. And in this realm of legal consciousness a definite and comprehensible idea must underlie the determination that one social structure is a state and another is not. However vague the form it takes, there must be some idea of a distinction which is one of kind and not merely of degree. Jurisprudence should and must endeavour once more to formulate that idea.

In Gierke's opinion Haenel had shown the right way by laying down the proposition that in the federal state the complete state manifested itself neither in the collective state nor in the member states, but in the totality of all. Laband had indeed himself recognised the great value of this idea. The fact that Laband's work was often exemplary in its presentation of the reciprocal relations between imperial authority and territorial authority was, Gierke thought, due essentially to his recognition of the detailed interworking of these two factors, their mutual dependence on each other, their "organic relationship and systematic co-operation."[1]

But Laband attached importance to this idea only in respect of the state as an "objective institution." He showed with great skill that in respect of the question of the legal subjectivity of the

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 71.

state Haenel had left a gap—though the problem of the federal state was closely involved in this question—since objectively even the unitary state formed a complete state only in conjunction with the self-administering corporations. But instead of filling the gap by searching out the subjective relationship corresponding to this objective unity, Laband at this critical point dropped the whole idea of association (*Verbundenheit*), and treated the super-state and the subordinate states as independent juristic persons. His conception of personality based on civil law prevented him from doing anything else.

The real truth, as Gierke saw it, is as follows. The legal-mindedness of modern nations, as developed by long mental toil, is convinced that in respect of the field of law there must be in every independent nation a collective authority (*Verbandsgewalt*) supreme over all other collective authorities, and to that supreme authority it assigns definite tasks and powers. To the legal field so determined it ascribes "state" quality. The characteristics of external and domestic "sovereignty" give rise to a distinction in kind between this sphere of power and every other sphere of power. For whilst every other sphere of power is subject to a legal system which is definitely independent of it, the state sphere of power can be restricted only by a legal system which is definitely dependent upon it. And the sphere of the state cannot be regarded as "divided"; to do so involves either the self-contradiction of a number of "supreme" powers in one and the same field of law, or the reintroduction of the idea of the non-sovereign state. If now the modern legal mind recognises plurality of holders of state power in one and the same community, the relationship between them can be thought of only in this way, that a definite body of rights and duties constitutes the sphere of a single supreme and indivisible power, but the exercise of that power is vested in a plurality of holders.

In the federal state the state authority is formed as in the unitary state; the only difference is the peculiar form of the holder of the state authority, which in the federal state is not a single collective person but a number of collective persons brought together in a prescribed manner.[1]

Then arises the question as to how the plurality of holders of state authority is to be formed in the federal state. Obviously the plurality of the existing state persons can be regarded as holder of the undivided state power only in their organic union.

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 72.

The collective state and the individual states as a homogeneity constitute that holder, which forms a single personality. This organic collectivity is not a new state person over and above its component parts, for it lacks a special organisation and a new special organ of its own. On the other hand, it cannot be thought of as the mere sum of a number of independent state persons. For the individual state persons participate only in a definite and constitutionally limited union, in which they are permanently bound together and made dependent upon each other. The position of the participants is not identical, but the collective state as such is the head of the community. Consequently in external affairs the collective state represents the collectivity of the member states, and in domestic matters it has the final decision in doubtful cases. In this way provision is made for the necessary unity of the plurality, and despite the dispersal of state subjectivity over a multiplicity of persons, in the final resort the unity of the state will is guaranteed.

But although the state power is, in substance, the undivided common possession of the collective state and of the member states, that is, of a plurality united together in a particular manner, the exercise of that power is divided among the individual co-members of the community in the form of "particular" rights. For this purpose the whole of the state powers are divided into two groups, demarcated by the constitution. One of these is assigned to the collective state, which exercises them in a unitary manner; the other is assigned to the member states and the exercise of each power is divided amongst them. Thus both the collective state person and all the member state persons have independent state power based on law. But neither of these two groups of state powers constitutes by itself state power. Each needs to be supplemented by the other. The collective state power is admittedly, for itself, the supreme power, but it is not the whole state power when looked at from below. The power of the member state on the other hand is the whole state power for its area, but regarded from above it is not by itself the supreme power. The collective state and the member states alike have separately to exercise only a part of the powers which are comprised in that sovereign and indivisible state power which they possess in common.[1]

So, Gierke argued, it is manifest why, in the federal state, both the whole and the part are in reality state persons. They

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 74.

are so, as being the joint holders of a unitary state authority of which the exercise alone (and not the ownership) is divided amongst them.

The member states in particular would not appear as "states," whether by reason of their rights of membership within the sovereign collective personality or by reason of their own rights within their non-sovereign individual sphere, unless at the same time they appeared as participants in the totality of sovereign state authority and in constitutional co-ordination. This accounts for the fact that the German individual states and their rulers, despite the empire's exclusive claim to be a state, appeared externally as international subjects enjoying sovereign rights.[1]

And this alone solves the internal problem and gives a distinction in principle, and is acceptable to the legal mind, between the member state and the communal union, for the doctrine set out above is inapplicable to the latter.

If we seek for a private law analogy for this kind of legal relationship, we come upon the association "collective ownership," or whatever one likes to call it. In this case it is a question of the property of a corporation. The body of powers involved in the ownership of such property falls into two groups, in one of which the juristic person as such is master and the individuals have rights only as members, whilst the other group is divided among the members as individuals and constitutes individual rights which the juristic person must not infringe. But even in this case the unitary collective right and the plurality of separate rights belong to one another and are so bound together by collective constitutional law that only in their totality do they become the supreme right involved in the conception of property. We cannot without the employment of force grant entire possession either to the juristic person with the exclusion of individuals, or to individuals with the exclusion of the juristic person. If we would maintain our position in regard to the substantive indivisibility of property, we must allow common possession of its substance to the collective person and to the individuals. Subjectively also, this collective relationship is reflected in the constitutional co-ordination of the "persons" who participate in it.

The objective conception of collective property finds its "correlation" in the subjective conception of the association (*Genossenschaft*): thus and not otherwise must we regard the joint-stock company if we do not place it merely on the level of a

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 74.

society, or wish to deprive the shareholders of the share in the property of the company which is legally recognised as theirs. The same principle applies to agrarian associations, craft unions, etc.

The dogma of the civilians, however, is obstinately opposed to the introduction of such conceptions and still proposes the alternatives of the Roman *universitas* with its *jura in re aliena* of the members, or the Roman *societas* with the mere compulsory legal control of individuals.

But in the long run in jurisprudence, as in life, right prevails, and the science of constitutional law is not bound in this, any more than in any other question, to accept the dogmas of the Romanists.[1]

Gierke thought that the "association" (*genossenschaftlich*) interpretation of the federal union would be found to be a very valuable clue when applied to details. He did not pursue the matter in that place, but remarked that Laband had made successful use of the legal conceptions which arose from the idea of the association. That applied especially to the use made of the conception of corporate particular rights in Laband's discussion of the rights of individual states, although Gierke thought Laband's classification of those rights was open to some criticism. The treatment of some other matters he thought had suffered from the non-application of the "association" idea. The outstanding instance of this was furnished, to his mind, by Laband's discussion of the financial relations of the empire and the constituent states.[2]

Gierke's *Genossenschaft* theory formed the basis of his federal ideas as representing the organic synthesis of unity and plurality —i.e. their *Zusammengehörigkeit.*

As to the metaphorical relationship to orthodox federalism, his notion of confederation was completely coincident with that of other German jurists as to the "legal relationship," and his distinction between the confederation and the federal state was on the same lines as that of other thinkers except for the fundamental difference due to his application of the *Genossenschaftstheorie.*

According to this argument the federal state was to be found in the mediaeval town associations like the Hansa League or Rhine Union, which was based on estates. The distinction between

[1] Otto Gierke: *Laband's Staatsrecht und die deutsche Rechtswissenschaft*, in Gustav Schmoller's *Jahrbuch*, 1883, p. 75.
[2] Ibid., pp. 75–76.

legal relationships, such as confederations or treaty alliances, and a union of the nature of a federal state, was asserted by him to depend on whether or not the union had a legal collective personality.

This test by "theory of personality" was an entire repudiation of the notion of sovereignty as the criterion of the state, and at the same time involved the complete rejection of any possible notion of the non-sovereign state in the federal state.

Of the elaborate organisms in which personal and territorial associations were federated, with their unity and plurality, the state stood as the highest collectivity with collective personality.

As regards the relations between state and state, Gierke, writing during the Great War, hoped for a reconstruction of international law. Although the goal of a new universal system of international law, rising from the ruin caused by that war, might be a distant one, he yet believed that there must be a re-establishment of an international community sustained by the legal consciousness of all peoples. He believed also that the German spirit, the deep Germanic consciousness of law, could contribute most to that end, in particular by the application of the *Genossenschaftstheorie* with its harmony of unity and plurality. It would maintain the sanctity and inviolability of a law between states which would not only regulate externally the common life of the peoples, but would acquire an internal authority from the common idea of law.[1] As a result of war experience it had been realised that no international law can destroy the striving for power which is rooted in the nature of the state and be superior to actual power conditions; that so long as mankind lives in distinct nations existing with their own purposes this law between states can never grow into a law over states; and that consequently international law is in harmony with the idea of justice only if it adapts itself to the shiftings of power which are justified by the judgment of history and does not give an equal status to each state, whatever it may be, but to the individual states what is their appropriate due. Gierke warned his readers not to be led by the efforts made under the guise of pacifism to subordinate states to a majority control, or by the talk of the abstract equality of great and small states into the mistaken desire that the international law of the future should guarantee the exercise of powers corresponding to the conditions of Germany's existence as a state, and therewith the union of re-established or new-created states necessary for the safeguarding of those powers.

[1] Otto Gierke: *Recht und Sittlichkeit*, in *Logos*. VI, Heft 3, p. 263.

And so, for a nearer goal, he pointed to a closer international union between Germany and her allies in the war. But ideas of a Middle European union or super-state must be put aside. Germany must maintain her independence and individuality, and not encroach upon the independence and individuality of any ally; but she must strive to bring about an entirely voluntary co-operation in respect of all things to which common action may be applicable and—so far as the aid of law is requisite—to express that co-operation in legal rules. Thus the international state as an association of states was Gierke's ideal as the final form of human association.

In *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (1887) Gierke pointed out that the kernel of that theory is the conception of the corporation as a "real collective person" (*reale Gesammtperson*) in contradistinction to the phantom "artificial person" (*persona ficta*).[1] And from it came directly those ideas which were usually regarded as a peculiar characteristic of the theory, namely, the possible association of unitary rights and plurality rights (*Einheitsrecht und Vielheitsrecht*) in the collectivity.[2] And the changed conception of corporate personality had very far-reaching effects; it called into being a new theory of the formation and termination of corporations; it led to a revision of the precepts as to the scope of the legal capacity of collective bodies to will and act. The whole of those individual and collective actions in which the life of a community manifests itself can be grouped to one centre and thereby newly ordered and directed. And it became clear that where a collectivity is admitted to have a personality distinct from the personality of its members, there is a legal system of a higher order than, and not attained by, the systems of individualist legal relations.[3] The corporation law stands over against individual law, and claims the right to autonomous development.

[1] Otto Gierke: *Die Genossenschaftstheorie und die Deutsche Rechtsprechung*, 1887, p. 1.
[2] Ibid., p. 8.
[3] Ibid., p. 9.

ADDENDUM.—I should like to call attention to an article by Gierke entitled "German Constitutional Law in its relation to the American Constitution," in the *Harvard Law Review*, February 1910. Among other contrasts Gierke points out that the American government, although possessing an independent executive, "was actually a party government," whereas in Germany "party government would be nearly impossible" and was essentially bureaucratic, "as it was in the time of absolutism."

With regard to the growth of the central power and the steady progress towards unification of the law, Gierke said that "nevertheless the decentralising forces are still strong enough to maintain the equilibrium in the future."

This theory was no doubt the fundamental principle of federalism on which the modern pluralistic political theory was built up and became the prevailing philosophy in our time. Modern pragmatic pluralism, however, developed the pragmatic idea into the concrete philosophical system of James' *Pluralistic Universe.*

The harmony of ethics with state and law was the new conception, and the new "association" theory applicable to every branch of human activity was a comprehensive political idea by which true democracy will be fully realised.

Gierke's immortal contributions, in strong conflict with the formal legal theories, marked the dawn of the formation of the new federal idea, not only in Germany but also throughout the world.

§ 3

More than any person in the history of political ideas in Germany was Hugo Preuss a devoted advocate of Gierke's theory of the *Genossenschaft,* as he stated that "never more than when I fight with him do I feel myself to be Gierke's pupil."[1] And in the last decade of the nineteenth century he fought hard for the overthrow of the idea of sovereignty. He relied entirely on the "young, hopeful and impelling *Genossenschaft* theory" to bring about the renunciation of the fundamental conception of sovereignty, to tear into shreds the tangled web of that obsolete and worn-out conception, and to establish a modern German structure in accord with the modern German spirit.

Breaking through the "spider's web of the conception of sovereignty" in which "the theory of *Staatsrecht* has been caught like a fly," and emancipating it from the "*a priori* axioms" of the individualistic conception of jurisprudence, Preuss used the *Genossenschaftstheorie* as the only foundation-stone on which a unitary conception of commune, state and empire could be built up. Beseler had been the founder of that theory, Bähr was the first to endeavour to make use of it for the conceptional expression of the legal state, but above all Gierke was its standard-bearer.[2]

Preuss published his epoch-making book *Gemeinde, Staat, Reich,* in 1889 in the endeavour to work out clearly and in detail Gierke's idea of German state construction on the basis of the *Genossenschaftstheorie.*

Gierke's remark of the *Genossenschaftstheorie* that "as in the

[1] Hugo Preuss: *Gemeinde, Staat, Reich* (Vorbemerkung), p. vii. [2] Ibid.

whole sphere of society, as in nature, the understanding of the most complete and complicated organisms has been furthered by the study of the lower and more simple organisms, so the hope may be realised that the association theory will exercise a clarifying and beneficial influence on constitutional law by means of the method which it has worked out," was to Preuss a true guiding star.[1]

But he was far from being an uncritical follower. In the book named above he surveyed previous German ideas as to the state, with particular reference to the federal state, and submitted them to a searching examination. For our present purpose it is unnecessary to set out his general conclusions as to the theories of particular writers, but attention must be directed to his criticism of Gierke's doctrines.

Preuss was of opinion that the more one was inclined to regard Gierke's general view of the structure of the state organism "as a fruitful and triumphant one and to recognise its great value to political science," the more keenly did one feel that his theory of the federal state was unsatisfactory as a whole and self-contradictory in detail.

Firstly, his basic idea of the essential similarity of the state to the whole series of union personalities should have led him to start from below and not with the last and most complicated form. Yet he started with the *a priori* acceptance of the conception of the sovereign state. His *petitio principii* was thus twofold. First he accepted "sovereignty" as the essential of the idea of the state; secondly, he denied to jurisprudence the right to deprive the empire or the individual states of the character of states. The logical result was the division of sovereignty. This Gierke rejected; his theory thereby lost all validity. It was merely an attempt to make possible the logically impossible.[2]

Secondly, Preuss sharply criticised Gierke's acceptance of the synonymity of juristic subjectivity and legal personality. As Gierke's *Genossenschaftstheorie* laid down the fundamental notion that the union personality of public law was "something other than the juristic person of the Romanists, without thereby rising to the formation of a non-personal juristic subject," Preuss agreed that the identity of a juristic subject and legal personality was "absolutely unavoidable for the public law." Therefore the whole conception of a third entity consisting of the collective and member states represented a conceptionally unattainable pheno-

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 1.
[2] Ibid., pp. 65–66.

menon, because a collective existence, more collective than that of the collective state, was a "mere fiction, a lifeless phantom; one of those conceptional laughing-stocks on which Ihering once poured scorn."[1]

Thirdly, Gierke thought that the collective state was the head of the community, but yet he described the member states as sovereign states and sovereignty as the highest authority. Preuss asserted that Gierke, whose general views had been the most powerful and fruitful contribution to modern ideas of the state and law, had not in this got beyond the primitive wisdom that sovereignty is an essential of the idea of the state, and that a sovereign collective state could exist side by side with sovereign member states, etc. He left no distinction between the member state and the communal bodies. For if his theory of the collective organism be acceptable, then in the unitary state it is necessary to form a collective organism of the state and the communal bodies, and divide the *nudum jus* of sovereignty between them. And then there is no distinction left.[2]

Preuss also rejected Gareis' idea (*Allgemeines Staatsrecht*, 1883) of non-difference between the state and the communal body on his theory of the community, since his general theory of the state was derived from a special view of the development of law and state and from an application of *a priori* principles—a method which Preuss held could not solve the immediate problem.[3]

Despite his criticisms of Gierke, the *Genossenschaftstheorie* as a whole was the only one acceptable to Preuss. Concluding his survey of what he called the history of dogmas, he remarked that the attempts at construction had been numerous but the results had been purely negative. Only a few fragments were left; without them there would be a complete vacuum. Reviewing the two centuries of scientific discussion, the best motto for that history was Seydel's phrase as to the bankruptcy of the theory of the federal state. The conception of the state could survive in the modern world only by freeing itself from the *a priori* idea of sovereignty.

In the history of political and legal ideas in Germany, Preuss was the first and most distinguished exponent of the denial of the conception of sovereignty as the essential characteristic of the state.

For the establishment of a new method of investigation—and generally speaking for the complete application of the

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 67.

[2] Ibid., pp. 68–69.

[3] Ibid., pp. 71–73.

Genossenschaftstheorie, or, in other words, of the modern federal idea—this renunciation of the conception of sovereignty was of the utmost importance, in order to make a bold scientific attempt towards a new method of investigation and to avoid "the danger of being entangled in a maze of error."

He agreed with Zorn that "the conception of sovereignty has been one of the great sources of confusion in the modern literature of constitutional law, not because of the structure of international law, but because of the structure of the conception of the federal state."

So long as the idea of sovereignty kept any place in the structure of the "state," the theory of the federal state was faced with two discouraging alternatives—either the theoretical distinction between the non-sovereign state and mere communal bodies must be given up, or there must be a return, more or less overt, to the doctrine of divided sovereignty which had been abandoned.

It had already been widely recognised that the theory of state sovereignty, of which Bodin was the scientific founder, is not a generally valid and absolute conception, but rather a theoretical abstraction derived from a particular phase of historical development.

Hitherto the realisation of this fact had tended only to eliminate sovereignty from the "essentials" of the state, but Preuss held that it must have a further consequence—the recognition of the fact that the whole conception of sovereignty originated in and belonged to a realm of ideas which has vanished with those forms of the state to which it was appropriate. As the actual forms of the state are essentially different from time to time and from place to place, so in the theoretical consideration of these phenomena there must be different basic ideas corresponding to these different phases. This development, like every organic development, was not by abrupt changes but by gradual transformation. No exact mathematical boundary-line could be drawn between one stage of development and the next, and each successive stage contained many traces of the previous ones. But Preuss insisted that it would be "to abandon any scientific conception of state life if one were to deny the existence of some guiding principle—different for each phase of development," and he added that "actual life is an unbroken stream, it knows no sections or epochs, and all divisions and periods are merely lines drawn by the human mind to aid it in the better understanding of actuality; and as such they are indispensable."

In political science these indispensable helps are represented

by those leading ideas in which men find the motive force of every great period in the development of the state. Preuss held that "without these abstract ideas political phenomena cannot be the subject-matter of constructive theory." But consequently it was of the utmost importance that the fundamental ideas utilised should in fact be an adequate expression of the real state life at the particular time.

Preuss believed that the essential error in which former thinkers and jurists were entangled was due to the fact that in their presentations of the theory of the federal state they had started from the basic idea of a long-past period of state formation, from the sustaining principle of the absolute state, i.e. from the conception of sovereignty. The result was to bring into the presentation and interpretation of a unique modern state structure a very heterogeneous and indefinite conception, on which all attempts at the formulation of principles must inevitably be shattered.[1]

Fealty was the theoretic basis of the mediaeval feudal state; sovereignty was the sustaining principle of the absolutist state; the legalist state needs another and quite different principle for its basis, if indeed such a state be regarded as a stage, independent of preceding stages, in the development of the state.

The recognition of this capacity of change in the forms of state life does not involve a denial of historical continuity, for the present-day state still contains some remnants of feudalism and some relics of absolutism.

With these assumptions Preuss rejected the attempt to make the sustaining principle of the absolutist state, i.e. the conception of sovereignty, into the basic idea of the modern state, and insisted that the introduction of a new conception was necessary for the scientific interpretation of the state. Therefore the elimination of the conception of sovereignty from the doctrines of present-day constitutional law and the consideration of it as merely an historical principle, analogous to the feudal principle, was in his view the most important starting-point from which the modern conception of the state must be begun.[2]

This conclusion would, Preuss thought, have been reached by those writers who no longer regarded sovereignty as essential to the conception of the state, if they had been willing to carry their opinion to its logical end. But the opinion had been due less to inherent necessity than to the disinclination to abandon the customary description of the members of a federal state as

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 93. [2] Ibid., p. 94.

"states." Therefore they did not take their stand on a theory of the state from which the theory of sovereignty had been eliminated, but they took as an indispensable postulate of the non-sovereign states the existence of a sovereign state superior to them.

As Preuss explained, this means the retention of sovereignty as an essential of that highest state formation, and the corresponding idea that the members possess their state character only through their share in that sovereignty; so sovereignty slips in through the back door and with it "divided sovereignty."[1]

The failure of all German writers upon political science, up to his own time, to realise fully that the conception of sovereignty must either be an essential of the theory of the state or abandoned altogether, Preuss ascribed to the method hitherto followed. That method had been the reverse of the "natural process" of construction; it had been building from the top downwards. True, in the philosophical introductions, etc., to the various writings the process of development from the smaller to the greater had been acknowledged and commune, state, union of states, were discussed in proper order. But when it came to the juristic presentation their order was reversed; the empire was dealt with first, then the member state and last of all the commune. This was the legacy of the idea of the absolute state, which was inseparably bound up with that of the idea of sovereignty.[2]

In commenting upon this Preuss remarked that as it is impossible for anyone to begin building a house from the roof without the support of scaffolding, so it is impossible for anyone who is working out a series of conceptions gradually increasing in breadth to begin with the widest and supreme conception unless he makes use of some *a priori* conception outside of the series of conceptions with which he is dealing.

The previous theory had therefore moved "in a vicious circle"; the method had prevented the elimination of the conception of sovereignty, which in its turn prevented a change of method. Both must be abandoned together.

The method which takes account of historical development, which proceeds from the lower to the higher, from the simple to the complicated, from the narrow to the wider, is a common characteristic of modern science in all its branches. In applying this method to constitutional law and particularly to the problem of the federal state, the key to the theoretical comprehension of the state is to be sought not in the adoption of an ancient and *a priori* conception, but in the setting aside so far as possible of

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 94–95. [2] Ibid., pp. 95–96.

all *a priori* postulates and in following the development of the state from its conceptual origin.

This method of investigation, that is, from below to above, will start from the lowest, simplest and narrowest of the whole chain of conceptions, namely, from the limits of personal right. In this way Preuss hoped to reach a new fundamental principle which as an adequate theory of the modern state would be fitted to replace the no longer supportable idea of sovereignty as a sustaining principle.

The destruction and elimination of the conception of sovereignty and the transformation of the method of investigation are then essential; but one thing more is needed, and that is a change in the goal of the investigation.[1]

In regard to this Preuss pointed out that all discussions hitherto had proceeded on the assumption that there existed some general federal law of which that of the German Empire was a more or less modified application. That there might be such a body of law he did not deny, but it did not afford a scientific basis of inquiry. In this respect again it was necessary to have more regard for the experimental methods of modern science. Satisfactory scientific principles are reached only by the combination of inductive and deductive reasoning, but inductive reasoning must precede deductive; only material collected by the inductive method can be usefully treated deductively.[2] As natural science had suffered a great deal from the old evil of generalisations based on scanty, inexact and isolated observations, Preuss thought that constitutional law, especially the theory of the federal state, suffered still in his day from this inadequate method of investigation.

Although under the influence of the actual phenomena many modifications had been made, they were subject to all those disadvantages and imperfections which are inevitable when extensive repairs and alterations are made to a complete edifice. Without sufficient inductive investigation, from the cursory observation of a single case, with the dragging in of *a priori* ideas and requirements, the characteristics of a general federal state had been deduced and the old theorists had always to be putting patches in the federal state while continuously complaining that the theory and practice did not coincide. This divergence between theory and practice had even been declared to be normal. But in reality there could be no conflict between the right theory and sound practice—rather are they the same thing.[3]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 97. [2] Ibid. [3] Ibid., p. 98.

The situation thus described was in Preuss's view largely due to the theory of sovereignty, that *radix malorum*. So long as that doctrine prevailed the discussion of the whole problem turned on the seat of sovereignty, and as that was an *a priori* conception, so the answer to the question was an *a priori* one.

The renunciation of the conception of sovereignty created a complete vacuum in federal law. To fill it the new method of investigation required, firstly, inductive inquiry, whereby the necessary material for investigation could be procured, and, secondly, a deductive conclusion derived from the study of this accumulated material.

As the first contribution to this process Preuss proceeded to examine one of the collectivities known as federal states, namely, the German Empire.

Preuss began this task by an analysis of the conception of sovereignty and the reasons for its inadequate applicability to the modern state formation.

In the transition from the feudal to the modern state the absolute state acquired a notion of sovereignty which sprang, not from a moribund and scholastic conception, but from the abstract expression of a real living force, i.e. it was the child of the time. The technical terminology of the science forms a kind of cypher code understood only by experts, but the first requisite of a cypher, if it is to be of any service, is that its terms shall have the same meaning for all who use it; even slight differences of interpretation cause confusion. And Preuss pointed out that in respect of sovereignty there are more than slight differences of interpretation. Some of the interpretations are mutually exclusive. But this wealth of definitions pointed to the complete setting aside not only of the name but also of the substance of sovereignty.

The overwhelming influence of our modern conception of the state on the theory of constitutional law, which is manifested in all the movements of the time, was shown particularly by the fact that the long succession of definitions of sovereignty ended finally in the reduction of this idea to a complete non-entity and its own self-destruction.

The absolutist notion found expression in Stahl's definition of sovereignty as "the primary, original and supreme power, which conditions and comprises all organs and institutions." Waitz defined it as "independence of any higher power"; Haenel by his doctrine of *Kompetenz-Kompetenz*. Liebe defined it as "legal independence from the commands of any other person" and

distinguished this from supreme rights, whilst to Zorn it was the source and substance of those rights. Jellinek regarded sovereignty as that quality of a state by reason of which it can be legally bound only of its own free will, and Rosin defined it as "determination solely by own will." Gareis considered sovereignty to mean the ability of a ruling community to treat any interest it chooses as its own interest. International law seems to reject the task of definition; Martens held that sovereignty means simply that each state forms by itself an independent juristic person. And Gierke thought the criterion of sovereignty to be the fact that in the sphere of law there must exist a supreme union authority over all other union authorities in every independent national sphere of life.[1] And finally Brie defined sovereignty as the quality possessed by an authority of being the highest in its own sphere,[2] thereby endeavouring to separate the notion of the state from that of sovereignty.

These last two jurists, whose ideas were opposed in theory, in fact abandoned the substance of sovereignty, while retaining the name. Unquestionably in a series of formations (*Erscheinungen*) progressing from the narrower to the wider, from the lower to the higher, there must be at any given time one which is the widest and highest, and amongst organic unions the state, which has no state comprehending it and superior to it, is a highest or supreme union, as for example the German Empire. But these external relations of a state do nothing to determine the internal nature of the state conception, and do not help the understanding of its relations downward and upward.

The lower collectivities comprised within the highest one may yet have something of the state nature; and on the other hand even the "highest" organism can be dependent on another though not fully developed, union, namely, the community of nations which is the outcome of international law, for each is the "highest" power only within the sphere of its own national life.

In the eighties of the last century the conception of sovereignty which Brie, Gierke and other jurists upheld was quite compatible both with the modern legal state and with modern international law, but only because it had its name, and not its substance, in common with the old conception of sovereignty. But the real notion of sovereignty was the fundamental and sustaining principle of the absolutist state.[3]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 103.
[2] Ibid., p. 104.
[3] Ibid., p. 105.

To Preuss the theory of sovereignty originated when the Roman jurists and especially Bartolus first distinguished sharply between the *universitates quae superiorem non recognoscunt* and the *universitates superiorem recognoscentes*. According to the mediaeval conception of the *imperium mundi* only the Holy Roman Empire came into the first category; but national sentiment and the pride of the rulers soon led to claims to inclusion within it—claims which could only be satisfied by the legal fiction that a *universitas* was without a *superior* if its only *superior* were the Emperor. This resulted in the formation of the territorial states and the break-up of the mediaeval world.

The absolutist state was by its nature an exclusive association which absorbed into itself all the public powers which in the mediaeval age were divided among a long chain of narrower and wider associations, starting from the district association and the gild and rising to the Romano-German world empire. The absolutist state recognised no union wider and more general than itself; equally it allowed no independent collectivity below itself. Side by side with the absolute state there was only the individual. This was in fact its object—a condition in which there was no intermediary whatever between the supreme generality of the state, caring for all things, and the number of individuals who made up the people (*das Volk*). Such unions as there were appeared only as local manifestations of the state or even as individuals; that is, there was "centralisation of government and atomisation of the people." This tendency of the absolutist state had a strong theoretical basis and obtained its theoretical completion by means of the conception of personality of Roman law.[1] As in public law the state, so in private law the individual, is the sole inherent, original legal subject; and such creations as are not individuals which must be recognised as possessors of rights are regarded as artificial imitations of individuals, created by the technique of jurisprudence. Even the state, so far as it entered upon the sphere of private law, was forced into this scheme as the *Fiscus*. Between the possessors of legal rights in their respective spheres—the "state" and the "individual"—there was no intermediary. For each in its own sphere there was an analogous terminology; "the sovereign state" and the Romanist "absolute person" are correlative ideas.[2]

Gierke rightly applied the attribute of sovereignty to the Romanist personality, saying that "the Roman person is sovereign internally and externally. . . . It is moreover indivisible, like

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 108. [2] Ibid., p. 110.

individuality. Its general and equal content is essential for its conception; it cannot let go a piece of itself without incurring self-destruction, and it cannot be a part or a member of another personality." To Preuss these two conceptions of the "absolute state" and the "Roman person" have one common feature—"sovereignty," "the unique and characteristic single nature of this 'Proteus' among conceptions."[1]

The sovereign state required as its inevitable correlative the sovereign person, i.e. the absolute individual of Roman law, and this again was untenable without the *persona ficta*. At the instigation of Beseler there had been during the half-century before Preuss wrote a scientific movement against this result of Romanist legalism—a movement which had met with increasing success. And yet Gierke, the most strenuous supporter of this movement, who had devoted his whole researches and energy to it, and had not failed to recognise the connection between sovereignty and the Roman conception of person, still clung to the doctrine of state sovereignty. On this Preuss disagreed entirely with Gierke. He held that his (Gierke's) conception of sovereignty was not the genuine and right one. It was clear to Preuss that the rejection of the *persona ficta* must entail the rejection of its correlative conception of sovereignty.[2]

The infallible indication of a sound and true theory is its effective interworking with reality. Theory rises to the height of its task when it not only presents a true picture of the facts, but with actual knowledge clearly indicates the line of future development. As it obtains this knowledge only by the close observation of actual phenomena, it is under the influence of actual events, but it also influences events. This interaction existed between the theory of sovereignty worked out in the sixteenth century and the absolutist state which was then in process of formation and grew ripe and overripe in the seventeenth and eighteenth centuries.[3]

So Preuss asserted that the theory of sovereignty took in the history of theories of the state the same position as the absolutist state in the history of states.

He maintained that "as the conception of sovereignty required, the absolutist state was in fact an institution for control of the whole human community; it was a unique entity, not tolerating any independent political collectivity above or below itself; it recognised "neither an international law nor a law of smaller

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 111.
[2] Ibid., p. 112. [3] Ibid., p. 113.

communities which could break into the sphere of the private law *persona ficta.*"[1]

Since law is the limitation of the will of personality, the idea of public law presupposes that the state is only one, though it may be the highest, of a number of personalities. But this is in direct conflict with the idea of the sovereign state. The state appears as a person only in private law, where it divests itself of its state character and as *Fiscus* appears as an ordinary *persona ficta.*

If the theoretical conception of an international law was alien to the Middle Ages, there was more than a mere substitute for it in the two international world powers—the Roman Empire and the Papacy, which represented the commonwealth of collective Christianity over the nations and states.

The absolute state was free from this superstructure whose place modern international law, of which the theory was still only in its early stages, was not yet able to take.

From the historical point of view, Preuss asserted that "every present moment is nothing but a conflict between the past and the future." Juristic theory must, however, regard the matter from a different standpoint; for its particular purpose it must call a halt in the march of human events, and formulate principles and doctrines as to the position at such a moment. But in so doing it must keep fully in mind that its basis is an artificial one, is in fact an imaginary static position in a dynamic movement.

Preuss therefore endeavoured to throw some light on the constitutional conceptions of his time by careful historical investigation. He observed that the present-day position of the state contained more or less important remnants of past epochs and more or less powerful germs of future development; and he set up as the object of any legal presentation of the state of to-day the derivation from actual conditions of a general principle which would comprehend those remnants and those germs, without compulsion, as it were in a common higher unity.[2] For the period of the absolutist state the basic principle was sovereignty and Preuss's whole argument had, he believed, led to the purely negative conclusion that for the modern state the conception of sovereignty, which was externally and internally the sustaining principle of the absolutist state, could no longer furnish a unifying and consolidating basis.

Whilst the sovereignty idea prevailed, it maintained its absolute dominating character above—in the sphere of international law—

[1] Hugo Preuss: *Gemeinde, Staat, Reich,* p. 114. [2] Ibid., p. 118.

and below—in the sphere of the law of the narrower political commonwealths, or rather by the complete absorption of both these spheres of law. At the present day international law and the law of the narrower political unions, i.e. the right of political self-government, were to Preuss "the allied opponents and conquerors of the idea of sovereignty."[1]

This appeared to Preuss to contain a powerful germ of future development.

With the growth of international intercourse the modern state is becoming only a member, dependent in all respects, of the greater community of states.

Although, owing to the temporary lack of organisation, the international community ruled by international law had not yet appeared as a complete institution, yet Preuss could point to the fact that even in his time it extended to certain fields of actual administration. In the international administrative unions for postal matters, railways, shipping, weights and measures, coinage and certain trade matters there were already organised international law unities over the states, and this had opened a way to the attainment of the highest and most ideal objects of public jurisprudence. For Preuss held that the cultural development of the individual state required its increasing participation in this international collectivity—to quote Lorimer, "the interdependence of progressive states is necessarily progressive."

After discussing the views of various international jurists of his time who did not accept this conclusion, Preuss agreed with Fricker that "we see in the term 'international law' the expression of the claim that law does not cease at the boundary of the state." Admittedly this is an essentially modern claim incompatible with the fundamental theory of the state as understood in former times, and so Zorn was right in saying that "international law and sovereignty are two mutually exclusive conceptions."[2]

Preuss took the same view with regard to the relationship of the state to those below it, to the narrower and more limited political unions. Just as the modern legal development broke down the absolutist position of the state by forcing it into the position of a member of an international legal community, so it "put an end to the absolute domination of the state over those below it by bringing about the recognition of the narrower political unions as possessors of a public law of their own, and of an independent sphere of will."

Preuss emphasised this tendency of the modern view of state

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 118. [2] Ibid., p. 122.

formation; namely that in contrast to the communes and other communal bodies the state at the present time no longer appeared "only as the sole species of its genus, as the sole possessor of public law rights, but as one among many admittedly lower but certainly homogeneous and similarly formed entities."[1]

Preuss argued that those writers who saw in these narrower unions merely creations of the state for its own purposes and possessed of personality only in respect of the law of property, ignored the characteristic phenomena of the modern state and legal development, like those who refused the recognition of international law. What distinguished the position of the modern commune from its former one of a mere geographical part of the sovereign state was its recognition as a holder of its own sphere of will and as a personality of public law.

These two movements, which have originated from the special spirit of the modern state and have shattered from above and below the foundations of the traditional sovereign state, have come together in both the theory and the practice of those political structures which appear as states made up of states, that is the so-called federal state law.[2]

The three modern organisations customarily described as "federal states" all recognised at least the principle of self-government for the communes, though applied in different ways and in different degrees. Preuss pointed out that political communities which claim to be states yet recognise a legal union and community, in the form of a consolidated state, which by its organisation and power negatives much more emphatically than the community of nations of international law the idea that states have no superior. And he added that on the other hand the category of the lower political communities within the state raised themselves to a status in face of which it was hardly possible to continue to deny to this whole category the quality of independent personality in public law.[3]

But by its very nature the conception of sovereignty must oppose an absolute veto on both these developments. It was therefore not by chance, but of necessity, that the conception of sovereignty opposed great and almost insuperable obstacles to the formation of the federal state. Its elimination must needs be the starting-point of any constructive effort. Without such elimination the modern theory either must maintain the true

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 122.
[2] Ibid., p. 123. [3] Ibid., p. 124.

nature of sovereignty and deny not only the positivity of international law, but also the conception of the federal state and the legal personality of the communes, or it must recognise modern legal developments and give to the term "sovereignty" a completely different meaning.[1]

The first alternative was adopted by Seydel and Zorn, whose final conclusions were diametrically opposed to each other. Preuss agreed with the other body of opinion, held by Haenel, Laband and Gierke, which thought that the modern science of the state must have this in common with modern natural science that it differs from the older schools in principle by not regarding the phenomena of organic life as absolutely isolated, by not dividing the different species by eternal and unbridgeable chasms, and by following an ascending series of organisms from the lowest to the highest, from the narrowest to the widest.[2] And political science has the advantage that there are no gaps in the chain, caused by the complete disappearance of some of its links. The conception of sovereignty in the science of the state corresponded to the old view of the eternal immutability of the species. But natural science had by Preuss's time overcome the old doctrines; political science must do the same.

Held had tried to introduce relativity into the idea of sovereignty by reference to the subordination of all states to God; but this was to pass from jurisprudence to theology. Bluntschli, with his mind on international law, declared that sovereignty was "only relative not absolute," and even Gierke had found in this relativity the characteristic of sovereignty. Preuss ascribed this to the fact that it offered him the only way out of the confusion caused by the inner conflict between his completely modern outlook and his reluctance to abandon the old and century-hallowed traditional word "sovereignty."[3]

Preuss's criticism was that although Gierke recognised the essential similarity between all political corporations, communes and unions and the state, yet he gave a special character differentiated from that of all other political unions to that union whose power is not limited by any other power above it and dominates all powers below it. For, as Gierke said, "a supreme power is distinguished from any other power by the characteristic of being a complete power" and "the will, which corresponds to that power, is different from every other will in that it is sovereign, more comprehensive and self-determined."

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 125.
[2] Ibid., p. 127.
[3] Ibid., p. 129.

Preuss asserted that in the whole of the works of Gierke nothing is to be found which an adherent to his general theory must so strongly oppose as the principle thus enunciated. For in the first place it is doubtful if the power of the state is actually not to be limited from above by any similar power. For the power of the international law community, fully recognised by Gierke, is a similar, though on account of the lack of executive organisation not like, power and one which limits the state. The subsequent conclusion that the supreme power is "power" is, in Preuss's judgment, a complete mistake. By adopting it Gierke fell back into the bondage of the absolutist state, from which he had hitherto so successfully freed himself.[1] By maintaining it the founder of the *Genossenschaftstheorie* had joined hands with his opponent Seydel.[2]

Again therefore, as the starting-point of a new method of investigation and to avoid confusion, Preuss insisted on the absolute necessity of the elimination of the conception of sovereignty. He admitted that the idea of the authoritarian state (*Obrigkeitsstaat*) still showed much vitality, in many different ways, in the life of the modern state, but he held that it is no longer fundamental but is mingled with other elements.

The main task in the formation of a modern state theory was the displacement of the principle of sovereignty by a new principle which would give scope for the play of what was left of the old forces and of all the new forces and elements in the modern state. This, Preuss held, is quite independent of the precise form of the state, for the French Republic contained far more of the authoritarian state than did most constitutional monarchies. So to Preuss the new ideas which were struggling against the idea of supremacy were not the products of constitutional dogmas obtained from France, but were new forms of the old Germanic idea of self-administration, which had been maintained and developed in England.

From the same source, that is from Germanic law, there has emerged the fundamental principle of the modern legal state, whose task it was to sweep away the Romanist conception and the Romanist word "sovereignty"[3] and replace them by the modern conception of the collective personality of the public law.

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 130.
[2] Ibid.
[3] Ibid., p. 136.

§ 4

Then Preuss analysed the organic and personal conception of the state. The organic theory which was incorrectly supposed to have originated with Aristotle but actually found its first starting-point in the philosophy of Schelling, was exaggeratedly developed into the organic notion of the anthropomorphic theory of state by Friedrich Rohmer, and his scientific apostle, Bluntschli, who saw in the "microcosm of the state" the image of the microcosm "human being" and particularly that of "man."

Van Krieken, who sought to point out the error of this theory, took as his basic axiom that the state is an enlargement of a human being just as a human being is a miniature of the state. He made a valuable contribution to the organic state theory by asserting that "the state in our time is the fruit of human activity, a work of a conscious rational human will."[1] A century earlier than van Krieken, A. L. Schlozer had summed up the matter as follows: the state is an invention founded by mankind for their own benefit, just as they invented the fire insurance company. The most instructive manner of treating the state theory is to regard the state as a machine artificially assembled in order to function for a certain purpose.

The theory which developed later was directly opposed to this view, since it regarded the state not as an invention but as a phase in the necessary development of mankind, not as a machine but as an organism, because the nature of an organism is that it finds the basis and the cause of its existence within itself, not outside itself, and all external circumstances are a condition and not the cause of its life.[2]

Even Stahl, opposed as he was to the political development of his time, admitted that there was a factor higher than human will, namely, "the historical dispensation which brings the innumerable acts of innumerable men to the one conclusion, that the state and he were produced in a definitely ordained manner."

But Preuss pointed out that while Stahl's theory of state formation exclusively by the agency of historical dispensation (*Fugung*) had been skilfully adapted to the modern conception, yet since it was based on the transcendental, conscious and divine origin of the state, it went beyond the limit of the organic theory.

Although Preuss was in entire disaccord with the theory of contract as laid down by Locke and Rousseau he was somewhat

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 136. [2] Ibid., p. 140.

more favourably inclined towards the patrimonial theory of which Ludwig von Haller was an exponent, since it did not entirely imply the rejection of the organic theory. His own argument against both these theories was that they were entirely opposed to the political character of modern states.

The question which then arises is, how did the state come into existence at all? And the only answer that can be given is, by some creative force of which the compact is only one manifestation.

The organic theory can be supported only on "negative grounds." It rejects the idea of arbitrary state creation by a conscious effort of human will, but also, whilst not entirely denying the theory of divine formation and kindred theories, it assumes a similar attitude to the one that modern natural science has adopted towards religious beliefs, that is to say, it neither accepts nor rejects them, and merely says that political science cannot explain the origin of the idea of state but must take it for granted. In the same way natural science has for the time being been obliged to take for granted the original source of human life.

Gierke contended that there could be no comparison between primeval organic living matter and the idea of the organic state since the latter was derived from far more complicated organisms and particularly from the spiritual ego endowed with thought and will which was the higher state of their development.

Van Krieken borrowed his conception of the organic from a textbook on anatomy by Hyrtl. " 'The organs,' says the latter, 'form a chain (an organism) so closely interwoven that no one of its members can be removed without destroying the conception of the whole.' " In like manner the state, and not only the state, but all unions regulated by it, can be regarded as organisms. This designation of "organism" placed the state "in the category of those existences which, created by the union of parts to form a whole, gave rise to a unity differing from the sum of its parts."

Van Krieken's error lay in supposing that the organic conception was indispensable for the state, but not so for other corporations. Gierke's reply, with which Preuss was evidently in agreement, was that "like the state the corporation can be conceived absolutely as an organism and its personality can be explained and made the general juristic principle of internal corporation law only on this basis."

In the organic structure of modern science, the state is only one of the members in the immense chain of organisms, and in direct contradiction to van Krieken, Preuss considered that every person was an organism, either a physical (individual) or

a social organism. Gerber, too, stated that the organic theory of the state was not a mere figurative description of natural and actual conditions which jurisprudence assumes, but was the "natural basis on which the structure of the legally important state relation of will is reared."[1]

The sovereign state as such was not a person. With the rejection of the Roman *persona ficta* its correlative sovereignty had to disappear. Preuss came to the conclusion that the replacement of sovereignty by personality as the central conception of constitutional law must entail a fundamental transformation of the "person" theory.

Von Gerber laid great emphasis on the "personality" theory, but according to him there must be at least three kinds of personality, whereas Preuss insisted that, since personality was entirely a scientific conception, its nature must be basically unitary.

In opposing the assertion of Rosin that a person in the legal sense was a being "to whom the law assigns a purpose in life—a will of his own for its realisation," Preuss agreed with Gierke that purpose and will could not be considered as constituent elements of the personality conception, but that the only essential substance of that conception was the living will power.[2]

Both Jellinek and Rosin were obliged to abandon the theory of the *persona ficta* and find another source of creative power for the formation of non-physical persons. Jellinek rightly remarked that the conception of organism was only an abbreviation of the fact that our former, perhaps also our future, knowledge failed to recognise a class of objects and events. And when Jellinek says that our incomplete theoretical knowledge regards organisms as being united by a purpose, he is confessing that the introduction of the idea of purpose is nothing else but a fiction. But Preuss maintained that the legal conception of the person had no need of this fiction; for the law there were not two kinds of unity, physical or objective, but for it only one unity was important, that of *will*.

Whether or not this unity of will had its basis in a physical body was a matter of indifference to jurisprudence. The physical individual is only the lowest and simplest form of person, and as it is at once a physical and legal organism it marks the boundary line between natural and legal science. But the physical person in its very quality of person is no more real than the higher and more complicated organisms, for the conception of person is a

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 146. [2] Ibid., p. 153.

legal and not a physical conception and has no need of corporeal or incorporate embodiment.

Gierke's opinion on the matter was that every human association which joined together a number of individuals by the partial deprivation of their individuality into a new and independent whole was a natural and actual living unity. Consequently, in speaking of community as above individuality we are using the language not of metaphor but of fact. The communities which superimpose themselves upon the individuals are real persons because they possess their own sphere of will determined by law. Thus the will dominating them is their will and the actions of that will are their own actions; that is to say, all persons, whether physical or moral, are equally capable of will and action. "This capacity of will and action of the corporations we accept as an actuality existing in and with their personality."

Law, therefore, seemed to ascribe personality to the communes only because it recognised them as the possessors of unitary and constant collective will. In this case, as in the case of individuals, we perceive in the will established as the motive force of external action the basis of legal capacity. In Preuss's view the capacity of associations to will and to act becomes a legal capacity, as in the case of individuals, first through the law, though that capacity is not created by the law but is precedent to it.[1]

In order to carry out their decisions, union persons require appropriate organs; but when Jellinek compares this with the need a cripple has for artificial limbs, this is introducing an artificiality which is characteristic but quite false. Preuss agreed with Gierke that the member person represents juristically the collective person just as the eye represents the man in respect of sight or the hand in respect of writing.[2] As it is impossible to deny to man the capacity to see and to write by means of his eyes and his hands, it is also impossible for anyone to deny to communities the capacity for will and action by the agency of their organs.

In strong contradiction to the Romanist personal theory, to which the impossibility of crime in the juristic person was an irrefutable axiom, later science, since Beseler, has developed the possibility of criminal action on the part of associations.

Gierke showed in one of his main works that this latter conception had found practical recognition in the highest tribunals.

The consequence of the state right to supervise the communes is a system of penalties imposed on the communes themselves

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 156. [2] Ibid., p. 157.

and not upon their organs, and this obviously presupposes offences on the part of the communes and not of their organs. Consequently, state supervision over communal unions applied to self-governing bodies as corporations and juristic personalities, not to the individuals representing them.[1]

The capacity of the individual states to commit crimes (*delicts*) and the penal authority of the German Empire over the states and not over their organs was even more strongly marked. The empire imposed its authority as overlord upon the state and if coercion was necessary it was applied to the recalcitrant state, and all members of that state, guilty or innocent, were affected by it regardless of whether they had or had not had a share in violating the imperial law. Nothing shows more clearly that the subject of punishment, that is to say the delinquent, the actual holder of the capacity to will and act, is the community itself as a physical unity, i.e. as a person, and not the physical persons who are its organs. Finally, in international relations it is the states that are recognised as responsible for wrongdoing, that is to say, in this sphere not their organs or citizens but the states themselves are alone considered as capable of will and action.[2]

Preuss therefore defined "person" as a physical unity having a sphere of will defined by law. Such a unity is capable of will and action; it is in its existence as real and active as an individual human being, for the latter is a person not because of his bodily appearance, but because of his faculty of will. And in order that the existence of a non-physical person may be recognised there is no need for either a fiction or the introduction of the idea of purpose. This simple conception of person was one and the same for all spheres of law.

From this conception of person Laband had developed the doctrine of the identity of the person and the individual. "Every person," he wrote, "is a unity, i.e. something logically indivisible and individual." Therefore the law which makes the collectivity an independent holder of rights and obligations, that is a person, by so doing contrasts it with the plurality as a unity conceptionally different from it, and forms of the sum of the separate entities a new basic unity, within which there is no plurality. In Laband's view the breaking up of this new unity into parts which are again persons was irreconcilable with the conception of personality which Gierke himself recognised as the kernel of state law; "for thereby the collectivity would degenerate from a unity into a

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 159. [2] Ibid.

sum of unities, i.e. would lose its personality." This doctrine, in Preuss's opinion, showed clearly that Gierke was right when he described his theory as not readily comprehensible to those whose concern was mainly with private law.[1]

The identification of personality with the individual is peculiar to private law, which is predominantly individual law, and regards any idea of the organic as merely an ornamental trapping. The conception of organism involves the overthrow of this identity of the person and the individual. On the other hand, public law, which is solely social law, is based wholly on an organic entity; this is not imagery or mere analogy, but is of the very nature of things. And it was this which had caused Preuss to set out the organic theory before entering upon the discussion of the theory of "person." To him "person" and "organism" were not antithetical, but were in the relation of species to genus: for "every person" is an organism.

Preuss regarded the "organic" in political science as meaning the combination of heterogeneous parts into one living whole, that is, an organism. Each organic part must subordinate its own partial existence to the conditions of existence of the whole; but at the same time all the parts are so interdependent that one cannot be taken away without destroying the idea of the whole. Therefore the conceptional nature of the organism involves unity in plurality; to understand this nature it is necessary to bear in mind *both* unity *and* plurality. Mere plurality is an inorganic heaping together; mere unity is an undifferentiated inorganic mass; only the penetration of unity into plurality creates an organism. And this organic theory cannot be restricted to the state alone; rather it applies above all to the nature of the person. From the physical standpoint a person is never an individual. In the organic realm only the protoplasm is an individual; it alone is something logically indivisible, for it is not made up of organic parts. All the higher organisms are agglomerations of cells organically united, and a consequence of the nature of the organic is that it is possible for an organism to be at once distinct and part of a higher organism. The highest physical organism is man; with him natural science reaches its limit. But Preuss agreed with Gierke that this Darwinian theory must start from the idea that the law of natural development which had brought man into existence extends beyond this limit and creates and shapes human society.

The more it stresses this "social" nature of the organism of the

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 160–161.

individual, the more easily comprehensible does it make the organic nature of the social community.[1]

Therefore Preuss thought the relationship of men to one another forms the sphere of legal science; and if natural science stops at man legal science begins with him. Therefore the man is to jurisprudence as the primitive "cell" to organic science, individuals are logically indivisible. Preuss contended that as organic natural science, beginning only with "cells," traced their formation into higher organisms, so also jurisprudence did not limit itself to the consideration of individuals, but followed the organisation of individuals into persons of a higher order. Therefore, since the nature and the conception of organism are essentially one and the same in all stages of development, so also the nature and the conception of person is one and the same, whether it be a separate existence or one of a progressive series of communities.

Since the result of the organic quality is that one and the same formation can be at the same time a separate organism and an organ of a higher organism, it is not a contradiction but a result of the organic person theory that one and the same existence is at the same time a separate person and a member of a higher union person.[2]

In legal and state life this relationship prevails almost without exception, if we leave out of consideration the position of the "independent" states vis-à-vis the community of states in international law. If Laband declares it to be incompatible with the idea of personality to break that personality into parts which are again persons, yet on the contrary the organic structure of human society requires that every person as such shall be at the same time an organic part of a higher "union person." That is the much contested "permeation of plurality by unity," the basic principle of the organic theory, without which all law remains merely individual law.[3]

As the nature and life of man is from the beginning individual *and* social, he can divide his will and set up two spheres, in one of which his individual will has sway whilst in the other it is in union with the collective will. Thus he creates social bodies, unions which are unities organically composed of pluralities. In one respect they are considered only as unities, that is externally, in relations in which their internal structure and nature are a matter of indifference. But just as natural science, in order to understand the inner nature of organisms, examines not only their unity,

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 163.
[2] Ibid., p. 164.
[3] Ibid.

but above all the manner in which they are built up of a multiplicity of organic parts, so jurisprudence, seeking to understand the internal juristic life of the collective entity, cannot regard it in Laband's manner as a basic unity, within which there is no plurality, but must direct its attention to the nature of the "part" persons and of their membership of the whole. In both cases the investigation is of an organic union, in the one case physical, in the other juristic. The examination and exposition of this legal tie is the sole task and whole subject-matter of social law, and so of public law, which is exclusively social law.[1]

The whole gamut of public-legal relationships, from the lowest to the highest, can be understood only if we think of "member person" and "collective person" as organically combined and not as inorganically side by side. And consequently, in contradiction to Laband's dictum that "if one supposes two subjects with equal rights and duties, it is not possible to suppose that at the same time one of them is a part of the other,"[2] Preuss maintained that a proper social-organic conception must lead to recognition of the fact that the special character of the reciprocal rights and duties of the subjects of public law can only be understood if one regards one of those subjects as part of the other, or both as parts of a higher whole.

As the individualistic conception remains rooted in private law, it cannot dispense with the crutch of legal fiction. In reality the subjects of public law rise in an ascending series of organisms, each higher category embracing all those below it. A theory of personality for which this actual relationship is a cardinal point, is alone realist: in it alone are theory and fact co-extensive, and there is no need for any legal fiction. For that unity of will which is essential to the conception of the "person" actually exists in the community, and is not a mere abstract idea. But whilst the organic formation of the entity is in the case of the individual a physical one, and therefore one of which law has no cognisance, in the case of the union person it is a juristic one, and therefore essentially subject-matter of law. To ignore this distinction and to treat the collectivity as being on the same basis as the individual, is to treat it as what it is not, i.e. to make use of a legal fiction, and the doctrine that the so-called juristic person is not a fiction makes no difference in this respect.[3] Laband's contention that to regard the city of Berlin as a juristic person is impossible except by "thinking away" the citizens of Berlin, that is, regarding

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 165.
[2] Ibid., p. 166.
[3] Ibid., pp. 167–168.

them as something different and apart from the city, was rejected by Preuss as entirely unsound. Admittedly the city of Berlin is something other than the mere sum of its citizens; it is the plurality of the citizens resident in a particular communal area organised into a unitary community. But it is impossible to "think away" this plurality of citizens without making the collectivity into an artificial and lifeless phantom: there would be nothing left of Berlin but a piece of ground, which clearly cannot be a person. Between it and the citizens separate from it there cannot be rights and duties. The theoretical explanation of the legal tie which binds the city and the citizens is that the persons of the citizens are integral parts of the collective person: the common will which animates the collective person is formed organically of parts of the wills of the members comprised in that collective person.[1]

The same is true, in Preuss's opinion, of the relation of the member states to the Empire. Laband held that the presentation of the Empire as a subject of independent rights and duties was possible only by treating the member states as personalities distinct from the Empire and regarding the Empire not as a consolidated plurality but as a unity distinct from all the member states and even from the totality of them. But in Preuss's view this presentation was merely fictional. The actual difference between the Empire, as a state composed of states, and a simple state must be expressed in a realistic and not fictional theory of the state-law personality of the Empire. That was possible only if the Empire were regarded as an organically "consolidated plurality," that is, as an organic unit which is the unity of all the member states and not something distinct from them. A "something" conceptionally different on the one hand from the individual states and on the other hand from this organisation into a collective unit did not in fact exist: any presentation of such a "something" was a mere fiction. It was to be rejected not only as such, but most of all because it made impossible any theoretical grasp and interpretation of the public law relationships between the Empire and its member states. The legal consideration of the member states could not ignore the fact that they were "subjects"; otherwise they could not be possessors of legal rights, and have rights and duties vis-à-vis the Empire.[2]

Preuss pointed out that the provision of the imperial constitution by which imperial legislation overrode state legislation—a provision embodying a fundamental principle as to the relations

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 169. [2] Ibid., p. 170.

between Empire and states—was irreconcilable with the individualist theory. It was an expression of the principle of the superiority of one will to another; and that was definitely a public law or organic social law principle, for which there is no room in individual law. The superiority and inferiority of unities possessed of will can arise only if the personalities are regarded as being organically *in* and *over* one another, that is, if some are conceived of as "member persons," as organic parts, of a higher collective person. In that event the subordination of the will of a part to the common will organically formed out of the wills of all the parts appears only as an instance of the general law of nature by which the member organism is in all its activities subordinate to the activity of the collective organisation comprising it.

To Preuss state legislation was the highest expression of the social will; and imperial legislation overrode state legislation because and only because the will of the member, being the will of a part, was taken into and subordinated to the common will of a collective person, that is of the Empire.

The reason for the rule of the Empire over the individual states was thus in Preuss's opinion perfectly clear. In contradiction to the individualistic doctrine it was not possible to distinguish between the member states as "persons" and as "parts" of the Empire; rather they were juristically parts of the Empire in so far as they had rights and duties in relation to it, that is, were "persons," and their special personality was explicable only by the fact that they were "part" persons of the collective person which is the Empire.

So Preuss concluded that Laband's pronouncements had not weakened Gierke's doctrine that the task of all public law is to give expression to the idea that the collectivity possesses a personality of a higher order which is formed out of member personalities in manner determined by law.[1]

§ 5

Preuss next proceeded to examine in detail the *Herrschaft* theory in its application to the federal state. He started with the assumption that the previous argument had shown firstly that the elimination of the idea of sovereignty had alone made possible the reconstruction of the idea of "person" on the basis of that

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 173.

of organism; secondly, that the idea of the "organic person" involved the elimination of the idea of sovereignty; and thirdly, that the most important question, and the most difficult part of the whole problem under discussion, namely, what it is that distinguishes the state from the communes, was not solved by the "person" theory. To describe the state as an organism and as a person is not to mark it off from all other communes; on the contrary it only indicates a common characteristic. Even the one purely relative characteristic which can be formulated on the basis of the "person" theory, namely, that the state is the highest collective person known to social law, was invalid; for doubt was thrown upon it by the existence of international administrative unions, and it was of no help in elucidating the structure of the German state entity, for in regard to that there was need of some principle by which the member states, though admittedly not the highest collective entities in this sphere of law, could yet call themselves "states." Preuss pointed out that Gierke's doctrine that the distinction between the state and all other persons is that the former knows no superior and is the only person that is a generality (*Allgemeinheit*) led him into the error of trying to introduce into the chain of relative conceptions, which was essential to his system, the conception of the absolute, that is, the conception of sovereignty.[1] It was not possible to say of the German states that they had no superior, for the Empire was their superior. And even if the state were the highest collectivity it would not on that account be the only generality. On the same line of argument Gierke, in order to introduce sovereignty into his system, had mistakenly put "supreme power" and "power" on an equality.

Von Gerber, the founder of the theory of state personality, had tried to find a characteristic which should mark off the state person from all other persons, and had laid down that "the state as personality has the special power of will, state authority, which is the right to rule, that is the right to give expression to a will binding upon the whole nation for the fulfilment of the purposes of the state." This will-content specifically distinguishes the juristic personality of the state from the juristic persons of private law. But Preuss observed that the right to exercise will in respect of its proper purposes is an original right of every personality; and every collective person has the right to exercise a will binding on all its members. Therefore the actual distinction between the state and other persons comes down to the difference between

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 176.

their respective purposes. This involves the introduction of the idea of purpose, and Preuss agreed with Gierke and Laband that this is not permissible.[1]

From Preuss's point of view the characteristic feature and main error of Gerber's theory was that he described the communes and citizens—that is, the individual and collective persons who make up the state—as "objects" of state rule. But the *Genossenschaft* theory had shown that a person, even as a member of a higher collective person, retains, and must retain, personality. But "person" is a synonym of "subject" and the antithesis of "object." The possessor of a sphere of will can as such never be "object"; "objects" are things having no will, such as goods and slaves.[2]

In Preuss's construction of the collective person the relationship of the state to its communes and citizens was a relation of will unities to one another, i.e. a relation between subjects.[3]

The misconception which he attacked was mainly derived from the individualistic idea of "property" and the idea of state domination. Rosin defined *Herrschaft* as "legal domination and subordination of the personalities," and distinguished *Herrschaft* rights from other rights in that they are rights which a personality derives from its own inherent powers. But in Preuss's opinion he mistakenly departed from this sound basic doctrine in two respects, in describing the subordinated persons as "objects" (i.e. as devoid of will) and in assigning to property the character of a *Herrschaft* right.[4]

Preuss held that the *Herrschaft* idea (as defined by Rosin) becomes tenable only when the persons cease to be a group of equal individuals and enter into organic relationship, and when the position is not that of the relationship of one individual to another, but of the relationships of the collective person to its member persons. A will is superior to another will only when it stands to it in the relation of the whole to a part.

Preuss next asserted that the will of the collective person is legally dominant over the will of its member persons in conformity with the natural domination of the whole over the parts, and this domination does not make the subordinate persons into will-less objects; they remain holders of rights vis-à-vis the "dominant (*herrschende*) person."

Therefore to him *Herrschaft* was the result of the relationship of the organic whole to its parts, and from this relationship sprang

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 177.
[2] Ibid., p. 178.
[3] Ibid.
[4] Ibid., p. 181.

rights of the parts against the collective organism. That is to say, the reciprocity inherent in all organisms extends not merely to the relations of the members between themselves, but also to the relations of the members to the whole.[1]

On this assumption Preuss asserted that the conception of *Herrschaft*, in accordance with that of organism, was based on social law.

Laband and Jellinek had both adopted the theories of Rosin as to "own right"—the former taking up a modified form of Gerber's *Herrschaft* doctrine, and both had fallen into the same error as Gerber and Rosin in basing themselves upon the conceptions of private law.

§ 6

Following on this analysis Preuss set out his view of the relation between law and the state. He pointed out that the science of constitutional law (*Staatsrecht*) combines two conceptions—law and state—and every attempt at a system of such law involves a judgment on the question: "Is the state a creation of law, or is law a creation of the state?" That the inconclusiveness of this discussion, up to his time, was due not to the answers to the question but to the question itself, could, in his opinion, be made clear only by a rightly understood and properly applied organic conception of state and law.

The contract and natural law theory, which assumed that law preceded the state, is, Preuss held, untenable in face of the diversified facts of the modern state, and though the reproach that it degraded the state to the position of a mere "night watchman" is not properly applicable to a doctrine which was the source of the whole of modern political science, yet the value of the theory is to-day merely historical. This is so not only because of its narrow conception of the state, but also because of the vagueness of its idea of law. The pre-state law, which is the basis adopted by this school of thought, is a darling of the philosophers: but the jurist can do little with it. So to Preuss the writings of Grotius and Kant, of Welcker, Mohl and Bluntschli, appeared to be rather philosophical and political speculations than juristic systems.

The opposite doctrine, first developed by Haller and formu-

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 183.

lated most clearly by Seydel, Zorn, Sarwey and others, namely, that the state preceded law, reversed the mistake of its predecessor without thereby approaching the truth. Whilst that theory was not adequate first to the nature of the state and then to that of law, the later theory ran counter first to the nature of law and then to that of the state. On this account Gierke characterised it as a "barren, hopeless, empty theory," which, although it must degrade the whole science of law to a worthless piece of handwork, yet threatens us like an epidemic—a theory which destroys the whole positive content of jurisprudence, and in bewildered impotence can put nothing in its place except the futile formula:—"Law is the body of rules established by the ruler for its subjects."[1] Preuss believed that whilst this conception was embarrassing in respect of the nature of law generally, it altogether cut away the ground from under public law. If law is only a creation of the state, then logically, international law, ecclesiastical law and constitutional law lose the character of law altogether.

Consequently Preuss held that the most consistent supporter of this doctrine, Seydel, reached the denial of state personality and therefore of public law, whose existence is incompatible with the conception of the state as "object." He disagreed also with Jellinek's attempt to save the juristic character of constitutional law by the introduction of the idea of self-limitation on the part of the state, and applying this to "sovereignty." For if law is only an outcome of the state will, it is impossible to imagine how this will can be limited by law; a restriction dependent on the pleasure of the will to be restricted is in reality no restriction at all. If the power of law is to be contrasted with the power of the state, it must be recognised as independent of and co-equal with it. This logical conclusion was recognised even by the representatives of this theory, as they contended that the state *must* limit itself by the law.[2]

The theory was as inapplicable to the state as to law. If consideration of the state as personality, that is, as a legal subject, formed the basis of the theoretical conception of the state, it was impossible to think of it apart from law and treat it as a pre-law formation. Preuss agreed with Gierke's statement that the idea that at some moment of time the state came into being without law, that then first rule (*Herrschaft*) was set up, and then the idea of law emerged was a complete fiction. The recognition that the nature of the state is inconceivable unless some element of law

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 201. [2] Ibid., p. 202.

is allowed to it, was the starting-point of the old legal theory of the state, which regarded it as a legal institution. The other theory was based on the idea that the nature of law required an element of compulsion, which was first given to it by the state; it therefore regarded the state as a coercive institution.

The question whether enforceability is essential to the conception of law could not be answered with a simple "yes" or "no," and Preuss thought that the general mistake in this respect was due to the identification of the final development with the actual nature of the conception, and to the ignoring of the fact that that conception reveals itself by a process of evolution. He quoted with approval Gierke's dictum that "the fact that the enforcement is incompletely organised, and that it may perhaps not be possible at all for want of an enforcing power, does not destroy the conception of law. . . . But the idea that coercive enforcement is proper and desirable is present in every rule of law. Actual enforceability by some organised power is not a characteristic, but a tendency, of law."[1]

Preuss argued that there is immanent in its nature a strong tendency towards the positive establishment of its rules by an organised power and an equal enforceability of these rules. Consequently positiveness and enforceability distinguish the highest development, the ideal of the idea of law, but they are not identical with it.

The whole course of development of law is therefore, like all development, a steady approach towards its immanent ideal, without ever reaching it. As positiveness is a consequence of the idea of law and does not create the law, so enforceability is a product of the progressive idea of law, but it does not make the law into law. Every law is a creation of the idea of law, but law is the creation of a legislative act.

Accordingly, as the acceptance of the pre-law state depends on the confusion of a form of development of law with the idea of law in itself, so on the other hand the acceptance of pre-state law depends on the confusion of a form of state development with the idea of the state.[2] But if in accordance with the idea of historical development we do not identify the nature of the ideas of law and state with the particular forms in which those ideas are manifested as the result of a gradual evolution through countless millennia, then we realise that the question "Which came first—the law or the state?" is not only unanswerable, but ought never to be put. For from this standpoint the question comes down to

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 203–204. [2] Ibid., p. 204.

another: did man precede the family or did the family precede man?

Preuss tried to solve this problem by applying to constitutional law the principles of natural science.

He agreed with Gierke that "in reality state and law have arisen and developed through and with one another. Man could not be man without the existence of a state union recognised as a generality above individuals."[1]

The general law of organic development, namely, that of reciprocal action, has been operative also during the long development of the ideas of law and state. These two ideas have passed through the centuries not in aloofness, for in the course of this development each has often affected the other, promoting and extending it. The drive towards positiveness immanent in the idea of law combined this more and more with the collective organisation which was forming itself above the individuals and on which the task of establishing law increasingly devolved. And the tie which held the collective organisms together became more and more clearly the tie of law.

Every development of the idea of state widened the sphere of law, until in Preuss's time the stage had been reached when state law was the main part of law, and the modern state had become a *Rechtsstaat.*

In an unceasing gradual evolution the modern state had developed from its prototype—the family—influenced by the progressive idea of law; and in the same way modern law had developed, influenced by the progressive idea of the state, out of the vague conceptions of primitive times when morality and religion were intermingled. Although to-day state laws determine the legal sphere of the family, the commune and so on, these collectivities, which are conceptionally older than the state, do not thereby appear as products of the state; rather the state law is only a modern mode of expressing the rights inherent in those "persons."

So Preuss's doctrine of political origins put no obstacle in the way of the theoretical possibility of the building up of the state from below; and he held that historically also the commune came first, the state second and the empire third.[2]

Further, Preuss believed that the evolution of the ideas of law and state was not finished with their reciprocal shares in the manifestations of the legal state (*Rechtsstaat*) and state law. International law was extending beyond the boundaries of states

[1] Hugo Preuss: *Gemeinde, Staat, Reich,* p. 205. [2] Ibid., pp. 206–207.

and empires; international organisations were beginning to be formed above the powerful organisms of states and empires.[1]

Although as yet there was no comprehensive collective organ which determined international legal relationships and there was therefore no full international law, these encouraging beginnings of international law and international organisations showed the same ever-productive driving force which created present positive law out of the vague conceptions of early times and the modern state out of the patriarchal family.

So Preuss found these manifestations of law and state in the present, and confirmation of this interpretation of the past and hope for the future.

This genetic mode of consideration showed, in diametrical opposition to the idea of sovereignty, that the state is a consubstantial member of the chain of human communities, that it is in no way directly antithetic to the individual, and that on the other hand it in no way represents the conceptional limit of human collectivity.

This historical evolutionary way of regarding state and law destroys not only the conception of the state as the sole species of its genus, and thereby the basis of sovereignty, but also that conception of the individual as the sole original subject of law on which legal technique had built up the "juristic person."[2]

This notion postulated the first non-physical collective person as existing at as early a stage as the physical individual. And as the existence of the individual postulates the existence of the family, and side by side with the legal relations of individuals between themselves there emerge the legal relations of individuals to the organic unity, so from the first there are the twin spheres of individual and social law.

After the study of the contrast between private and association law was inaugurated by Bähr, Gierke's investigation of the *Genossenschaft* theory—following on Beseler—had promoted greatly the conception of constitutional law as a part of association law. The previous division of law into private and public law was no longer regarded, as it had been by Bluntschli, as sufficient.

That division of the whole subject-matter of law into private and public law—with the spheres ordinarily assigned to them—was admittedly indispensable for purposes of theory and practice, but was not utilisable for the formulation of a body of doctrine which, making use of the historical method, rejected all *a priori* dogmas and strove to build up from below.

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 207. [2] Ibid., p. 208.

Preuss laid it down that public law, and in particular constitutional law, is part of the general law of the collective person, that is, of the social law, and that starting from the central idea of law, personality, the conclusion reached is that the state is a species of the genus "collective person," and therefore its law is a species of the genus "social law."

As the unitary wills of the individual and the family, of the single and collective person, came into being simultaneously, so the idea of law as the delimitation of the power of will of persons had to develop simultaneously in two directions.[1] The natural impulse of the idea of law towards positivity caused law in the process of development to become more and more closely bound up with the growing collective organisms in which it found the most suitable organs to promote that positivity. And, on the other hand, the nature of those collective organisms consisted in a superiority and inferiority of persons, that is to say, a delimitation of their wills, i.e. it was of a legal character. This legal character remained constant to the collective organisms as they grew into the modern state. At any rate it was latent in them, for they had always the nature of collective persons, which is the legal organisation of a plurality of persons into a unity. But the interaction of plurality and unity in the historical development of political forms and in the intellectual development of jurisprudence was the result only of a very long process.[2] The principle of plurality found expression in the Middle Ages; the period of the absolute state laid stress only on the principle of unity. It had been the task of that age, Preuss thought, to form the unity of the modern state out of the multifariousness of mediaeval political institutions, and the theoretic formula of that stage of development was the idea of sovereignty.[3]

That idea denied the characteristic of plurality in unity and, consequently, the real nature of the collective person and also the social law inseparably combined with the idea of personality. As the conception of persons presupposed that of law, so law presupposed the mutual union of the wills of persons standing to one another in many varied relations of superiority and subordination.

When the task of that age was finished the shell of the modern state edifice was complete; then the legal nature of the state, hitherto latent, made itself increasingly felt; it became more and more effective alike in practice and in theory. The idea of the

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 211.
[2] Ibid., p. 212. [3] Ibid.

unity of the modern state was now sufficiently rooted for its organic formation and combination by means of plurality to be realised. The true theory of the legal state was emerging and taking an appropriate form. The first stage was the recognition of the personality of the state, which thereby entered into the sphere of law, that is, into that network of reciprocal obligations into which law brings all persons. The next step was the shaking off of that conception of private law which identified the person and the individual, and the idea of the state as a collective person and of its nature as an organic structure of social law. And so there was developed the true internal nature of the legal state.[1]

And this nature, according to Preuss, is not that the state is simply a creation of law, but that the "tie which unites all its parts, the individuals and collective persons which were its members, into the highest unity, is a legal tie." So the state appears as an organic tissue of simple and compound cells. Law has not created this organism, but it is of a juristic character.

Preuss argued that Sarwey had been mistaken in identifying the legal state with the constitutional statute, and that they are distinct.[2]

Just as the tendency of law is towards positiveness, so is it also towards compulsory enforcement. For this to be possible, positivity by means of legislation is not sufficient to prevent uncertainty; the positive law must be extended by legal (judicial) interpretation.[3] So the idea of the legal state developed side by side with public law legislation—that is, constitutional laws—the necessity for the interpretation of the public law.

From the doctrine that the unity of the state is not a mechanical unity, but an organic collective personality consolidated out of a plurality, it followed in Preuss's argument that its constitution must give expression to its association character, that is, it must be based on the principle of representation. But this is a dynamic (political) postulate rather than a juristic one.

From the juristic standpoint representation is a *naturale* but not an *essentiale* of the legal state; what is fundamental to it is simply the conception of the state as an organic collective person and holder of state rights.

Therefore the judiciary and popular representation, like every other organ of the state, is not representative of a plurality of individuals, but is the organ of a plurality organised into a unity.[4]

Discussing next the idea of self-government as expounded by

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 213.
[2] Ibid., p. 215.
[3] Ibid., p. 216.
[4] Ibid., p. 217.

Gneist, Preuss pointed out that as the modern idea of the legal state is based on the postulates that the state is a member of a long chain of legally organised collective persons, whose first manifestation, the family, was contemporary with the origin of mankind; that the collective persons, forming parts of the state, are not the creation of its will, but are developments of the same idea as the state itself; and that, finally, the law of these collective persons is not an arbitrary creation of the state, but the developed manifestation of an idea which is as old as the state, it follows that the legal state and all the collective persons of which it is made up are alike self-governing bodies.[1]

§ 7

Therefore, as he was the chief adherent of Gierke's *Genossenschaft* theory at this time, he expounded it more clearly than any other contemporary writer and criticised all political structures from the standpoint of that theory.

He defined the *Genossenschaft* theory as the "rejection of *a priori* doctrines and fictions and the substitution for absolute and sharply distinct conceptions of a succession of developments—understandable as an historical evolution of a primitive idea—which interlocked like links of a chain." That was the leading principle underlying all expositions of the *Genossenschaft* theory.[2]

Preuss asserted the similarity of the definition of the new natural science with that of the *Genossenschaft* theory. He defined the new natural science as the "replacement of *a priori* doctrines and of the absolute fixity of species by a succession of developments understandable as an historical evolution of a primitive organism."[3]

So Preuss could describe the *Genossenschaft* theory as "the Darwinism of jurisprudence."[4]

The *Genossenschaft* was to Preuss the outcome of the German conception of the *universitas*, which differed from that of the Romanists; it was an association unity, a real collectivity of the members, a unity in plurality. And this new idea of the collective person had three elements:—

(i) The collective person, without giving up its own personality, can be a member and an organ of a higher person. And that personality embraces (ii) the plurality, in which there

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 222–223.
[2] Ibid., p. 234. [3] Ibid. [4] Ibid.

is an inherent impulse towards organic combination, and (iii) the unity, which is the result of that impulse.

The search for suitable technical terms for these three elements had resulted in the three descriptive terms "association (*Genossenschaft*)," "corporation (*Körperschaft*)" and "institution (*Anstalt*)."[1]

Although Preuss adopted this terminology, he disagreed with Gierke's (and Rosin's) definition of the association as a corporation (in the sense of German law) which is not a political commune. That is a corporation, but not a public law association.[2]

In criticism of this nomenclature, which made the association into a sub-species of corporation, Preuss pointed out that if it were correct it was surprising that the term "association theory" had established itself for this whole body of doctrine instead of the term "corporation theory." The association theory is the doctrine of corporations; neither Gierke nor Rosin had doubted that its fundamental principles applied to all corporations, and not merely to a sub-species—the associations.[3]

Without the basis of the *Genossenschaft* conception the new conception of corporation would dissolve into nothingness. To Preuss the division between corporation and association was somewhat arbitrary, in other words, *a priori*. The combination of association and institutional elements which characterises the commune is to be found in a great number of other corporations, so that on the one side the exception of the state and the commune from the class of "associations" is entirely unjustifiable, and on the other side, in view of the fact that these corporations contain an association element, the idea that the two conceptions are in the relation of genus to species appeared to Preuss to be inacceptable.[4]

Preuss argued that the real ground for the exclusion of the political communities from the category of associations was the maintenance of the conception of sovereignty which—as diametrically contradictory to the general association view—confused and shattered the system.

Gierke had hinted at the sovereignty theory when he indicated that the commune or the state might be something more than an association. For the word "more" could not refer to any institutional element in them, but to the conclusion that "owing to the quality of sovereignty, which distinguishes it from all other persons, the state occupies a special position."

But this led to the doctrine, formulated more clearly by Rosin

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 240.
[2] Ibid.
[3] Ibid., p. 241.
[4] Ibid., pp. 242, 243.

than by Gierke, that the state was the only community possessed of rights and all others had only duties. Preuss believed he had shown this to be inherently unsound. And, further, the conception of the state as the highest imaginable form of community was in conflict with the whole basic idea of the association theory. From the standpoint of that theory the state can be regarded only as the most completely organised expression of the idea of community for the time being—not as the ultimate form. And in the case of Germany the highest form was not the state but the Empire.[1]

The whole idea of the peculiarity of the "sovereign" state, like the resultant demarcation just discussed, is an *a priori* one, and conflicts with both the method and the basic idea of the association theory.

Preuss emphatically asserted that the essential importance of the association theory was due to its "recognition of the fact that inasmuch as man from his earliest beginnings is and feels himself to be both an individual and one among other individuals, and so has an individual and social life, he is able to divide his will and to set up against the sphere of the egoistic individual will the sphere in which his will is combined with others into a common will."[2]

And so Preuss asserted that "society (*Gesellschaft*) is an individual legal relationship; association (*Genossenschaft*) is a union based on social law." The Romanist doctrine which made a sharp distinction between *societas* and *universitas* was rejected from the outset by the historical evolutionary theory of association. True there have been personal unions which modified the purely individualist structure of society without becoming fully developed "union" persons, but these were embryonic forms of the association idea, bridging the gap between the unorganised plurality and the plurality organised into a unity.

Even specialist associations, such as professional associations, were considered by Preuss to be associations in the narrower sense.

So Preuss laid down the definition that " 'association' means that form of union of persons in which there is inherent the principle of the coalescence of the members into a single higher unity"; association in the narrower sense "means a union in which that principle has not resulted in the complete establishment of an actual union-person over the individual persons. Where, on the contrary, that *has* happened the association has made itself into a 'corporation.' "[3]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 243–244.

[2] Ibid., p. 245.

[3] Ibid., pp. 246–247.

Preuss accepted fully Gierke's dictum that in the past "the quality of collective personality was common to all the corporations of German law. A corporation came into being when a unity inherent in a collectivity was perceived and accepted as a person." The inherent idea of association attains complete development in the corporation. But it is not possible in Preuss's opinion simply to reverse the previous classification and treat the corporation as a species of association, for the latter contains some elements resulting from a conflicting principle. "In this respect the association theory needs to be enlarged by means of the institutional theory."[1]

The nature of the corporation consists in the organic unity of a plurality of persons, i.e. in the unity of the wills of that plurality. If that unity develops internally, that is, if the ruling will is inherent, then the corporation appears as the completion of a pure association idea. But if the corporation is influenced by an external and transcendental will—both in its formation from the plurality and in the exercise of its authority over the plurality—then it is not purely an association structure, but contains institutional elements also.

The institution is a unity constituted as some form of legal union from outside. Its living principle is a will that is an offshoot, become individualised, of an external will; its personality is not inherent in the persons whom it unites, but is derived from above.

Preuss left aside those institutions which are the outcome of the will of a private person and whose activity is restricted to the sphere of private law. For the rest the nature of the "institution" is most clearly manifested by the constitution of the Catholic church. The unity of the church did not derive from the coming together of the faithful, but from its institution by a divine founder. In the canonist theory it did not develop, but was created; the single will which animates it is not the common will of the members, but an emanation of the divine will; and the ruler of the church is not the organ of the collectivity but the representative of the Founder.

The growth of the "sovereign state" was greatly stimulated by the influence in Germany of foreign systems of law. The canon law entered along with the Romanist system; the canonist theory of the institution developed with the Romanist theory of person.

Gierke showed repeatedly in his historical examination of the association theory how the sovereign state, taking form as a state institution, gave the prince the same position, based on divine appointment, as the Pope had in the church; how this institutional

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 249.

theory was imposed from above on communes and corporations, in conflict with the still surviving "association" elements; and how finally there resulted from those elements the modern reaction against the institutional state.

It followed from Preuss's argument as to the nature of association that any combination of the antagonistic theories of "association" and "institution" is impossible; their external forms do not approximate, for the one develops upward and the other downward. But the corporation can unite elements of both kinds; its ability to do so is simply the ability of the collective person to be at once an independent organism and part of a higher organism; the first expressing the association element and the second the institutional. The formation of such a corporation is an organic process from within, but aided by the higher collectivity. Preuss agreed with Gierke that fundamentally the association structure needs an institutional factor (in the form of some higher approval) and the institutional structure needs an association factor (in the form of some co-operation of the members).[1]

But he did not agree with Gierke's further dictum that as a general rule there is no difficulty in determining which is the preponderating element in any case. For we are concerned with an unbroken chain of manifestations, with no sharp break anywhere in it; the beginning and the end—the institution and the association—are clear; but in between are a variety of corporations, which contain the two elements in varying proportions which cannot be mathematically determined. And, in fact, Preuss regarded such determination as unnecessary for a terminology which treats association and institution as antithetic conceptions, but the corporation as a creation which can combine elements of both conceptions in many varied proportions. Preuss further pointed out that the corporations can have institutional elements, and can as collective persons be at once members and organs of a higher collective person, but only of that higher collective person as such—they cannot be members and organs of an external individual person or of an alien personality with which they are not in organic relation.

For Laband's dictum that "the state alone rules over human beings," Preuss substituted the formula that "only collective persons rule over their member persons."[2]

On this assumption the so-called "corporation supremacy" of the state presents no difficulty in the legal state, as the collective

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 252. [2] Ibid., p. 254.

personality of the state comprises as organic members all the corporations existing in it. At the same time the state can itself contain an institutional element, but only vis-à-vis a higher collectivity of which it forms part, not vis-à-vis an individual or a will not in organic relation with it.

The German individual states were not exclusively corporations of an association character, but also contained institutional elements, because they were members of the Empire, but not because and so far as they were monarchical.

Although the German monarchical right derived originally from the domination union (*Herrschaftsverband*) in contrast to the association union, and the period of the authoritarian state had regarded the state as an institution vis-à-vis the will of the ruler, and some remnants of this conception were still to be found in the modern life of the state—yet these appeared as exceptions to the prevailing legal principle on which the modern state is based.

According to the principle of the modern legal state the prince is an organ of the collective person—that is, the state will is a part of the state common will—but is not a transcendent will influencing the state from outside. The right of the prince in respect of the state presents itself as a highly empowered member-personality within the collective personality. Therefore it is not the right of the prince, but that of a higher collective person, embracing the state, which gives an institutional element to the state corporation.

Finally, Preuss argued that the Empire was not a pure association, but a corporation not completely free from institutional elements. He argued that these institutional elements in the Empire did not depend upon the position of the Emperor, or upon the collectivity of the federated governments as manifested in the federal council, because both the Emperor and the federal council were subject to certain limitations—they were organs of the Empire personality and their will was inherent in the will of the Empire and not transcendent to it. Preuss assumed further that the Empire was at the same time a member of a higher collectivity, the international law community. However incomplete the collective organism of this international community might be at that time, yet there were the beginnings of such an organisation in the various international administrative unions and in the bond of international law which held together the nations of the world.[1]

Preuss declared that these formations could be considered as

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 255.

an embryo of a collective personality of the international law community, and at the same time as a structure analogous to those unions which he had previously called associations in the narrower sense. It was a union of a plurality of state persons with an inherent tendency to organic union, but which had not yet reached the stage of a unity superior to the plurality.

This unmistakable trend of development was directed to the final organisation of the plurality of states into the organic unity of an international collective person. That was the ideal, the completion of the association idea, and Preuss assumed that the international community was by its very nature a complete purely association corporation, because a more transcendent will and a higher collectivity of which that international community would form part, were inconceivable; and the possibility of the international community including an institutional element was thereby excluded.

But the existing state organisms, especially the Empire, could have a certain institutional element; otherwise the whole process of evolution of the idea of law and state would be in irreconcilable conflict with the idea of the state and law. And though at the time, in view of the incomplete organisation of the international community of nations, the institutional elements which existed in the Empire corporation, along with the predominant association elements, were of much smaller scope and importance than those existent in the individual states, communes, etc., yet they were not completely lacking. For otherwise the Empire could not by its very nature be a member of international administrative unions and could not recognise international law as a legal limitation upon its will. But the future would unquestionably bring—with the development of the community of international law—a strengthening of the institutional elements, without thereby modifying substantially the legal nature of the Empire as a corporation.

So to Preuss, the commune, state and Empire appeared as corporations whose legal nature showed a fusion of association and institutional elements. This fusion differed in degree, for the institutional elements were stronger in the communes than in the state, and stronger in the state than in the Empire. But this fact does not lead to the classification of these manifestations of the association idea into separate genera. Commune, state and Empire are corporations and nothing more than corporations.[1] This principle, which puts the state with, on the one hand, its

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 257.

lower manifestation, the commune, and on the other hand its higher manifestation, the Empire, in the category of corporations, provided the starting-point from which a theory of the German state could be developed on the basis of the association theory. For it eliminated the two disturbing elements—the institutional idea and the idea of sovereignty—which had hitherto prevented the formation of a coherent and consistent theory of the modern legal state.

The conceptional position of commune, state and Empire within the idea of corporation was established; it remained to investigate the specific difference between them and other corporations and their relation to one another on the basis thus established.

Legally corporations are either public or private. An important distinction unquestionably exists in fact between the rights of these two classes; the theoretical definition of the difference presents great difficulty. Preuss argued that as the public corporation was nothing but the corporation of the public law, the distinction just mentioned is involved in the distinction between private and public law. He claimed to have shown that the idea of public law is derived from the state, and that a constructive theory, which is not *a priori* but inductive, can establish a distinction between individual and social law, but not between private and public law, since these are both comprised within social law. Gierke came to the conclusion that only the state can determine the public law part of social law, and that consequently the idea of the public corporation depends more upon positive and concrete provisions of law than upon theory; and with this conclusion Preuss agreed. No general formula defining the public corporation could serve to distinguish the commune, state and Empire from all other corporations, or one of these from the others.[1]

The existence of public law corporations below the commune was to Preuss indisputable. It was equally certain that state and Empire being included in the category of corporations are not the sole members of their species, and consequently this characteristic is not a distinguishing one.[2]

But there are two respects in which they are marked off from other public law corporations, and these, when combined, do provide a distinguishing characteristic. Corporations can be divided into "natural" and "artificial" or "arbitrary."

According to the organic view, all political communities are

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 259. [2] Ibid., p. 260.

in their internal formation not "artificial" but "natural," whatever may be the outward appearance. In this class are included not only the commune, state and Empire, but also the family, tribe and race. These last three can even attain corporate unity. But what distinguishes them from true political communities is that whilst they have a personal basis, they lack a material basis. And this brings us to the second line of division.

There are corporations which have both a personal and material basis. These include the commune, state and Empire, which are marked off from the others in this class by the fact that the others are "artificial," whilst they are "natural," and also by the special nature of their material basis, which is *territorial.* Commune, state, Empire are distinguished from all other corporations by the fact that they are *territorial corporations.* They alone among corporations have a basis which is territorial as well as personal.[1]

Consequently, the conception of the territorial corporation depends not on the attachment of a union to a particular area, or the possession of a particular property as a condition of membership, but simply and solely on the fact of legal domination in and over a defined territory.[2]

In order to make the position clear Preuss considered the definition of territory and territorial supremacy, and examined the relation of the state to territory and territorial supremacy, not from a philosophical point of view, but from a juristic standpoint.

Examining the various notions of the state territorial supremacy in his own and previous times he criticised adversely all those which were based on individual law in conjunction with the idea of sovereignty, and reached the conclusion that the territorial supremacy was not derived from the conception of *Sachenrecht* but from the idea of the organic nature of the collective person.

The territorial supremacy was derived from the idea of the corporate person which dominates the members within its territory. Therefore the characteristic of the political commonwealth of a territorial society is the organic combination of material and personal elements. The state law is simply the internal law of the territorial corporation, and the law of the corporation is a part of social law. Therefore the relation between the state and territory is one not of individual law but of social law.[3]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 262.
[2] Ibid., pp. 261–262.
[3] Ibid., pp. 288–289.

§ 8

Preuss next discussed the historical relation between the old and new German Empire, emphasising the change in the period from 1806, when the old Empire was finally dissolved, to 1867, when the modern German state had come into being as an organic constitutional state, thereby giving the new Empire a basis which the old Empire had totally lacked.

Preuss considered that the beginning of the modern organic state formation was marked by the work of reform commenced in Prussia by Stein, who really broke up the constitutional basis of the old Empire. The mediaeval autonomy of the village, town and province, where no state law limited autonomy and no state supervision restrained self-government, where the state was nothing and the community was everything, had been transformed into territorial states which in turn developed into absolute states which destroyed the vital forces of the old Empire above them and the communes below. The state had become everything and the Empire nothing. This transformation from the mediaeval state to the absolute state was followed by the modern transition from the absolute state to the organic state corporation.

Preuss defined the old Empire as nothing but a patrimonial state. It was bound to fall, and bring down the patrimonial state, before the territorial corporation of the legal state could raise itself above the territorial corporations of the revivified towns, and above it the territorial corporation of the Empire could establish itself:—these are the two organically related creations of the modern age.

Coming next to the consideration of the territorial corporations and territorial power (*Hoheit*) in the new German Empire, Preuss claimed that his argument up to this point had shown that it was the collectivity idea of the old town-communes, and not that of the old territorial state or the old Empire, which had become the dominant principle of the modern state and legal system. Further, it had been shown that whilst the feudal and patrimonial state had been based in principle on the personal power of the prince and in accordance with this individualistic conception the whole law of that period could not either in form or substance be more than private law, the distinguishing feature of modern public law (as Laband had pointed out) is that it does not recognise either private subjection (*Privatunterthänigkeit*)

or private power (*Privatgewalt*). Their place has been taken by the social law principle of the exclusive domination of the collective person over its member persons. As all public relations are essentially relations of domination (*Herrschaft*), and as in modern law that conception is exclusively derived from social law, all public law is exclusively social law, and so Preuss agreed with Gierke that every presentation of modern political structures must begin with the idea of the formation of the collective person from distinct component parts.[1]

Admittedly the new organisation of Germany as an ascending series of component parts of a legal state had not been systematically carried out from bottom to top. But as the members intermediate between the revivified communes and the rejuvenated state had been largely formed, and the bringing together of the states into the new Empire had been completed in essentials, it was possible to construct a theory of the state on the right lines. The formation of these intermediate members—as in recent times in Prussia, the most powerful German state—by the organisation of the circles and provincial communes showed clearly the essential difference between the old and new state structures.

The Circle Ordinance of 1872 had put an end to the dependence of governmental and representative powers upon the ownership of particular states, and to the feudal basis of local office, and replaced the remnants of the individualist law system of the patriarchal state by a system based on social law. The social law rights of corporate organs took the place of the personal rights of the estates; a real organic public law was substituted for individualistic private law. Similarly, the Provincial Ordinance of 1875[2] put an end to a provincial system which was based on the personal nature of the state organised on the basis of estates, and to which a law of 1823 had tried to give new life by the establishment of provincial estates. Just as the corporations of the old imperial and territorial estates had been merely personal corporations, so these provincial estates had the same personal character and extended beyond the boundaries of their own particular provinces—that is, they were not definitely territorial. The modern political collectivity is, on the contrary, not only a corporation but a corporation with a defined territorial basis (*Gebietskorporation*).[3]

Preuss defined the conceptional "territory" as that of "a

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 366–367.

[2] Ibid., p. 368.

[3] Ibid

material unity in social law, inseparable from the concentration of an association into a corporate unity."[1] The essential presuppositions of this idea, and therefore "territory," existed during the period of the old Empire only in the mediaeval towns, and were not present in either the feudal or the patrimonial state. But modern political organisation had adopted these presuppositions at all stages. The individual law idea of public powers, the property basis essential to the patrimonial state, had been overthrown: and the social law unity of territory had taken the place of purely personal relationship as the bond of union.

Examining then the existing organisation of Germany from this point of view, Preuss held that there was no difference between the town and country communes. In reaction from the mistaken effort at uniformity made for a time under French influence, the idea had prevailed that the difference between town and country was not only a natural one but was deeply rooted in the historico-legal development of Germany in particular, and consequently most German legislation relating to municipalities and communes had abandoned any artificial division—generally based on population—and had taken more account of historical conditions. But the distinction does not affect the consideration of the communes as territorial corporations. The idea of the consolidation of a number of persons by unity of territory had been clearly expressed in recent legislation. "All inhabitants of the municipal area belong to the municipal commune. As inhabitants are considered all those who, in accordance with the provisions of the law, have their place of residence within the municipal area," and "to the commune belong all the inhabitants of the communal area, which includes all the estates within that area." Later, imperial legislation had largely abolished the former distinction between membership of the commune and mere residence in the communal area, and the current right of citizenship was actually a concomitant of that membership which depended solely upon such residence. In short, the bond of union which made the personal element of the commune into a special unity was the material unity of social law. The German municipal and country communes were territorial corporations.[2]

The same was equally true of the organisations intermediate between the communes and the state—namely, the circles and the provinces. These are, in fact, communes of a higher order. "Membership of the communal unions" of a higher order depends on residence within the union. The territory of the circle was

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 368. [2] Ibid., p. 371.

the bond which held the members together: the circle communes were therefore territorial corporations. As regards the provinces the position appeared to be somewhat different. The Provincial Law of 1875 laid down that "the communal union of the province comprises all communes included in the circles within the province and all localities which are attached to those circles," and "members of the province are all the members of the circles comprised in the province." But this related only to the manner in which the territorial corporations are coalesced and not to their character, as to which the kinds of persons combined by the material legal unity of the territory—whether they are individuals or collective persons, or even territorial corporations—were a matter of indifference. As membership of the province depended on the membership of the circle and also on the position of the circle within the territory of the province, the territory was the bond which held the members of the province together—that is, the provinces were territorial corporations.[1]

Membership of the German individual states was regulated by the imperial law of 1870. The distinction between membership of the state and state citizenship was the same as between membership of a municipality and municipal citizenship. "The citizens are members having a special qualification; that is, the personal element constitutes the membership."

State membership depends on descent, marriage or naturalisation. The importance of the territory in respect of membership is first of all a negative one, in that residence abroad ends that membership. But it has also a positive importance. Of the three modes of acquisition just mentioned naturalisation depends essentially upon settlement in the territory of the state. On the other hand, acquisition by birth is possible even when the birth takes place abroad. Acquisition by marriage resulted from the legal rule that the wife acquires the residence of the husband.

The fact that it is the material legal unity of territory which consolidates the personal element into a corporate unity of state membership is shown further by the fact that on the incorporation of a new area by a state the inhabitants of that area automatically become members of the acquiring state, whilst at the same time those persons who before the completion of annexation have moved their residence outside the conquered area do not become members of the state union—for they become subjects of the new state authority only by the fact of remaining within the sphere of power (i.e. within the territory) of the new authority. In contrast

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 372.

with this, the union of two independent territorial units simply by common subjection to the same individual ruler—that is, a personal union—does not form the inhabitants of the two territories into one body corporate. And as the conception of the patrimonial state, which being an institution found its combining factor in the person of the ruler, was expressed in the terms "royal Prussian state," "royal Bavarian state," etc., so the modern conception of the territorial corporate unity describes Prussia, Bavaria, etc., as "states." That is to say, in principle the state territory is by the express law of the member states regarded as the bond that holds the members of the state together; the German member states are territorial corporations.[1]

The so-called *Reichsland* of Alsace-Lorraine required special consideration. Laband had contrasted its position with that of the member states, but Preuss thought that the fundamental question whether the *Reichsland* was or was not a "state" could not be answered until after the adoption of some definite test of the state character of the German member states.

But in any event the *Reichsland* was certainly a territorial corporation. Even Laband regarded it as a province of the Empire with a "decentralised imperial administration," and compared it with the provinces of Prussia, though he maintained that its administration and legislation were quite unlike the self-government and autonomy of the provincial and other communal unions. This contention was based on Laband's doctrine of "inherent rights" as the test of statehood, and the resultant distinction between state and communal autonomy. But Preuss rejected that doctrine and the deductions from it; and regarded the *Reichsland* as a corporation, whether state or communal, and in either case as a territorial corporation. And whether membership of Alsace-Lorraine was membership of a state, or a province, or a commune, the basis of it was residence in the territory of the Empire.

Finally, in Preuss's opinion only those who denied the right of the Empire to be regarded as a "natural" corporation could deny that it was a territorial corporation. He had already argued that only a "natural" corporation could be a territorial one. Seydel's doctrine that the Empire was an artificial corporation, a mere treaty relationship between the member states, involved the conclusion that the Empire had no territory of its own, and therefore was not a territorial corporation. Preuss thought it unnecessary to discuss that doctrine, since Haenel's investigations

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 377.

had provided ample proof that, despite the preliminary pacts, the German Empire was not artificial, but like all other political collectivities an organically developed corporation; and that opinion was generally held. As with the other political collectivities discussed above, in this case also the material legal unity of territory formed the bond that held the personal constituent parts together.[1] (The argument that Article I of the imperial constitution threw doubt on this by its enumeration of the member states Preuss dismissed as of little weight; neither in 1867 nor in 1871 was it possible to indicate the legal unity of the territory of the new organisation except by this method of enumeration.)

As an advocate of the association theory Preuss assumed that this illustrated the fundamental basis of all social law, namely, the interaction of unity and plurality. The conception of territory being solely one of social law, it shares fully the nature of that law. Consequently, the material social law unity of the territory of the Empire is the unity of the plurality of state territories.[2]

The unity in plurality of the political territorial corporations, passing through the development of material social law unities of various grades of unions which consolidated members and territories, ended in the completely developed organism of the Empire.

Thus Preuss's criticism of the new Empire was based on his *Genossenschaft* theory of territorial corporations, deducing from the historical evolution as well as from the actual phenomena in which it was formed an organic development from the lower organism of the communal union to the highest organ of the Empire with the harmonious consolidation of collective personality, inducing the ultimate legal *Genossenschaft* assumption of unity in plurality, without any bias of *a priori* legal conceptions.

The position of the Empire according to this argument was not at all that of a final political organism in the systems of political commonwealths. Rather the federal state was considered as a legal unity made up of a plurality of territorial corporations and representing, therefore, the highest stage of the territorial state corporation and the lower stage of the international community. Modern federalism, therefore, was to him the ultimate political structure embodying unity in plurality of the various grades of territorial corporation, with their own collective personalities; and the long discussions of federalism on the basis of sovereignty could be ignored.

So Preuss conceived that the legal organisation of the new

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 380–381. [2] Ibid., p. 384.

German Empire, in all stages of political structure, from the local commune up to the Empire itself, showed an ascending scale of territorial corporations of which the higher included the lower.

Accordingly, he remarked that there was a presupposition (*Voraussetzung*) of organic incorporation (*Eingliederung*), but there was, of course, in principle no need for every territory corporation to enter only into one of the next higher grade and not directly into one of still higher grade. So in Prussia the larger towns were brought not into the circles but directly into the provinces, and the city of Berlin was not even in a provincial organisation, but had direct membership of the Prussian state.

This ascending series of organic incorporations depends on the faculty of the collective persons to be at once independent organisms and members of a higher organism, and this is the same in the smaller local communes vis-à-vis the higher, in these vis-à-vis the state, in the state vis-à-vis the Empire. When the narrower territorial corporations are regarded as independent organisms their members are indirectly members of the wider territorial corporations; when they are regarded only as parts, their members are directly members of those corporations. In general the line between the two spheres is determined by *Kompetenz*, but "the nature of organic permeation and interaction had the result that neither sphere could be absolutely demarcated and that finally with the individual citizens their capacities as members of a commune, a circle, a province, a state and the Empire formed an organic whole."[1]

Each higher territorial corporation contained individuals and lesser territorial incorporations, and this showed itself in the manner of constituting the requisite organs. In this, in so far as it was done by election or the like, sometimes the collectivity of the individuals belonging to the higher territorial corporation was operative and sometimes the parts of that collectivity, i.e. the lower territorial corporations—that is to say, the members of the higher territorial corporation—took part sometimes indirectly and sometimes directly in these organs of the higher territorial corporations. The first method could be employed for some, for others the second, for yet others a combination of both. The last method was, in fact, employed for the establishment of the circle assemblies, which were elected by the three electoral unions of the larger land-owners, the rural communes and the towns.[2]

These two principles of the direct and indirect participation of the individuals appeared in the imperial constitution in respect

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 385–386. [2] Ibid., p. 386.

of the formation of the Imperial Parliament and the Federal Council of the German Empire. Preuss quoted with approval Laband's dictum that "in the *Reichstag* the population of the German Empire had secured collective representation"; in its election as an organ of the Empire the individual citizens of the Empire took part directly. In the formation of the Federal Council, on the other hand, their participation was indirect, indeed only the highest members of the Empire—the constituent states—took part. This peculiarity of the federal state was explained by Laband as due to the fact that the Federal Council was only partly an organ of the Empire and that in part it was an organ whereby the member states exercised their rights as members. Preuss agreed with Gierke in rejecting that doctrine.

The Federal Council as such could only be the organ of the collectivity of member states; but the organised collectivity of those states was actually the Empire. The provincial assembly was unquestionably the organ of the province, although it was constituted by the circles as the Federal Council was by the states. As the organised collectivity of the circles formed the province and the collectivity of their representatives formed the organ of the province, so the organised collectivity of the member states was the Empire and the collectivity of their representatives was its organ. Laband's comparison with the constitutional position of the Emperor was, in Preuss's opinion, inappropriate, for the Emperor as such was only an organ of the Empire; the King of Prussia was, as such, simply and solely an organ of that state; the two offices were held by the same person. The case of the Federal Council was not analogous; that was not in any sense an organ of a state; the collectivity of the council was not identical with the individual plenipotentiaries. Admittedly each plenipotentiary exercised a special part of the will of a state; but the totality of these parts of state wills which the Federal Council represented was one of the two factors, the other being manifested in the *Reichstag*, which made up the collective will of the Empire.

Laband's opinion as to the nature of the Federal Council was based on the connection of that body with the federal assembly (*Bundestag*) of the old Empire. But important as that connection might be from the political and historical standpoints, Preuss thought it of no significance in respect to the juristic nature of the Federal Council. Indeed, he regarded Laband's confusion of historico-political and juristic considerations as somewhat surprising. For in Laband's view the German union had been a "confederation" and, therefore, not a juristic person, and certainly

not a territorial corporation; consequently, not being a unitary organism, it could not have organs of its own; so the old federal assembly was not a federal organ. And as Laband was not disposed to regard the new Empire as to some extent a state, he could hardly regard the Federal Council as partly a state organ and partly an organ of the Empire. As the Empire had grown out of the old Germanic confederation, but was not legally a continuation of it, so the Federal Council had an historico-political relation to the old federal assembly but had no legal connection with it, for the corporation of which it was the organ did not come into existence until after the dissolution of the Germanic confederation.[1]

The new Empire was a territorial corporation, and the Federal Council was the organ of the Empire, giving expression to the collective will of the member states, like the corresponding organ of any other territorial corporation within the Empire.

The organic combination of two elements, membership and territorial basis, forms juristically the special entity of the territorial corporation. Right in respect of territory is simply the right to be a territorial corporation; territory is a right inherent in the status of the territorial corporations.[2]

Preuss proceeded to discuss next the legal effects of territorial changes and laid down the axiom that every change of the territory of a territorial corporation is a substantial change of the corporation itself. He agreed with Fricker that "the state itself is for us simply the nation organised for legal purposes in a definite area. The gain or loss of state territory is therefore a change in the state itself." The state concept is wholly different from the idea of property. The conception of territory being the same throughout the whole of constitutional law, and developed upwards from below, the importance of territorial change is the same for all grades of territorial corporations, from the local commune to the Empire.

Change of territory is not only a substantial change of the territorial corporation itself; it is the only possible kind of important change which such corporation can undergo. For every change of constitution is simply a change of organs, not of the corporation itself. The essential factors are membership and territory, and the former depends on the latter. Consequently, a change in these essentials is possible only by means of a change of territory. A territorial corporation—whether commune, state or Empire—can only be absorbed into or come out of another by the absorption or separation of territory. A substantial change of membership

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 391, 392. [2] Ibid., p. 395.

without a change of territory is inconceivable. On the other hand, the gain or loss of unpopulated territory, or of territory the whole of whose inhabitants have the option of retaining their former status, is a substantial change of the territorial corporation, for the basis of membership is thereby altered. That is to say, the number of members is not a matter of vital principle; the extent of territory is such a matter.

Change of territory, and that alone, being a substantial change of the territorial corporation, the question arises whether the corporation so changed is a new one, a new subject of law, and therefore only the legal successor of the former corporation. The answer in Preuss's opinion is unhesitatingly in the negative, so long as the whole territory is not lost or a completely new territorial unity set up. He agreed with Gierke that "a collective person, like an individual, is identical with itself so long as it exists." Like the special legal nature of territory generally, so the whole conception of essential distinction between substantial change in a corporation and its dissolution and reconstruction (on which the idea of legal succession is based) involves a break with the individualistic doctrine. The idea that the territorial corporation, and every collective person, is merely an artificial individual carries with it the idea that every substantial change involves dissolution and reconstruction, and consequently legal succession. For the personality is then artificially placed on a definite basis; if that basis is changed in essential respects, then it must be allotted in the same artificial manner a new personality, which will have the same relation to the former, as both are quasi-individuals, as one individual has to another: it will not be a changed personality but a different one; a legal connection between them is conceivable only in the form of a legal succession. But the standpoint of the organic social law theory is entirely different, because it holds that the individual and the collective person are both organisms, the former physical, the latter juristic. With changes in the individual, which are generally purely physical, the law has no concern, so far as they do not cause the loss of, or set up, personality; with changes in the collective person, being of a juristic nature even when they do not cause the dissolution or re-formation of personality, the law *is* concerned. And whilst, therefore, the individualist doctrine, by identifying the person and the individual, also identifies every substantial change of a juristic person with its dissolution and reconstruction, the organic theory rejects both identifications.[1]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 400.

There is only one case in which a change in the physical individual organism is of importance to the law, and that is the change which results from coming of age or—in certain circumstances—its antithesis. That this change is in respect of law a fundamental change is indisputable; but so is the fact that the individual when of age is not the legal successor of himself as he was during his minority, but the same person; he is a substantially changed but not different person.

This conclusion applies equally, in Preuss's opinion, to substantial changes of territorial corporations by gain or loss of territory. Prussia, reduced to one-half by the treaty of Tilsit, was not the successor of the pre-treaty Prussia, but was the same person, just as it was before and after 1866. And this applies both to the lower grades of communes and to the Empire. The German Empire was not the legal successor of the North German confederation, it was the same territorial corporation substantially enlarged by the absorption of the South German territories.[1]

It follows that the loss of the whole territory means the disappearance of the territorial corporation, and that the formation of a new territorial unity—or part of the existing one—means the creation of a new territorial corporation. And the absorption of the corporation which is to disappear, and the formation of a new one, both involve a substantial change in, but not a new formation of, the corporation which is absorbing or losing as the case may be.[2]

The inclusion of one territorial corporation in another can take place in two ways. The territory of the absorbed territorial corporation can altogether cease to exist as a material legal unity, or the absorbed territorial corporation can continue in the relation of a lower corporation to the higher one in which it is included. There is in this case also a substantial change of the territory and therefore of the corporation; for the absorbed territory becomes, what it was not previously, part of a larger territory, but this does not involve necessarily the dissolution and reconstruction of the absorbed corporation. Two different cases can be distinguished. If the city of Berlin, which is at present part of the Prussian state but not of a province, were included in a province, that would be a substantial change in the position of the municipal corporation, but there would obviously be no dissolution and reconstruction of the corporation, which would be the same legal personality after as before the change. Similarly, the exclusion of the larger towns from the circle communes (by

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 400. [2] Ibid., p. 401.

giving to them the status of town circles) is a substantial change, but does not involve the dissolution and reconstitution of the municipal communes, and does not make the towns concerned into new legal persons.

Preuss argued that the position was the same in regard to the inclusion of the member states in the Empire. Such inclusion made a substantial change, for their territories became, what they were not previously, parts of the territory of the Empire. But the states were not dissolved and reconstructed: the state of Prussia after 1867, the state of Bavaria after 1871, were, though substantially changed, the same "persons" as before those years. Hanover, Hesse, Nassau, Frankfurt (all annexed by Prussia in 1867), are still territorial corporations; but they are only provincial or municipal communes, and not the same persons as they were when states. Those states in fact disappeared, and the Prussian state, and not the new communes, was their legal successor.

Preuss held that the critical comparison of these facts made it possible to lay down one fundamental principle. Just as a commune, when brought into a higher communal union, undergoes a substantial change but not dissolution and reconstitution, and remains the same person, so the member states, when brought into the Empire, experienced a substantial change but were not dissolved and reconstituted, and remained the same persons, i.e. states. On the other hand, states included in other states did undergo dissolution and reconstitution, and became different persons, i.e. from states they became communes. So Preuss arrived at the proposition that in truth and fact there was a conceptional difference between the German communes of any kind on the one side, and the German member states on the other, and that this difference was actually based on differences in the mode of absorption.[1] The significance of this conclusion lay, for Preuss, in the fact that it was derived not from the existence of this difference as an *a priori* assumption, but from the conceptional uniformity of all territorial corporations. Starting from this premise, not only the existence but the nature of the conceptional difference becomes logically inevitable. "For if in the comparison of two things all that is common to both is struck out and still something remains, then not only the fact but also the nature of the difference between them is established." So Preuss claimed that he had indicated the factor which distinguished the German member states from the communal bodies;

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 403–404.

he proceeded to show that the theory thus developed was a realistic one, finding its support in private law.

The purely individualistic nature of the relation of the prince to his land—the territorial supremacy—which characterised the patrimonial state was shown in the prince's right, in theory uncontrolled, to dispose of or divide the land. The modern state, Preuss claimed to have shown, differed from the patrimonial state in that it is a corporation and especially a territorial corporation. The change was not simply in the fact that the collective person of the state took the place of the individual person of the ruler, but also in the fact that the place of the mere object of an external will has been taken by a material social unity, with an inherent governing will of its own; in other words, "territory" has taken the place of "land." Therefore the relation of the state to its territory is quite different from that of the prince to his land. Change or division of the land did not affect the person of the prince except externally, as the private person is affected by a change in, or division of, his property; change or division of the territory is change or division of the state itself. The prince may lose his land, but he continues to exist; with the loss of its territory the state comes to an end. Such a relationship is incompatible with the idea of the relation of subject and object; it is inconceivable that every substantial change in an object should involve the change of its subject, that a substantial change in a subject is made possible by a like change in its object, and that the disappearance of the object involves that of the subject also.[1] Consequently, unlike the power of disposal of his land enjoyed by the patrimonial prince, the power of disposal possessed by the territorial corporation over its land is only one of the rights comprised in territorial supremacy. But it is a very special right; it is the capacity of a territorial corporation to change itself substantially. That is the very essence of territorial supremacy. And to Preuss this was the fundamental difference between commune and state. "Communes of every grade are territorial corporations *without* territorial supremacy; the German member states (and the Empire) are territorial corporations with territorial supremacy."[2]

In the detailed consideration of this relationship as regards positive law, Preuss distinguished two fundamentally different cases. A substantial change in one of the lower territorial corporations may or may not be at the same time a substantial change in the higher territorial corporation of which the lower one

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 406. [2] Ibid.

forms part, according as the gain or loss of territory is or is not between territorial corporations forming parts of one and the same higher corporation, and according as the territorial change in the lower is or is not a corresponding change in the higher corporation. The lower territorial corporation naturally cannot be able by its own unilateral action substantially to change the higher corporation; such changes can only be made by the higher corporation of its own motion or by agreement with the lower territorial corporations affected.[1] But where a change in the territory of a local circle or provincial commune means a change of the territory of the state concerned, the change is a matter for that state alone, without regard to the commune affected. Preuss remarked that the provisions of Prussian legislation, by which changes in the boundaries of such communes as are also circle or provincial boundaries involve automatically changes in the latter, seemed to conflict with the principle that a lower territorial corporation cannot of its own accord alone make a substantial change in the larger corporation of which it forms part. It would be so if the subject entitled to make the change were the lower commune itself; but actually it is the state itself which is entitled to make changes in the communal territories of every grade within its own comprehensive territorial corporation. From these and other examples Preuss concluded with Gierke that "every change of the territory of a commune, even when the consent of the commune is necessary, is made by an act of state."[2] The communes have not the legal power substantially to alter their territory—that is, themselves; the communes of the higher grades have not that power in respect of the smaller communes comprised within them; the change of communes of every class is made solely by the state territorial corporation in which they are included. So, as already stated, the German "communes are territorial corporations not possessing territorial supremacy."[3]

The legal position of the member states of the Empire was quite different. Territorial changes among these states depended solely on the wills of the states themselves: the consent of the Empire was not needed for them, and the Empire could not determine upon them. On this as a matter of theory there was unanimity, and practice conformed to theory. But changes in the territory of a member state which were changes in the territory of the Empire could not be made solely at the volition of the member state which was an inferior territorial corporation. But equally—

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 406. [2] Ibid., p. 409. [3] Ibid.

in contrast with the position as to the communes—in view of the territorial supremacy of the member states such changes could not be made by the Empire of its own accord, and the agreement of the two corporations whose territory would be affected was necessary.[1]

That for the transference to a non-German state of territory belonging to a member state the consent of the latter was in principle requisite was scarcely disputed, and practice had been in accord. But it had frequently been argued that peace treaties were an exception, since in these the Empire could cede territory without such consent. Preuss agreed with Zorn that such a distinction, which was based on political necessity, had no juristic validity. The right accorded to the Emperor to make treaties with foreign powers could not widen the competence of the Empire—that is, the Empire could not deal in international treaties with matters for which under the constitution it could not legislate—and it could not in a peace treaty give a consent which constitutionally it was not empowered to give.[2]

But for the same reasons, the exclusion from the Empire of a member state without its consent was not permissible. Such an exclusion was a substantial alteration of the state territory and this required the concurrence of the state. The exclusion from the Empire of parts of the territory of a member state—without the cession of them to a foreign state—was to Preuss inconceivable. For from the idea of the territorial corporation and of territory it necessarily followed that a territorial corporation could not be in part within and in part without a higher territorial corporation. Just as a town could not be partly within a circle and partly outside it, so a member state could not be partly within the Empire and partly outside it. The existence of such cases in the old Empire and the old Germanic confederation was due to the fact that neither of them was a territorial corporation. As the modern German Empire and the member states were both territorial corporations the partial membership of a state was a mere unrealisable speculation.

The whole legal relationship of the member state to its territory derives from the simple and unitary idea of territorial supremacy. The member states have complete power to alter their territory —that is, themselves—and they alone have this power in regard to the communes comprised within themselves. The German member states are therefore "territorial corporations possessing territorial supremacy."[3]

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, pp. 410–411.
[2] Ibid., pp. 411–412.
[3] Ibid., p. 413.

Finally, Preuss declared the Empire to be a territorial corporation possessing territorial supremacy. Admittedly, the consent of the Empire was needed for every change of the imperial territory. So far as the change was also a change in respect of a state, the concurrence of that state was required; otherwise it was solely a matter for the Empire. To the latter it did not matter if the new territory was admitted as an independent member state or as direct imperial territory (as Alsace-Lorraine in 1870): the difference was that in the former case an act of will of the incoming state, as a territorial corporation, was requisite, in the latter case it was not.

So Preuss asserted that externally the Empire had the legal capacity to alter substantially its territory—that is, itself—and that this capacity was an exclusive one so far as concerned what was only imperial territory, but in respect of state territory could be exercised only jointly with the state concerned. The Empire had the same capacity internally, i.e. in respect of such communes as had not territorial supremacy, i.e. were not states or members of states. So the German Empire was a territorial corporation with territorial supremacy.[1]

Discussing the position of the *Reichsland* (Alsace-Lorraine), Preuss reached the conclusion that it was a territorial corporation without territorial supremacy—that is, not a state but a commune—and in fact a commune of the higher grade directly included within the Empire, i.e. an imperial province.[2]

In the fundamental principle thus arrived at Preuss found ready answers to two much discussed and apparently difficult questions as to the status of the German princes and the international position of the German member states.

As regards the first, the princes were not hereditary "Chief Presidents,"[3] and differed from them in legal status just as the member states differed from the provinces. True the prince had no individual right to the land, but this right had disappeared, not because of the inclusion of the state in the Empire, but because of the change of the patrimonial state into the modern legal state. The organic right possessed by the princes before the establishment of the Empire—namely, the right to be the supreme organ of the state—they had not lost any more than the state had lost its territorial supremacy; but they had become the organs of cor-

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 414. [2] Ibid., p. 415.

[3] The Chief Presidents in the Prussian provinces are the heads of the provinces regarded as self-governing communities, and also the chief representatives within those areas of the central government.

porations which had undergone a substantial change. The burgomasters of the towns, the headmen (*Landräthe*) of the circles, the chief presidents of the provinces underwent similar changes at the will of the state, because the territorial corporations at whose head they stood did not possess territorial supremacy. The princes underwent the change, but not at the will of the Empire, because their states did possess territorial supremacy.

No personal appointment, such as that of the Governor-General (*Statthalter*) of Alsace-Lorraine, could confer a real princely status; that could be done only by the establishment of a territorial corporation with territorial supremacy.[1] Unfortunately, this quite simple position had been confused by the introduction of the unsatisfactory because dogmatically meaningless term "sovereignty."

Lastly, Preuss stressed the fact that the idea of sovereignty with the individualistic theory of the state which was inseparable from it, and the resultant private law interpretation of international law, had complicated and confused the question of the international status of the constituent states of the German Empire, which was really quite simple. If the characteristic of the political collectivity, the territory, were degraded from being an organic element to being a mere object, then the nations were regarded like real property owners, and these individuals were distinguishable from others only by their possession of sovereignty. But then international law was faced, in respect of the German Empire and its member states, with the very obstacle which the state doctrine had not been able to surmount. And as constitutional law had failed in its duty to supply international law with suitable ideas, so the attempt had been made to obtain these ideas for constitutional law from international law—an obviously topsy-turvy proceeding.[2]

Preuss contended that as the characteristic of the political collectivities as such is their territory, so the characteristic of the states as such is their relation to their territory—that is, their territorial supremacy. And in his view the international community was an association, in process of formation, of territorial corporations. Independent members of this association could be only those territorial corporations which had the legal power of disposing of their essential basis—their territories, that is, of themselves—the legal power to change themselves substantially and of dissolving and reconstituting themselves—that is to say, which had territorial supremacy. Consequently, communes,

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 417. [2] Ibid., pp. 417–418.

whatever their rank, are not members of the international community, but both the Empire and its member states could be, so long as and in so far as they possessed territorial supremacy. As the territorial supremacy of the Empire restricted that of its member states and *vice versâ*, so there was a reciprocal restriction of their capacity in international law.[1] In this case, as in all others, there were external effects of the restrictions resulting from internal organisation. But Preuss thought that when looked at from this point of view there was a solution, unitary in theory and conforming to reality, of all controversial questions.

So Preuss claimed that at the end of his long inquiry he had shown the contrast between the social and individual law, the three chief categories of the former, and the manner in which they combine. Further, it had been shown that all political communities are corporations, and differ from all other corporations in being territorial corporations; and as such they form an ascending series from the local commune to the Empire. As between commune and state territorial supremacy was the decisive criterion, distinguishing communal and state territorial corporations. As the higher communes included those homogeneous with them, so the Empire included the states homogeneous with it. And Preuss claimed that the creative power of the *Genossenschaft* theory obviated dependence upon the crutches of legal fiction, purpose or sovereignty.[2] In the original idea of that theory the logical conclusion was latent. This line of thought offered the complete explanation of what theory had tried to demonstrate by the most diverse means, and practice had often brought about by unconscious submission to the logic of facts, and disproved the fable of the conceptional incompatibility of reality and theory. And consequently Preuss asserted that on the basis of the association theory and the resultant conception of the territorial corporation there stood a unitary and self-contained legal theory of the German state.

Despite the inherent theoretical weakness in the *Genossenschaftstheorie*, particularly in regard to organic theory, yet its highest contribution has been the inauguration of a new way of thinking which rejected legal positivism, the theory of nature law and the Romanic *persona ficta*; and the final result obtained was the evolution of the fundamental federal idea, unity in plurality.

[1] Hugo Preuss: *Gemeinde, Staat, Reich*, p. 418. [2] Ibid., p. 419.

CHAPTER VI

DEVELOPMENT OF FEDERAL IDEAS, 1890–1918

From the beginning of the last decade of the nineteenth century down to the formation of the German Republic in 1918 federal discussions in Germany were confined to the actual working functions of the German Empire. With the exception of the "association theory," the basis of German federal ideas was a legacy of the juristic theory of federalism. A fundamental cleavage, however, had taken place between two theories of federalism—namely, the individualistic and association ideas, and from these two contrasting currents of thought a new German political and juristic federalism emerged as the result of the actual experience of its functioning in the German Empire.

In the former group the *Allgemeine Staatslehre* of Jellinek, a couple of monographs of criticism of the federal organism and the *Reichsaufsicht* of H. Triepel were the outstanding expositions of the juristic ideas according to which the federative elements gradually merged into the unitary elements through the necessity —political as well as economic—for the efficient administration of the Empire. With the exception of the work of the *Genossenschaft* school, the vast amount of literature in the eighties and nineties of the last century concerning the principle of the federal state tended to reach the same conclusion—namely, that the Empire, as a federal state, was based on the traditional hypothesis of the conception of sovereignty. The general conclusion was that the constitution of the federal state was formulated as "common will, i.e. the law," and the relationship between the collective state and the individual states therein was that of superiority of the former over the latter. Since these ideas were based on the conception of sovereignty the recognition of the supreme right of the member state in the sovereign federal state resulted in the ingenious notion of *Kompetenz-Kompetenz*, by means of which supreme rights were voluntarily bestowed upon the collective state by the member states.

It was generally accepted that in every federal state the member states must be non-sovereign and the collective state must be sovereign.[1]

[1] Georg Liebe: *Staatsrechtliche Studien*, 1880.

Thus the very end of the last and the early years of this century were a period of stagnation of the theory of federalism. At that time the conflict between Seydel's theory of confederation and Haenel's theory of the *Herrschaft* union had not been settled.

In that same period, in 1892, J. B. Westerkamp, in his work *Staatenbund und Bundesstaat*, was still upholding the principles of the American federalists. In a comprehensive historical study of the distribution of the powers and functions in various confederations and federal states in North and South America[1] and in Europe, the difference between *Staatenbund* and *Bundesstaat* was mainly derived from actual "historical, political and geographical differences," and thus was not due to their own characteristics, but to the different "confederated and federal state constitutions."[2] Since the material authority of the *Bund*, i.e. *Herrschaftsrecht*, was essential for the distinction between them, he assumed that the main difference in the sphere of domination right was a "quantitative" and not "qualitative" one.[3]

As to the organisation of the federal authority, Westerkamp clearly stated that "the characteristic difference between the confederation and the federal state did not depend upon the sphere of the supreme right in itself, or upon the sphere of the organisation of the federal authority or the functions of the federal government in themselves, but rather upon the methods of amending and guaranteeing the federal constitution."[4]

Since the development of the confederation into the federal state was brought about by means of the extension of the federal authority so as actually to include the amendment and guarantees of the constitution, the confederation required the unanimous agreement of all its members, whilst the federal state held the "majority principle." Thus the characteristic difference between the confederation and the federal state could and must be based on "self-sufficiency" and "the independence of the union vis-à-vis its members." He assumed that the *Bunde* which possessed these qualities were federal states, whereas those lacking them were confederations. Therefore his conclusion was that the difference was not due to the nature of the union, but only to those attributes of the unions which were based on the independence and limitation of federal practice and law.[5] At the same time he discredited Laband's theory of the union as due to an insufficient investigation into actual and legally relevant facts.[6]

[1] Westerkamp described the federal conditions of Mexico and the Argentine.
[2] Westerkamp: *Staatenbund und Bundesstaat*, 1892, p. 451. [3] Ibid., p. 453.
[4] Ibid., p. 458. [5] Ibid., p. 462. [6] Ibid., p. 479.

The federal state accordingly required a greater measure of the *Herrschaftsrechte* of the union and the confederation required a smaller measure of federal authority.

Two years before Westerkamp, August Trieps had published his concise work on federal organisation, *Das deutsche Reich*, which was also representative of the ideas of that time.

Like other contemporaries, he regarded the state, whatever its particular form at the various stages of development, as presenting the characteristic of all human collectivities—namely, the "unity of will" which found expression in the personality of the state as a subject of public law, and the "authority of that will" manifested as state authority and coming into existence, simultaneously with the settlement of a people, to be the legal basis for its developing common life. The "all-sidedness" of its purpose, and consequently of its authority, distinguished it from all other collectivities, and particularly from the communes.[1]

With regard to the union of states, he entered this state structure through the door of private law. He asserted that when the state abandoned the exclusiveness based on self-sufficiency and entered for the fulfilment of its purposes into international relations there began for it a legal intercourse akin to that of private law, but on a higher plane, in which the relationships of the states to one another were defined and arranged, and in which the individual states appeared as the participating legal subjects with mutual recognition of their unitary legal personality.[2]

As in private law it was an objective legal order which included these legal subjects and as international law raised the physical community of states into a legal community, and formed both the basis and the most general form of state unions, whose existence and regulating influence on state life, by means of the growing knowledge of the legal relations of states hitherto treated as quite isolated, required constant consideration to be given to all spheres of state activity.

According to Trieps, by entry into the international legal community, and by the mutual recognition of the independent legal subject, the state acquired definite rights, and on the other hand in consequence of self-limitation the corresponding obligations devolved on it as a new legal subject. This provided, in Trieps' opinion, the basis for further legal unions, entered into in fulfilment of the tasks of the state, and the form for these unions was "the treaty."[3]

Therefore he divided unions into two kinds, the obligatory

[1] Trieps: *Das deutsche Reich*, 1890, pp. 11, 13. [2] Ibid., p. 14. [3] Ibid.

(*contractual*), and the substantial (*positive*). First, Trieps assumed that "in the legal relationships international intercourse was open to the participating states as legal subjects; it was a matter in the first instance of the relationships of person to person, namely of obligatory unions" which on the basis of the agreed union of will were completed in the form of a treaty, but, in subject-matter, varied in importance according to the purpose of the agreement and according to the particular needs which were to be satisfied by positive action of the states which had accepted the obligation.[1]

By the side of unilateral interests essentially mutual interests came up, whether they led to reciprocal assurances or sought to promote the recognised solidarity of interests by reciprocal obligations—a case which came to the front as the practical basis of treaty-based unions and formed the starting-point for further developments.

The content and scope of the common interests have a decisive influence on the state unions, and, apart from the number of the participating states, determine especially the intensity and duration of the unions, but on account of the multifariousness of life they defy classification. However different the contents of "administrative" or "political" treaties, i.e. treaties relating to internal or external state purposes, might be, they were still, in Trieps' opinion, obligatory compacts which pledge the contracting states to do or not to do certain things. Consequently, the legal position was that the domination of the participating individual state over its people and land was by no means legally influenced by the facts of the particular union of states, and that the mutual relationship of the federated states with one another was on the international law basis of the rights and duties of the members of a society (*Societät*).[2]

According to the nature and extent of the common object there was necessarily a difference in the legal relationship. A growing solidarity showed more and more clearly the insufficiency of the obligatory union until the community of interests covered all the activities of the state, and in order that there might be a permanent guarantee of this community and, finally, for its own maintenance, the formation of a closer legal union and the abandonment of the purely treaty or contractual basis, became necessary.

Along with the administrative unions there are the political unions which for the present purpose need special consideration.

[1] Trieps: *Das deutsche Reich*, 1890, pp. 15–16. [2] Ibid., p. 18

These do not include merely temporary alliances depending on temporary political circumstances, but are unions of states brought about by national relations or other conditions, internal or external, and under the influence of these unifying forces showing a growing community of interests. It was the need for protection, which exists among the larger number of small states bound together by a common tie, that increasingly emphasised the idea of unity.[1]

Trieps pointed out that there was a widespread disposition to treat these unions as being, from the point of view of the society, relationships of international law, and that this idea had been extended, particularly by Seydel, to unions in which legal unity, in contrast to a mere contractual tie binding a legal plurality, had found full expression.[2] This was greatly stimulated by the inclination to search for a limit to these narrower unions, and to derive from the contrast between the federation and the confederation a definite legal line of demarcation, which in the case of the confederation is seen to be the obligatory (contractual) nature of the union.

As regards the discussion as to the differences between the federal state and the confederation, Trieps assumed the main problem to be how to characterise the variations of the state combinations in question from the simple type of "society," that is to say, to determine what is the legal interpretation of their non-contractual relations, in so far as they are not clearly explicable by the "association" agreement.[3]

With its entry into intercourse based on international law and its general recognition, the individual state acquires definite rights not only inside but also outside its own realm. On the basis of international law, and in accordance with its rules, these rights are in every respect, and particularly in regard to territorial authority, "positive" rights. But like the obligations imposed by treaty on a particular state, the corresponding contractual rights are "relative" rights, depending on the relations with the other contracting parties, without regard to third parties. Consequently international legal intercourse, like private legal intercourse, is governed by absolute and relative rights.[4] Connected with and resulting from this distinction, there arises the question whether in the relationships we are now considering positive rights are not involved as well as relative (contractual) rights. In view of the insufficiency of the contractual tie, it was in Trieps'

[1] Trieps: *Das deutsche Reich*, 1890, p. 18.
[2] Ibid., p. 19. [3] Ibid., p. 23. [4] Ibid.

opinion necessary to enquire if the corresponding substantial or positive (*dinglich*) tie could furnish the starting-point for the legal elucidation of the union.

Trieps held that in contrast to the contractual right, which gave its possessor a claim for specific performance against the other party, the positive right is the direct power of a "person" over a "thing." That right is, by its very nature, of concrete application; the actual treaty or contract, which aims at establishing a right over a thing, or changing, conditioning or transferring the right, is conceptionally an abstract matter. Only gradually was there recognition of the special character of the actual treaty or contract, which in the interests of the security of intercourse must have a precise form, and the establishment of its validity in private law.[1]

The principle of positive rights, or the direct rule of "person" over "thing," could, according to him, apply to the territorial supremacy, and those rights vested in the international legal subject of his own inherent right.[2]

Trieps assumed that the main difference between *Staatenbund* and *Bundesstaat* was not only due to internal differences in their organisation and functions but also, though indirectly, to "the contrast of the relative and absolute law" and to "the distinction between obligatory (i.e. contractual) and positive union."

Therefore "unity of the central authority and sum of the individual authorities" are the dominant factors in these unions and decide the further question as to how far the unions are to be treated from the standpoint of international law as being contractual unions of a number of states, or from the standpoint of constitutional law as unitary collectivities based on a positive union.[3]

Though the federal state as a "real absolute union" applied the majority principle in legislation and the unitary state function in administration, yet there were still the wider organisations and different spheres of state life between individual and collective states. He admitted that the separation of powers as the characteristic of the federal state was derived from the relationship of the central authority to that of the individual states, the competence of which was determined by the constitution. In this respect he assumed that the theory of *Kompetenz-Kompetenz* was of the highest importance as the characteristic quality of the unions which could be classified as federal states.[4]

[1] Trieps: *Das deutsche Reich*, 1890, p. 24.
[2] Ibid., p. 25. [3] Ibid., p. 54. [4] Ibid., p. 63.

Although Trieps approached the federal theory from a different angle, yet his federal conception did not differ from Laband's idea that the confederation was based on a "legal relationship," whereas the federal state was based on the "legal subject."[1]

Affolter, in his work *Das Allgemeine Staatsrecht*, published in 1892, upheld the opposite argument regarding the confederation and the federal state. He assumed that it was because of the legal order based on the obligation of the individual states to be organs and members of it, but not because of the law of the confederation itself, that the confederation appeared as an organised unity and consequently as a subject, whereas, as the legal authority of the federation was exercised not only over the states as a whole, but also within the states, the federal state had an authority which directly affected the land and people of the individual states.[2]

Differing from Laband's theory, he held that there were no fundamental distinctions between the juristic person and the association, because the former was to be recognised as an economic subject, whilst the latter was recognised as a legal subject in the sphere of property law. Accordingly he asserted that the confederation and the federal state were both associations, of which the first possessed only the states, while the latter possessed also citizens as members; and since each has an economic "subject," i.e. the exchequer, they were considered as juristic subjects, and since both appeared, though not by means of their own right, as organised unities in respect of foreign affairs, they were regarded as subjects in this relation.[3]

In a later work, the essay on *Staat und Recht*, published in 1903, Affolter assumed that a confederation, which could be formed and dissolved "by a treaty of international law," was a new political commonwealth with its own organisation for carrying out the state tasks. By means of the distribution of political functions between the union and the individual states he made clear the relationship between the confederation and its states. In so doing he expressed an opinion altogether different from the common view, namely that though the confederation was a "new political commonwealth" formed by treaty, yet as the real (*dinglich*) claim on the territory appeared to be divided internationally between the confederated state and the new commonwealth, the members of the confederation were not only the states, but also the individual citizens who were directly related to the

[1] Trieps: *Das deutsche Reich*, 1890, pp. 76–77.

[2] A. Affolter: *Grundzüge des allgemeinen Staatsrechts*, 1892, pp. 53–56, 57.

[3] Ibid., p. 55.

confederated law, although they had no active political rights as members of the confederation.[1] But the confederation, owing to the legal nature of the international treaty relationship and its activities or functions, may not be a complete state, and the individual states may maintain the same sovereignty and inner functions as those of the normal unitary state.[2]

In his view the confederation was not only a new commonwealth, i.e. a state which comprehended the individual states and citizens as members, but also was based on treaty relations between states and the union, whereas the federal state was a "state" in which there was no treaty-basis, but a legal constitution, formed not by the unanimous will of the individual states, but by virtue of a law which could be enlarged and altered even to the extent of destroying the separate organisms of the individual states.[3]

Kloeppel, in his study of *Dreissig Jahre deutscher Verfassungsgeschichte*, in 1900, stated that the German union could not be a confederation in the sense of the international legal relationship of sovereign states, but must be regarded as coming under the conception of a federal state, since the "constitutional relationship" in which the individual state stood to the higher authority was the basis of the federal state, and the structure of international law was the foundation of the confederation, because the individual states, since the downfall of the old empire, had maintained constitutional sovereignty, and the union as such was recognised as a legal subject of international law. Therefore he assumed that the union was not merely an international, but a treaty relationship which guaranteed the sovereignty of the members.[4] Thus he admitted that the federal state was a constitutional structure which possessed a federal constitution and its own collective and independent organs, and the federal law and the federal authority were based on the majority principle. Therefore he defined the German Empire as "the state unity of Germany under the kingdom of the Hohenzollerns expanded by the participation in the government of the princes and the free cities, as estates, in federal forms."[5]

Conrad Bornhak, in his work, *Allgemeine Staatslehre*, in 1896, approached more closely to the position of Gierke's *Genossenschaft* idea of the state. The conception of the state in general is based

[1] A. Affolter: *State und Recht* in *Annalen des Deutschen Reichs*, pp. 827, 828, 831.
[2] Ibid., pp. 833, 834–39–40. [3] Ibid., pp. 839–840.
[4] Kloeppel: *Dreissig Jahre Deutscher Verfassungsgeschichte*, 1900, p. 26.
[5] Ibid., p. 216.

on the three main factors, "a definite territory, the people belonging to it, and the collectivity of both under the highest authority." It does not matter if the state be described as the subject or the object of authority, but the traditional habit is to describe it not as the object of the authority over it, but as the subject (possessor) of that authority. The state is, therefore, the dominion over land and people independent of any higher earthly power. The state is dominion; that is to say, the state rules, is the possessor of dominion. But this dominion must have one special quality; it must be independent of all other earthly power, and exist of its "own right."

As Bornhak favoured Gierke's and Preuss's ideas of the state, he enquired into the validity of the definition of this negative quality of independence as "sovereignty." He remarked that the state could be described as derived from Deity and therefore divine only in so far as, on the negative side, there is no higher power, and on the positive side it is the task of the state to co-operate with the church in fitting man for the next world. But no further conclusions of a kind favoured by a theologically minded jurisprudence could be drawn from the divine right of the state.[1] Bornhak, like Gierke, assumed that the difference of the state from all other legal communities depended on the nature of *Herrschaft*, i.e. on the independence of state authority from any other power.

The unions of private law are set up either by voluntary agreement of legally equal individuals, who of their own will undertake reciprocal obligations, or by marriage or ties of consanguinity; but both kinds are subject to the control of the state.

Even the communal union, which by its very nature is most like the state and exercises like it a territorial and personal dominion, lacks independence. The church's dominion is not of this world; it has no dominion over territory or physical persons, but only over the spiritual life of mankind. Although the church is conceptionally not subordinated to the state yet in its conflicts with infidels and heretics it invoked the aid of the state, which alone had dominion over the whole personality.[2]

Bornhak, like Preuss, assumed that the objects of the state authority were "land and people." "No state," he said, "is conceivable without a definitely limited territory." The "land" is not merely a sphere of activity of the state authority; it is the object of the material right of dominion (*Herrschaft*).

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 9.

[2] Ibid., p. 10.

At the same time the people, i.e. those attached to the state, are "the personal object of the state dominion." But there is no necessary legal tie between them and the land; the state dominion over its subjects being personal, it extends even to those who are outside its territory.

The state "dominion" is as such legally unlimited and illimitable. This quality was no longer considered as derived from the conception of sovereignty; it is rooted in the very nature of the state. Every limitation "presupposes a power which can limit the state and therefore is to it a higher authority." "Such a higher authority," he explained, "is incompatible with the conceptionally necessary independence of the state authority."

So he returned to the old hypothesis that the state can "do whatever it will"; its right of dominion is the comprehensive sum of all imaginable rights, which can never be divided entirely into separate powers of the territorial authority and individual duties of the subjects.

Thus by the necessity of its being the state is absolute, whatever its constitutional form may be.[1]

But he asserted that the facts do not commonly correspond to this legal absolutism. The weakness of the state authority can prevent the state from doing what it is legally entitled to do. There are moral limitations even on the legally unrestricted power of the state. The fact that it is legally entitled to make laws which some of its subjects are forbidden by religion and conscience to obey only shows the incompleteness of all law, which can never by itself deal with all human relations.

The legal limitation of international law, in so far as it is recognised as a legal system ruling over and binding the states, does not limit state dominion over land and people, since international law is established only to regulate the relations of the states with one another but not the relations of the states to the objects of their dominion.[2]

It might be assumed that in the federal state there is a legal limitation upon the dominion of the state, inasmuch as both the collective state and the individual state rule over the same territory and the same people. But actually neither federal state nor individual state answers to the conception of the state as such. Each of the two is an incomplete state organism, and it is only in their combination that what we commonly understand by a state exists. The possibility of divisions of the state authority and the idea of the consolidated state were, in fact, Bornhak's

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 11. [2] Ibid., p. 12.

main reasons for favouring Gierke's conception of the state as an organic personality.[1]

Bornhak remarked that there were some who described the state as a personality and organism, and others who denied its possession of these qualities.

Personality means that an entity has legal capacity, that is, that it has or can have its own rights and duties. Like law generally, constitutional law is concerned with legal conditions, the reciprocal relations of independent legal personalities. Without these different personalities in relations one with another constitutional law could not exist. As the state is a legal subject the personality of the state remains the same, even when its constitution undergoes a complete change.[2]

He explained further that the view, which maintained that the state was the union of the people with the holder of *Herrschaft*, and that the holder of *Herrschaft* was the highest organ of the state, was reached by the fact that a legal relationship cannot be a legal subject.

Like Gierke, he asserted that "the construction of a collective personality of such a kind that in relation to one another as persons the whole and its parts have rights and duties, goes beyond the bounds of private law and even of logical thought, and enters into the realm of mysticism."[3]

On this assumption he acknowledged the identity of the physical person with the juristic personality. But Bornhak threw doubt on the acceptance of the state as an organism. Whilst the conception of personality is a legal one and can be utilised directly in the discussion of constitutional law, the conception of organism belongs to natural science. As the state is an entity created by the human mind, it is evidently not a product of nature. In the literal sense the state cannot be an organism, but it resembles one in some respects. Opposed as Bornhak was to Gierke's notion of the *Genossenschaft* theory, as being "Darwinism in jurisprudence," yet he admitted that much. These similarities were due to the fact that separate components of the state were not merely "wheels of a machine," but have developed interdependently and fulfil certain functions like the limbs of the body. Therefore it was to him a "matter of choice" whether the term "organism" was applied to the state or not.

Bornhak asserted "that consideration of the state as a collective personality composed of persons, and entering into legal relations

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 12.

[2] Ibid., pp. 12–13.

[3] Ibid., p. 13.

with its parts, which one usually regards as the fine flower of the organic theory of the state, could be just as well maintained, and just as little logically conceived, if the idea of the organism were abandoned."[1]

On this assumption he refuted the statement that it was a natural law axiom that the social compact was the basis of the state, and asserted that the state is "not a creation of law but an historical fact."[2]

In criticising the doctrine of "purpose" he said that the state of his day, by making comprehensive provision for the protection and economic existence of individuals, and by undertaking great industrial enterprises, had elements of the socialistic ideal state, according to which the state should be the sole undertaker and thereby guarantee the economic existence of the individual members.[3] The state purpose is of importance for the characterisation of the state in its political aspect, but juristically it is of no importance whatever. The purposes of the state are impressed upon its collective legal system and its administrative activities.

Although Bornhak favoured a new conception of the state, yet his federal idea conflicted in one way or another with the orthodox theory of the consolidated state.

He divided the consolidated states into two large classes: (A) unions between two states, and (B) state unions.[4]

The former he divided into two types: (*a*) the co-ordination of two states, such as personal unions and real unions, and (*b*) the subordination of one state to another, such as that of colonies or dominions or protectorates to the mother state. The former are international treaty relations; the latter are relationships of suzerainty.[5]

The second group of state unions he also divided into two categories, confederations and federal states. Out of the fragments of the Holy Roman Empire there were being formed at the close of the Middle Ages two collectivities which could be regarded as confederations, namely, the Swiss Confederation and the United Netherlands. The member states were "by no means modern states," but "had grown up on the soil of the system of estates"—a fact which gave these two confederations some features not present in those of a later date. The modern confederations, such as the Swiss Confederation from 1815 to 1848, the North American Constitution from 1778 to 1789, and the German union from 1815

[1] **Bornhak**: *Allgemeine Staatslehre*, 1896, p. 14. [2] Ibid., p. 17.
[3] Ibid., p. 24. [4] Ibid., p. 207. [5] Ibid., pp. 207–224.

to 1866, were therefore the historical basis for his formulation of the theory of confederation.

What made the two earlier confederations not juristically but politically more important than other alliances was the long duration of the union, based on a "permanent community of interests" and "the combination of a number of insignificant small states into a political collective power."

The permanency of the union made it necessary that there should be a standing representation of the collective power. In the Netherlands this took the form of the States-General and the Statthalter. Whilst the latter was only the executive of the estates of the individual provinces, the political influence which he exercised in each state introduced into the confederation a factor making for unity and into the republic a factor making for monarchy. The union itself had not only collective political relations, but also a collective property (*Gesamtbesitz*). As the union left the sovereignty of the individual states untouched, these could make alliances with other state systems.[1] In North America, under the Articles of Confederation of 1778, each state maintained its sovereignty, freedom and independence and every power and every right which was not expressly conferred upon congress.

The legal validity of the federal articles depended upon ratification by the state legislatures considered as holders of the individual state sovereignties. The organ of the collectivity was a congress of delegates appointed and recalled by the legally competent authorities of each state. The confederation alone represented the state in foreign relations, regulated the posts, weights and measures and coinage, commanded the army and navy and appointed the staff officers and all naval officers, and contracted debt in the name of the union. But the federal organ was only granted authority to legislate subject to the ratification of the confederated states, and had no means of executive action, but was entirely dependent on the good will of the sovereign states. This confederate compact was altogether inadequate, and consequently it was replaced by the federal constitution of 1787, which is in substance unchanged to-day.

The German confederation of 1815 formed a permanent defensive and offensive alliance of the confederated states with the mutual guarantee of their possessions. As a political collective power it entered into relations with foreign powers on the basis of international law. The dissolution of the German union took

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 227.

place in the year 1866 by all the member states either declaring the union to be dissolved or acknowledging and confirming its dissolution in the peace treaties.

Diverse as were these confederations of the past, they all had a common starting-point and fundamental principle, namely, the complete sovereignty of the member states. But the only possible way in which sovereign states can combine in due legal form is by a treaty in accordance with international law.

Therefore the union, although it may be called a constitution, is not "a law but a treaty between states."[1] From this Bornhak went on to explain that even though the principle of the majority decision might be adopted in respect of the legislation of the union, the final basis was the individual wills of the consenting states. The federal authority of the majority decision depended on this. And if the states did not believe themselves able to accept the majority decision, they had the last resource of the sovereign state that puts its honour and existence above all treaty obligations, namely, the denunciation of the treaty and the taking of the consequences of that action.

He concluded, therefore, that "the admission of the majority decision in all modern confederations does not set up a federal constitution, but is in complete harmony with the sovereignty of the states and the international law character of the union which holds them together."[2]

So he held that the international treaty cannot create anything more than a legal relationship between the states. Admittedly the *Bund* is politically a collective power both internally and externally, and this gives to those unions which are politically strongly organised the appearance of "state organisms," but Bornhak maintained that legally "this collective power is not different from the sum of the individual states united by membership of a society, just as a private law company can be nothing else than a plurality of individuals legally united."[3]

On this assumption he reached a conclusion that the nature of the confederation is that of an international treaty relationship between sovereign states; it is not itself a legal subject, and its authority is "nothing else but the sum of the state authorities of the confederated states." But there may be factors dependent not on international law but on constitutional law—e.g. the principle of the majority decision, unequal voting powers of members, the establishment of a common representative assembly,

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 231.

[2] Ibid., pp. 231–232.

[3] Ibid., p. 232.

and even direct authority of the confederation over the subjects or citizens. These are not incompatible with the maintenance of the legal basis of confederation. But the more numerous they become, the closer does the confederation approximate to the federal state.[1]

With regard to the federal state Bornhak gave a graphic description of the three most important federal states, the Swiss and the North American federal republican state and the German monarchical federal state, which was a unique phenomenon. All three had this in common, that they all developed out of confederations which had proved to be inadequate. In the transition from the confederation to the federal state characteristics of the federal state were more marked in its authority, in its functions and in its organs than in those of the former, such as the theory of *Kompetenz-Kompetenz* or the Federal Council, Congress and President. Arguing from the collectivity of the state authority in the three representative federal states, Bornhak assumed that in contrast to individual sovereignty there was the collective sovereignty which is the characteristic of the federal state.[2] For the relationship of individual state functions in the federal state there is a condition of substantial importance, namely, that the legal holder of the domination authority is not an individual physical person but a collective personality which can attain to legal existence only with a constitution, and by that constitution as its first basic law. The federal state participates in this development with the state of popular sovereignty even when, like the German Empire, it is not based on the principle of popular sovereignty, but is a collective domination of individual states which are in the main monarchical. Therefore there is of innate necessity the same relationship of state function to the federal state as to the state of popular sovereignty.[3] Bornhak assumed that historical authority which was the source of the system of law as well as of the whole state activity did not come into existence in the federal state in any event, but arose with the constitution, which is no more "derivative" than the federal state itself.

Therefore the constitution, as the first law of the new state entity, was the original codification of its legal system; there was for the empire no pre-constitutional state law. The position and functions of all the organs must, therefore, in the last resort depend on the constitution, i.e. on a law. Consequently the

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 234.
[2] Ibid., p. 247. [3] Ibid., p. 252.

government was not free; its basic functions were determined by legislation, which was the one and only supreme regulator of all the activities of the state.[1]

For the administration of the federal state the older theory, represented by Waitz, held it to be necessary for the federal state, so far as its competence extended, to have its own administrative organ for carrying out its laws and with this to be in direct contact with the subjects and citizens of the states. That is to say, the federal state and the individual state were two independent state entities, which developed their activities quite independently though in respect of the same land and the same people. This idea had its basis in some features of the United States constitutiuo, but these were, in Bornhak's opinion, due to historical circumstances and not inherent characteristics of the federal state. And even that union made use not only of its own organs, but also of those of the individual states, though only to a limited extent.

With the Swiss Federation and the German Empire on the other hand, special organisations concerned with a whole branch of administration were exceptional. The general rule was that the federal state enacted laws within its competence, but left their execution and application to the organs of the separate states acting under its supervision.

Bornhak's criticism of the federal state was to a certain extent correct, on the assumption that the federal state was a collective organism, differentiated from international treaty-based confederations. According to him the distribution of power between the collective and individual states was not the essential characteristic; that was the internal "administrative organism" to give effect to its own will. He failed, however, to explain the federal state clearly by his fundamental idea of the state as a collective personality: yet his doctrine was representative of the theories of federalism at the time.

Gerhard Anschütz was an advocate of the prevailing theory of the state in his articles on *Deutsches Staatsrecht*[2] in von Holtzendorff's *Encyklopädie der Rechtswissenschaft*, 1904. He examined various theories of the state and admitted the theory of personality

[1] Bornhak: *Allgemeine Staatslehre*, 1896, p. 253.

[2] Holtzendorff: *Encyklopädie der Rechtswissenschaft*, Vol. II, 1904, p. 458.

to be the most acceptable modern idea of the state, in that the state is in a legal sense a corporation or a collective personality on a territorial basis. So he concluded that the state is "the union of all the human beings of a determined territory into a collective personality vested with the highest authority over land and people."[1]

As regards the forms of the state, in so far as the general conception of the constitution was not based on mere speculation but on the scrutinising and comparative consideration of the actual states of the past and present, the unitary state was the normal type "differentiated from the consolidated states, and especially from federal states, which appeared not as unions of human beings but as state entities of a higher order consolidated out of a number of states."[2]

Anschütz, like other jurists, assumed that the characteristic legal basis of the union of states was derived from "the general and universal community of states formed on the basis of international law." According to their degrees of permanency and institutional character the unions of states could be classified as of two types: the first including state unions of various kinds having an international law character, and the second comprising reciprocal state treaties (like protective unions).

At the same time the legal basis on which the union of states rested could coincide with international law or constitutional law, and on this the distinction between an international and a constitutional union of states could be laid down.

Anschütz, like some of his contemporaries, divided the various kinds of international unions into three groups: "single independent relationships, communities and associations." As the predominant characteristic of the first group he pointed out the inequality of the federated states and the dependence of one or more of them on another (e.g. as colonies or protectorates).

In the other two groups he assumed that the community relationship and the association relationship were on the contrary based on the equality of the associates, or, in Bornhak's phrase, on co-ordinate relationship. Applying private law analogies to international unions he made between these two groups a distinction according to which the *Gemeinschaft* was a state community and the *Gesellschaft* was a state society. In the category of state communities he included personal and real unions, and in that of state associations he included the so-called international

[1] Holtzendorff: *Encyklopädie der Rechtswissenschaft*, Vol. II, 1904, p. 458.
[2] Ibid., p. 460.

administrative unions and the political unions of which the confederation was the highest type. Thus he assumed that the confederation was an organised state society based on political purposes.[1]

He also examined the constitutional unions of states, and particularly the *Staatenstaat* and federal state. To him a constitutional union of states was a plurality of states brought together as subjects of a higher state power in such a manner that the dominating state was consolidated into a political unity of a higher order. He, like Gierke, realised the difference between domination union and association union, and he regarded the *Staatenstaat* as having the special characteristic of suzerainty which was the absolute negation of a federal relation.

On the contrary, another form of consolidated state, that is, the federal state, admitted a higher state authority, but one of an association nature. It was based on the "corporative collectivity" of the federated states themselves, so that every member of the collectivity was the "ruled as well as the corporative ruler."[2]

Therefore he held that the federal state is not a union or a union of states, but is "a higher state authority ruling over the associates" and "nothing else but the collective will of the associates themselves made perceptible by the collective actions of all."

The federal state was thus differentiated from the *Staatenstaat*, and at the same time from a confederation. Anschütz said "in a confederation the idea of plurality is predominant," and in a federal state the idea of unity prevails.

Thus Anschütz, like other contemporaries, admitted the classical distinction between the confederation and the federal state, and noted that the confederation is a legal relation of a plurality of states, whereas the federal state consolidates that plurality into a unity of independent state subjects distinct from the sum of all the independent states, i.e. into a collective state existence, so that the individual member states do not lose their state character by reason of their membership of a state unity of a higher order.[3]

From his political study of various federal states he reached the conclusion that the "federal state" is a "sovereign state" consolidated from a plurality of non-sovereign states which participate constitutionally in the formation of its will.[4]

Karl von Stengel made a comprehensive study of federalism in his articles *Staatenbund und Bundesstaat* in Schmoller's *Jahrbuch*

[1] Holtzendorff: *Encyklopädie der Rechtswissenschaft*, Vol. II, 1904, pp. 461–462.
[2] Ibid., p. 463. [3] Ibid. [4] Ibid., p. 464.

for 1898. He related clearly the history of the federal ideas in Germany from the time of the conflict between Ludolf Hugo's conception of *systema civitatum*, the consolidated state, and Pufendorf's theory of "confederation." He, like Brie, examined chronologically the detailed discussion of the theory of confederation and the federal state in connection with the German union.

The theory of Pütter, which regarded the old German empire as a consolidated state, was generally accepted during the last decades of that empire, but the general doctrine of combinations and unions of state adhered to Pufendorf's standpoint that a form of the state intermediate between the confederation of state and the unitary state was not possible. But the formation of the Confederation of the Rhine stimulated fresh consideration of the problem, and a resultant new terminology distinguished between *Staatenbund* and *Bundesstaat*. In the time of Jordan, Klüber and Zöpfl the difference between confederation and federal state did not receive much attention. The German union was regarded as a permanent treaty-based corporation, yet they recognised the central authority as not marking a transition stage towards some future state structure, and on the other hand, as not a mere temporary alliance, and not as a collective state with a central government to which the separate state government was subordinate.[1] All the writers named accepted the complete sovereignty of the individual states in the confederation. One effect of the French Revolution of July 1848 was a movement, represented by Gagern, Pfizer and Welcker, for the replacement of the confederation by a federal state which seemed likely best to meet the need for unity whilst providing for that maintenance of the separate states which was recognised as being necessary or at least useful.[2]

After 1850, Waitz's theory of the federal state, which was greatly influenced by Tocqueville's writings on the United States, and turned largely on the division of state powers, dominated discussion until the appearance of Laband's comprehensive work on the German Empire and Seydel's theory of confederation.

Although in his sketch of the history of dogma he studied the historical theories of sovereignty and especially Preuss's renunciation of sovereignty, Stengel criticised Preuss's conception of the state as a territorial corporation with territorial supremacy, which to him was "nothing more than that part of state authority by virtue of which it can alter the territories of its subordinate

[1] Stengel: *Staatenbund und Bundesstaat*, in Schmoller's *Jahrbuch*, Viertes Heft, 1898, p. 1093.

[2] Ibid., p. 1095.

communal bodies, whilst a change of the state territory depends on the will of the state itself."[1]

On this assumption sovereignty was an essential quality of the state by which the comprehensive differences between the confederation and the federal state could be determined and the basic definition of the federal state obtained. But he assumed that sovereignty was "relative" and must be so conceived as to be capable of limitation, so that the so-called semi-sovereign states on the one hand, and the consolidated states on the other, which must form the standpoint if an absolute sovereignty be deemed impossible, become completely intelligible.[2]

Normally the sovereignty of the state is a relative one only in so far as the states which make up the community of nations are subject to a higher legal system, namely, that of international law. Not only the communities of international law, but also other organisations, such as the church, have their own independent organisation. Stengel conceived that "the sovereignty of the state over the church was in a certain sense only relative," because in the sphere of the care for and promotion of religious life not the state but the church is the authoritative community which does not derive its origin and power from the state, and consequently the law which it sets up is not state law but ecclesiastical law.[3]

With regard to the relationship of the state to the international community and its legal order, Stengel held that too much emphasis must not be laid on the self-sufficiency of the individual state and that it is wrong to base the conception of sovereignty mainly on the comprehensiveness of the state purpose. If the state met all human needs, there would be no necessity for the co-operation of the states in an international community. So whilst the state is superior to other corporate unions, and in regard to them appears to be sovereign, it is also a member of a higher collectivity for the satisfaction of certain needs, and subject to its legal system. The idea that sovereignty is the sum of the supreme powers possessed by a state not only involves a confusion between the state power and the sovereignty which is a quality of that power, but is entirely unsound, since the state power is not to be regarded as the sum of certain specific powers, but is rather the central authority dominating the whole state. The conception of sovereignty had developed in the unitary state, and there the position was comparatively simple alike in inter-

[1] Stengel: *Staatenbund und Bundesstaat*, in Schmoller's *Jahrbuch*, Drittes Heft, pp. 776–777. [2] Ibid., p. 785. [3] Ibid., p. 782.

national and constitutional law, for the unitary state not member of a federation (*Bund*) is unquestionably a person in international law, whilst a communal union always lacks this characteristic.

The purposes and tasks of the self-governing bodies are prescribed for them by the state; their power to legislate for themselves, even if it be considered as an inherent right, is subject in its exercise to the supervision of the state. So Stengel declared that the epithet "sovereign" can be applied only to those collectivities which are persons in the sphere of international law and can independently determine the objects which they are to pursue and, uncontrolled by any superior power, can create their own law.[1]

Since he assumed the relativity of sovereignty, the conception of the *Kompetenz-Kompetenz*, that is, the power of the state to determine its own sphere and therefore to impose restrictions upon itself, was Stengel's main argument for that form of the theory of the state which did not regard limitation as incompatible with statehood.[2]

He endeavoured to develop a new theory of the confederation and the federation on the basis of this doctrine of sovereignty. Like other contemporaries he made a distinction between these two forms of union and other unions, such as personal unions, real unions, protectorates, and associations of states for limited purposes (offensive and defensive alliances, postal and telegraph unions, etc.).

The characteristic feature of both the confederation and the federal state is, in Stengel's opinion, that each of them is a firm combination of allied states under the domination of a higher central authority for the attainment of a comprehensive purpose.[3] Stengel differed from his contemporaries by propagating Gierke's conception of the application of social law to the state and to the union. Accordingly, he favoured Gierke's theory that the federal state was a corporation formed by the member states in which they had each a share in the authority of the collective state.

Therefore he contended that the confederation and federation were both corporations, namely, new state commonwealths with a social power which had juridically the same character as the state power in the unitary state. As the members of the corporations were states and the purpose of the unions was characteristic of states, he regarded these two unions as consolidated states.[4] The individual member states were subordinated in the

[1] Stengel: *Staatenbund und Bundesstaat*, in Schmoller's *Jahrbuch*, Drittes Heft, pp. 788–790.
[2] Ibid. [3] Ibid., p. 796. [4] Ibid., Viertes Heft, pp. 1131–1132.

one case to the will of the union, and in the other to the federal authority.

To Stengel the fact that each of these two unions had a treaty basis was compatible with their having a corporate character, because a new objective law, i.e. a new legal order, could by treaty create a new legal personality. He considered that the constitution of the consolidated state created by a constituent treaty could be designated as "law," meaning thereby that the constitution was as binding on the members of the collective state as a law. And consequently it was not possible for a constituent state to denounce the federal treaty and withdraw alone from the union; on the other hand, a dissolution of the union by general consent must be possible.

Stengel held that the confederation, like the federal state, was a "legal personality, not merely a treaty relationship." It had a collective purpose distinct from the purposes of the individual member states; it was based on perpetual duration and possessed an independent organisation and authority over its members.[1] Moreover, he assumed that if the confederation and federal states were consolidated states and the central authority in each had a state character, then both had the quality of sovereignty in international as well as internal constitutional relations.

With regard to international personality, he asserted it to be indisputable that the confederation and the federal state are persons in international law, that they have therefore sovereignty in the sense of that law, and that in international relations the confederation is quite as much as the federal state "a collective power, i.e. a unitary personality."[2]

As regards internal constitutional sovereignty, he clearly explained that in the confederation as in the federal state the federal power within its allotted sphere is the highest authority, possessing the right to bind its members by its decisions and orders, in the same degree as the laws of the unitary state bind its subjects, because those decisions are not agreements between the states, but decisions of the federal organ.[3]

Even though the federal competence modified and limited the sovereignty of the member states, yet Stengel asserted that sovereignty remained to the member states both in the confederation and in the federal state. The division of possible state functions between the corporation—the collective state—and the members—the individual states—was according to him based on the broad

[1] Stengel: *Staatenbund und Bundesstaat*, in Schmoller's *Jahrbuch*, Viertes Heft, p. 1132. [2] Ibid., p. 1137. [3] Ibid.

principle that those purposes and tasks which could best be fulfilled by the collective state were transferred to it, the others were left to the member states.[1]

In the consolidated state there exists a dual state authority. There is a dual territorial supremacy. There is also a dual citizenship; each citizen has a state citizenship and a federal citizenship—the former is predominant in the confederation, the latter in the federal state. In short, Stengel argued that the essential feature of the consolidated state is that in it there are two state authorities which divide between them all the possible state powers. It does not matter if the competence of the consolidated state in the matters assigned to it is exclusive or concurrent with that of the constituent states. But this division of the purposes and tasks does not mean a division of the state power; the two authorities exercise that power as a unitary one, each within its sphere.[2]

Thus Stengel did not admit any fundamental distinction between the confederation and the federal state, regarding each as a corporation.

But, like Meyer, he did make a distinction between the confederation and the federal states based on the fact that the former affected the constituent states only, whilst the latter had an influence on the subjects of those states. In the confederation the subject of the federal power was limited to the state, whereas in the federal state it extended to the citizen and the individual state.[3]

Stengel's conception of the corporation theory was carried further by Rosenberg in his study entitled *Staat, Souveränität und Bundesstaat* in Hirth's *Annalen des deutschen Reichs* for 1905. He defined the state as "that territorial corporation which has the right of disposal of its territory, dominion over the inhabitants of its territory, autonomy in respect of constitutional matters, and legal capacity in respect of international law relations."[4] A sovereign state is one which is not dependent upon other states in respect of matters of constitutional or international law.[5]

His criticism of political organisation was based on the private law conception of "society" and "corporation." He held that "unions" in the legal sense are of two kinds—"societies" which

[1] Stengel: *Staatenbund und Bundesstaat* in Schmoller's *Jahrbuch*, Viertes Heft, p. 1142.
[2] Ibid., pp. 1144, 1146, 1148–1150. [3] Ibid., pp. 1155–1158.
[4] Rosenberg: *Staat, Souveränität und Bundesstaat*, in *Annalen*, 1905, p. 281.
[5] Ibid., p. 283.

have no legal capacity and whose legal subject is merely the sum of the members, and "corporations" which constitute a legal subject with its own rights, i.e. a juristic person. These corporations are either private or public; the public corporations are either voluntary or compulsory. The compulsory corporations in their turn are either a union corporation (*Vereinkörperschaft*) having a mere personal basis with the right of dominion over its members, or a territorial corporation, that is, one having a personal and material basis and consequently the right of dominion over all persons within its territory.[1] Territorial corporations, again, are either "independent" or "dependent"; the first are called "states," the second "communal unions." Rosenberg's definition of the state has already been given; in contrast to it the communal union has not the power of disposing of its territory; it has no *general* dominion over the persons in its territory, it has no independent right to alter its constitution, which yet can be altered against its will, and vis-à-vis the state it has no independent right of existence.[2] States in their turn were divided by Rosenberg into two classes—"independent" (i.e. "sovereign," as defined above) and "dependent" (i.e. "non-sovereign"); the first having legal capacity and complete freedom of action in respect of all matters of international law, and the second having legal capacity but not complete freedom of action.[3]

Corporations can unite in order to form either a society or a new collective corporation; in the former case there is no new legal subject distinct from the separate corporations, in the latter case a new legal subject distinct from the separate corporations is brought into being. And, like other corporations, states can combine into societies of states or corporations of states, which include confederations, dependent territorial corporations (state unions), and federations. These corporations of states constitute each a legal subject distinct from its members—i.e. a legal subject of public law is formed, based on the right of dominion.[4] The theoretical distinction between a society of states on the one hand and corporations of states on the other corresponded to the general distinction between society and corporation; that between the confederation on the one hand and the dependent territorial corporation and the federation on the other corresponds to the general distinction between union corporations and territorial corporations.[5]

[1] Rosenberg: *Staat, Souveränität und Bundesstaat*, in *Annalen*, 1905, pp. 276–279.
[2] Ibid., pp. 279, 280.
[3] Ibid., p. 281.
[4] Ibid., pp. 348–349.
[5] Ibid., p. 350.

The confederation possesses the right of dominion only over its members, that is, over the individual states, whereas the union of states and the federal state possess the right of dominion over all persons and things within their territories.

As the federal state is not subordinated to any state authority, it possesses constitutional supremacy and international personality. The conceptual difference between the state union and the federal state is based on the general distinction between the dependent and independent territorial corporation. The federal state is a state made up of states; it has all the essential qualities of a state—territorial supremacy, dominion over all persons within the territory, power to determine its own constitution, personality in international law; whereas the state union is simply a dependent part of a collective state, a communal union made up of states but lacking the four essential characteristics of the state.[1]

§ 3

Hermann Rehm in his work *Allgemeine Staatslehre*, published in 1899, like Preuss found no difference between the state and the territorial corporation, but these differed from the communities as being international personalities and from the church as being territorial corporations.[2] But the state was distinguished, in his view, from a dependent corporation by having an international personality, an international legal capacity and also, from the standpoint of international law, the capacity of independent action.[3]

Thus he assumed that "the principle that the state is a community for the promotion and protection of the general welfare of its members is applicable only to the complete and normal state, and not only to a regular state in a juristic sense, but to the normal state in a political sense, because as an empirical conception the absolutely independent state is able to determine its own sphere of activity as it chooses."[4] Rehm as a jurist reached a "consolidated definition" of a state: "The state is the organised and settled union of a number of human beings pursuing temporal purposes and possessing international personality."[5]

Admitting that the conception of sovereignty must be independent of that of the state, Rehm reached the conclusion, after

[1] Rosenberg: *Staat, Souveränität und Bundesstaat*, in *Annalen*, 1905, p. 350.
[2] H. Rehm: *Allgemeine Staatslehre*, 1899, pp. 30, 35.
[3] Ibid., pp. 28–30. [4] Ibid., p. 31. [5] Ibid., p. 38.

a survey of the history of the doctrine of sovereignty, that special independent territorial authority is the basic foundation of sovereignty in present-day law. Therefore, sovereignty in the sense of the state authority could be designated as sovereignty in the sense of constitutional law, that is as sovereignty in respect of internal affairs, and the sovereignty of the highest state organ could be described as sovereignty of the state organ. And unlike Meyer, he thought that sovereignty, in international law and in constitutional law respectively, is not simply two aspects of one and the same conception, but two distinct conceptions, which have the same name only because they have the same historical origin.[1]

On this assumption the question of the limitation of sovereignty was according to him of practical importance, and he assumed that "limited sovereignty is not sovereignty; sovereignty must be complete." It is quite wrong to maintain that so-called semi-sovereignty is really sovereignty in the sense of international law, if only partially. In the sense of Bodin's theory of sovereignty as adopted by present-day constitutional and international law systems there is no partial, divided, restricted, or relative sovereignty, but only an absolute one, i.e. independence of every other mundane collective power.[2]

But the principle that, within the meaning of international law, there is either full sovereignty or no sovereignty at all, does not necessitate, in Rehm's opinion, the abandonment of the term "semi-sovereignty." That term connotes something akin to sovereignty, but less than sovereignty. It is not a case of incomplete sovereignty in a limited sphere, but a lack of complete sovereignty in that respect. "Something akin to sovereignty means independence, that is, relative independence of any other temporal power." This relative independence can properly be called "sovereignty," not full, but partial. If absolute and complete independence be called sovereignty, relative or semi-independence can well be called semi-sovereignty.[3]

Rehm reached the conclusion that constitutional and international law sovereignty are not two sides of one and the same conception, but are two distinct conceptions. It is therefore wrong to speak of a division or limitation of sovereignty, in the sense that a state can have constitutional but lack international sovereignty.

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, p. 63. [2] Ibid., p. 68.
[3] Ibid., p. 69.—"The complete non-sovereign states are non-sovereign states as to which there is no more question of a relative independence, inasmuch as they are subject to the supervision and direction of another collectivity in all respects."

The division or limitation of international law sovereignty is impossible. But its possibility in respect of constitutional sovereignty needed to be considered as part of the theory.

From this theory it followed that states stood either in dependent relationship to one another, if one of them lacked international sovereignty, or in a position of equality which was possible only between sovereign states.[1]

Surveying the position in respect of protectorates he laid down the proposition that the modern doctrine that a protectorate in respect of foreign affairs gave the protecting state *ipso jure* power of directing the internal affairs of the protected state, which thereby ceased to be sovereign, went much too far.

The right of protectorate does not extend beyond the limits laid down in the treaty on which it is based. If, nevertheless, the protecting state may, because of the responsibility which it bears, interfere in the internal affairs of the protected state, this is not because of the protectorate, but from the right of intervention derived from the general principles of law, under which every state can intervene if important interests of its own or of a third state are threatened. Its intervention is, therefore, not the exercise of a right of suzerainty, but of self-help under international law—i.e., the relation is one of equality, not of domination and subordination.[2]

He contrasted the federal relationship with this one-sided dependent relationship. The federal relationship is a combination of dependence and superiority in the same state in such a way that the state is subject to a higher authority, but has itself a share in that higher authority.

If the state is ruled over by another state in whose state authority it has a share, it can equally well be ruled, Rehm argued, by a group (corporation) of states in whose conduct it has as a member a legal share, even if this corporation of states is not itself a state.[3] This brought him to the conception of confederation, and with regard to the question of the legal nature of confederations he took into consideration only the most practical and undoubted historical confederations. For an individual confederation to be an association, the union must have legally appeared as a plurality, as the sum of the associates, and the rights exercised by the union must have been, in fact, inherent in itself.[4]

This test, undoubtedly a proper one, Rehm applied to only two of the recognised confederations, namely the Confederation

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, p. 70.
[2] Ibid., p. 86. [3] Ibid. [4] Ibid., p. 88.

of the Rhine and the German confederation; the others he left out of his examination, although in any consideration of the juristic character of the confederation they should have been included, with far more justification—legally and still more politically—than the highly problematical Confederation of the Rhine.

The only thing in favour of Rehm's method was that he simply wanted to show that, historically, there have been confederations of both the "society" and the "corporation" type.

As an example of the confederation he could cite the German Customs Union (*Zollverein*) and associations for particular administrative services. In these it was not the union as such, but each one of the associated states for itself, that had rights and duties towards third parties.

On the other hand he declared the German confederation to be an example of a confederation having the nature of a corporation.[1] For from the fundamental laws of the German confederation the idea of unity in plurality clearly emerged, whereas in the pact of the Confederation of the Rhine the idea of plurality alone found expression.[2] He deduced this first of all from the terminology; the pact of Confederation of the Rhine described the whole body as "confederated states" (*états confédérés*) and, apart from the rarely used and more modern term "confederation," omitted any reference to a unity, and in the alliance with Napoleon, made in accordance with the pact, "*les Alliés*," not then forming the Confederation of the Rhine, appeared as the other party to the alliance. On the other hand, the final act of the Congress of Vienna spoke of the members of the German confederation not merely as a group of members, but as the collectivity of the confederation, called the confederation a unity based on treaty, and talked of the "common will" of the confederation.

Further, in the detailed legal provisions the confederate obligations of the members appeared not so much as obligations to the other members, but as obligations to a unity which embraced all those on whom the obligations rested.

This was illustrated particularly by the provisions as to federal enforcement (*Exekutionsbefugniss*).

For though the setting up of the federal authority was certainly the result of the agreement of all the individual members, the legal basis of its application in any particular case was not that general decree, but the legal authority established thereby. Consequently, the collectivity in whose name the measure of

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, pp. 88, 96–98. [2] Ibid., pp. 89–96.

enforcement was determined and carried out was not the sum of the constituent members, but a unity distinct from that sum. Federal enforcement in the federal state depends admittedly upon the will of the supreme authority, and as it was the same in all respects in the German confederation it was not apparent to Rehm why in the latter case one could not assume the existence of the same relationship of authority.[1]

To the criticism that the description in the Final Act of Vienna of the union as "in external relations a collective power combined into a political unity," and in internal matters a community of independent states "with reciprocal and equal treaty rights and obligations," and in Article 1 as a union in international law of "sovereign Princes" for the purpose of maintaining the independence of the states included in the confederation are arguments against the corporation theory, Rehm replied that all this could be admitted as in no way incompatible with the corporation nature of the German confederation. For the history of the formation of the confederation clearly showed that these phrases were not intended to deny to the union a corporate character, but to reject the idea that the Germanic confederation was a federal state or a confederation in which one member predominated.

The description of the princes of the confederation as "sovereign" was due to a mistaken idea of the founders of the confederation that the sovereignty would have been diminished by subordination based on a constitution but not by subordination based on an international arrangement, i.e. in accordance with international law. They were therefore anxious to avoid the first form of subordination. Moreover, the assertion of the principle of equal rights of members did not mean that the relations between them were simply those of members of an association, and did not reject their subordination to a juristic person formed of all the members collectively—for with this the principle of legal equality was entirely compatible, as federation showed; it rejected only their subordination to one of their number.

Though the confederation was described as being in respect of internal affairs a collectivity (*Gemeinschaft*), this must be assumed to mean a union of persons forming a body corporate, for it had been previously described as an international union, and by the term union (*Verein*) is commonly to be understood the constitution of a number of persons into a corporation, whereas the term collectivity (*Gemeinschaft*) could equally well mean either an association or a corporation.

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, p. 96.

Similarly, the use of the terms "treaty rights" (*Vertragsrechte*) and "treaty-based unity" (*Vertragsmässige Einheit*) in Article 2 did not imply that the relations of the allied states were simply those of the members of an association. Rather Article 15 contrasted the affairs of the separate independent and not subordinate states with those of the treaty-based unity, and thereby described the states as not independent but subordinate to the unity constituted by them; the term *Vertragsmässig* could mean only that within the body corporate the principle of the equality of the members prevailed and emphasised only the fact that the establishment of the corporation was due to a treaty and was brought about by a collective decision; even the German Empire could be described as based on a treaty.[1]

The main distinction between the confederation which was merely an association and the confederation which had a corporative character was in his view to be found in the fact that in the latter the constituent states lost their international sovereignty, which means independence of any other temporal power—as we have seen Rehm rejected the idea of modified (*gemindert*) sovereignty—and in the further fact that the corporate confederation alone possessed competence in the sphere of international law, whilst in the confederation, which was merely an association, i.e. a group acting as it were under a single name, the individual members had rights and obligations resulting from treaties, which was not the case with the members of corporate confederations.[2]

The existence of some form of hegemony did not constitute a distinction between the two kinds of confederations.

Hegemony, as a conception of law, means that in a community of states one or more of them have a larger share than the rest in the conduct of the affairs of that community, i.e. it is a departure from the principle of equal participation. This precedence can exist in an association of states, in a corporative confederation, and in a federal state. It results in a blend of federal and protectorate relations only if the precedence means legally direct control by the state, having the precedence, over the other members. But that is excluded. The leading state exercises federal rights of its own.[3]

Finally the practical difference between the two forms was set out by Rehm as follows: In the society type of confederation, in the absence of any special agreement to the contrary, the agreement of all the members is necessary for any change in the

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, pp. 89–95.
[2] Ibid., p. 98.
[3] Ibid., pp. 144–146.

constitution. In the corporation type, with some exceptions due to the fact that the corporation is a confederation and to the purposes of the confederations, a simple majority is sufficient.

In the society type, which constitutes a relationship between parties with equal rights, the exclusion of a member against his will is not permissible. On the other hand, the corporate confederation possesses a common authority over its members in all that relates to the objects of the confederation, and a member can be excluded so soon as his membership conflicts with the objects of the union. In contrast to the federal state, the unilateral withdrawal of a member in any conflict of opinion is permissible in both types of confederation, and disputes between confederations and members can be settled only by good will, for in the corporation the states concerned are members whilst in the federation they are subjects (*Unterthanen*).[1]

Rehm carefully examined the legal and political classification of unions of state (*Staatenverbindungen*), first pointing out that the term "union of states" had both a wider and a narrower significance. In the wider sense it connotes any relation between one state and another, whereas in the narrower sense it connotes only such a union as creates a certain relative unification, a community of states, whether that community be of organs, or of interests, purposes, and action.

Unions of states in the wider sense include the protective relationship between states, but unions of states in the narrower sense include only such relationships between states as give rise to some amount of community-relationship. From these unions in the narrower sense are excluded those state relations which serve to balance conflicting interests, and in which the parties are rivals. It is of the essence of unions of states in the narrower sense that the states stand together as a functional collectivity, or as co-workers. Consequently a guarantee or protectorate does not create a union of the states concerned.[2] Rehm's classification of unions of states from the legal standpoint was as follows:[3]—

I. International unions of states, i.e. those which do not bring any new state into existence and are therefore subject to the rules of international law.

(A) International unions of which the members are co-ordinate (independent)

[1] H. Rehm: *Allgemeine Staatslehre*, 1899. pp. 144–146.
[2] Ibid., p. 101.
[3] Ibid., pp. 102, 104.

(*a*) Those without particular organs of union (unorganised international unions of states), including:

(i) Alliances.
(ii) Protectorates.
(iii) Systems of Guarantee.

(*b*) Organised international unions of states.

1. Those which have only a common organ. These include personal unions in the wider sense, comprising:

(i) Accidental personal unions (i.e. personal unions in the narrower sense) and
(ii) Permanent personal unions (i.e. real unions).

2. Those in which there is a common exercise of the supreme authority. These comprise confederations of the "society" type (including international administrative unions), which divide into

(i) Those in which there is complete equality of all members, and
(ii) Those in which one member has the hegemony.

(B) International unions in which there are between the members relations of superiority and inferiority (dependence relationships).

(*a*) Relationships of unilateral dependence under international law, i.e. those in which only one participating state is dependent:

(i) Protectorates under international law.
(ii) Subject territory relationships, also under international law.

(*b*) Relationships of reciprocal dependence, i.e. in which all the participating states are dependent on the same higher authority; this group includes the corporative confederation (and the corporative international administrative union):

(i) Those in which there is complete equality of all the members and
(ii) Those in which one member has the hegemony.

II. Constitutional unions of states, that is those which form a new state in which all the states stand under the constitutional authority of another state and are governed in their relations to that state not merely by international law, but also by the system of constitutional law of that superior state. This class includes consolidated states, collective states, and states made up of states. It divides into:

(A) Unions of states in which the superior or collective state authority is vested in one constituent state authority (relationship of unilateral constitutional dependence): these include:

(*a*) Constitutional protectorates (suzerainty or vassal relationships), and

(*b*) Constitutional subject-territory relationships.

(B) Unions of states in which all the constituent states have a share in the authority of the super-state (relationships of mutual constitutional dependence), i.e. the federal state

(i) with equality of all members,

(ii) with the hegemony of one member.

From the political standpoint, Rehm classified the same unions as follows:[1]

I. Relationships based on equality, but with continuing tendency towards relationships of dependence:

(*a*) Personal unions and real unions.

(*b*) Alliance.

(*c*) Confederations of a purely "society" type.

II. Dependent relationships:

(A) Of a lower grade, arranged in an ascending order of dependence:

(*a*) Guarantees.

(*b*) Hegemonies, in confederations of a "society" type.

(*c*) Protection—a term which Rehm does not clearly define.

(*d*) Protectorates (normally based on constitutional law, exceptionally on international law).

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, pp. 106–107.

(*e*) Purely corporate confederations.
(*f*) Corporate confederations with hegemony.
Of these (*a*) to (*d*) are unilateral; (*e*) and (*f*) involve mutual dependence.

(B) Of a higher grade, in ascending order:—
(*a*) Pure federal states.
(*b*) Federal states with hegemony.
(*c*) Constitutional subject-territory relationships of a partial federal member character.
(*d*) Protectorates (normally based on international law, exceptionally on constitutional law).
(*e*) Subject lands under international law.
(*f*) Subject lands under simple constitutional law.

After surveying the various theories as to the confederation and the federal state, Rehm discussed the question of the elaborate distinction between the federal state and the confederation, and within the latter between the "society" and the corporate confederation which is of practical importance. Admittedly as unions, that is, combinations for the exercise on joint account of supreme rights (*Hoheitsrechte*), these three forms of unions of states are very close akin, in that in general their working is the same, whether the exercise of powers on joint account is like the conduct of a society or like that of a corporation or the authority of a consolidated state. But the differences between the juristic natures of the three kinds of combinations led to practical differences. These all came back to the fact that the position of the member state is quite different in the federal state from its position in the corporate and *a fortiori* in the "society" confederation. In this connection Rehm considered the position of the individual in the state and in the union.

Of the state the individual is a member (subject or citizen) in respect of his whole personality (so far as any special exceptions are not made). There is the possibility that in relation to the state he is only "an object not a subject of law." But in a union (*Verein*) on the contrary his status as a subject of law is predominant. He is admittedly there an object of the union authority, but in the first instance the member of a union has vis-à-vis the union an independent legal sphere of his own.

So that one belongs to (is a member of) the state with one's whole personality, but to the corporation only with a part of one's personality. One is not only a member of a union, but also a non-

member. That is to say, the presumption in the state is that of subjection, in the union it is that of freedom. In the first one is a subject; in the second, one is a member.

The same is true of the relation of the individual state to the confederation and the consolidated state. In the corporate confederation there is in favour of the member state a presumption of freedom from subordination; in the consolidated state there is a presumption of subordination "so far as limits are not placed on that subordination by the nature of the higher state as a federal state."[1] That is to say, in the corporate confederation the constituent states are members; in the federal state the constituent states are subject. The federal law affects the states that are its members just as it does the individual subjects of the federal state.

On the principle that in the state there is the presumption of subordination and in the union that of freedom, the first practical line of division is between the federal state and the corporate confederation.[2]

And from this certain consequences follow. In the first place withdrawal from the corporate confederation is possible (in the absence of express stipulation to the contrary) at any time, because the individual state is simply a member. But in the federal state, the state which is a part of it is not only a member, it is also a "part object" of the territorial authority of the consolidated state. The latter has dominion over the part state as being a part of its territory, and therefore the withdrawal of the member state is impossible without the consent of the collective state.

Secondly, a corporate confederation cannot transfer one of its members to another state (e.g. as part of the terms of peace) and thereby destroy its legal personality. But the federal state can do so, if it thinks it necessary to do so for its own purposes. Thirdly, disputes detween the collective state and the individual states can in the corporate confederation be settled only by diplomatic methods; in the federal state the decision of that state is final.[3]

The main distinction between the corporate confederation and the "society" confederation is that in the latter, amendment of the constitution cannot be effected (in the absence of special agreement to the contrary) without the unanimous decision of all the members, whereas in the former (apart from special cases due to the nature of the corporation as a union and of its purposes)

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, pp. 143–144.
[2] Ibid., pp. 144–145.
[3] Ibid.

the decision of a majority of the confederated member states is sufficient. Again, in the "society" confederation the exclusion of a member against its will is not permissible; the corporate confederation has the definite right to exclude a member. This is in each case in accordance with the nature of the union, for the "society" union is a relationship between equals, whereas in the corporate union there is a collective authority over the members.[1]

Although Rehm thus tried to characterise the federal state and the confederation from the empirical point of view, yet as to their legal aspects he did not go beyond the prevailing juristic dogma.

Eugen von Jagemann, writing on the *Deutsche Reichsverfassung*, in 1904, defined the legal character of the German Empire, and declared it to be based on the following premises: First, the Empire and individual states combined were sovereign. Secondly, the authority of the "Kaiser" and of the imperial organ was exercised in the name of the federation, and the imperial supremacy was derived from the community of the federated states, which as a complete collectivity had no will of their own, though in general as a plurality in the imperial community they possessed this will. Thirdly, the Empire was an independent legal personality, although its life was carried on in the form of an association. Finally, for the individual rulers and the individual states, sovereignty was based on the fact that there was no will superior to themselves in respect of their territorial authority, but they were the corporate holders of the supreme right of the whole Empire, of which their territories were a part.[2]

Independently of these juristic discussions the great historian, von Treitschke, published his outstanding work, *Politik*, in 1897.

His criticism of the state confederation and the federal state was that "since the qualities of power, unity and sovereignty compose the essence of the state, it is evident that all associations of states are artificial productions, because they limit the sovereignty of the individual state in one way or another."[3]

He touched very briefly on those associations of different states under one head which are called personal unions and real unions, and devoted his attention to federations "in the proper sense."

First he sketched the historical alliances and unions of states in the Grecian age, when the absence of the idea of representation

[1] H. Rehm: *Allgemeine Staatslehre*, 1899, p. 146.

[2] Eugen von Jagemann: *Die deutsche Reichsverfassung*, 1904, p. 53.

[3] von Treitschke: *Politik*, 1916 (Eng. Trans.), Vol. II, p. 330.

made a free confederation of allied states impossible, but on the other hand he regarded the Middle Ages as the "very arena" for confederations, which were called into being by the sheer instinct for self-maintenance.[1]

Confederations such as the Hansa, the Swabian and Rhenish City Leagues, or the Lombard City League, although powerful, did not bear a state character, and so could not stand against the increasing territorial patriotism. The only confederation which was territorial from its very outset was the Swiss confederation.

The Netherlands Republic marked a transitional stage and "finally on the threshold of quite modern times the great federation of the North American states arose" and "became the bridge between state confederation and federated state."

A confederation like that of Switzerland up to 1748, the United Netherlands, and the North American Union from 1778 to 1787, was in Treitschke's opinion "distinguished from an international alliance pure and simple chiefly by its long continuance"; it was founded either on "a living consciousness of national comradeship or upon common historical tradition, but the sovereignty of each member state was guaranteed and each had the right of *liberum veto*."[2]

A citizen of the Dutch state, Spinoza himself, once proclaimed that any man who demanded equality among unequals was asking for something against reason. With such a complete equality in the German confederation, Austria, Prussia, Bavaria, Württemberg, and Hanover could theoretically be overridden by the smaller states.[3]

In practice this was obviously impossible, "and the big states were forced to exercise their power behind the scenes in order to secure support in the Diet."

According to Treitschke, hegemony within the confederation may be formed either in practice or in forms of law in order to give a definite direction amid the confusion of so many sovereign wills. Thus in the Netherlands Republic the leading power of the House of Orange was the centripetal element which prevented, sometimes by the use of anarchical weapons, the full play of the *liberum veto* of the provincial estates.

To Treitschke the secret of the long continuance of confederated Switzerland was the political expedient resorted to in that country by which, failing a unanimous decision of the cantons, those

[1] von Treitschke: *Politik*, 1916 (Eng. Trans.), Vol. II, p. 335.
[2] Ibid., p. 337. [3] Ibid., p. 338.

cantons which were in agreement with each other could form a separate union, in the hope that the others would in time follow their example.[1]

But the history of confederation in any federated country was short-lived; and Treitschke declared that the sixty years of its existence in Germany were the darkest pages in her history.

In estimating the difference between the confederation and the federal state, he declared that although many theorists tried to prove that this difference lay mainly in the scope and power of the central authority, the essential point of contrast must be sought elsewhere. With regard to the authority of the central power, the nerveless government of the German confederation had wider power than the modern German Empire, but left its exercise to the discretion of its members.

But the fundamental distinction between the two forms of federation did not lie in this, nor yet in the question as to whether the central authority left the individual states to carry out its orders (as in the confederation) or carried them out through its own servants (as in the federal state).

Treitschke assumed that this theory, fallacious as it was found to be, had its origin in America and was the product of the "practical genius" which has always characterised the Anglo-Saxon nations. His conclusion from a survey of actual history was that there the real sovereign is "the people of the United States collectively," as the nation wielded the power and the members of the union had only to obey. He assumed that "the fair division of political functions which theory prescribed, was both impossible and unnecessary in a federal state." In the American union and in Switzerland what appears is not division but unity of the supreme authority.[2]

Treitschke remarked that like all political conceptions, the theory of sovereignty is elastic, but there has to be "an ultimate criterion by which to discover the essence of sovereignty." He believed that the fixed and inalienable property, without which no state can call itself a state, is "the right of arms and the power to determine for itself the scope of its own supreme authority."

In this sense the power to determine the scope of its own authority by itself was proved by the constitution of the federal state in North America, and also in the North German confederation, where the "appalling phrase" *Kompetenz-Kompetenz* was used

[1] von Treitschke: *Politik*, 1916 (Eng. Trans.), Vol. II, pp. 338–342.

[2] Ibid., p. 350.

to describe this characteristic feature of the federal state. The existence of this power was also proved by President Lincoln, who set out to remodel the federal constitution. The Southern states were treated as rebel states, first put under military government, and then allowed to summon constituent assemblies, though their constitution was laid down by the union; only by the union and under its authority were the rebel states reinstated.

Treitschke accordingly found the radical distinction between a confederation and a federal state in the fact that in the former the member states are "sovereign" and the central authority is subject to them; it can only signify its will by decrees, and it leaves to the individual state the power to give effect to the laws of the confederation. Thus, he asserted, "since there is no guarantee that this will be done, anarchy often rules."[1]

In the federal state, on the contrary, "sovereignty is withdrawn from the hitherto independent members," who even though still called by the title of "state" cease to be true states, since sovereignty is vested in the central authority.

In the federal state, which was different from the unitary state, the sanction of law was obtained by the direct share of the members in framing the will of the whole. The American method of two chambers, the Senate and the House of Representatives, the first representing the constituent states and the second the people, became characteristic of the federal state generally.

Thus the distinction between the two forms of federation was to Treitschke "one which strikes down to their very roots," and explained why the transformation from a confederation to a federal state, with the shifting of sovereignty from the individual states to the central authority, was generally the outcome only of a period of severe crisis. An equally important factor for the healthy development of federal life was to him "the presence of a moral force which we may call the instinct for federal law."[2]

Thus in the historical development of the German federal Empire, Treitschke, like the positivist jurists, assumed that the Empire, as a federal state, withheld from its members the essential prerogative of sovereignty, and accepted the actual supremacy of Prussia, in that "if Prussia should cease to be, there could be no more Empire." Observing in the prevailing conditions of his time that the Empire rested on a principle exactly opposed to that of the federal states, he asserted that the legislative activity of the German Empire had "become almost feverishly great,

[1] von Treitschke: *Politik*, 1916 (Eng. Trans.), Vol. II, pp. 353–354.

[2] Ibid., pp. 354–356.

for the new Empire is a growing monarchy," and "like a ball set upon a steep slope where it must roll without possibility of pause, our Empire is destined to travel more and more towards a firm centralisation."[1]

The conclusion of the great historian was that a centripetal tendency was inherent in the very nature of the federal state.

§ 4

In this respect Heinrich Triepel's work, *Unitarismus und Foederalismus*, dealt with the outstanding issue of German federalism.

In an earlier work, *Das Interregnum*, published in 1892, he discussed the unions of states as affected and as elucidated by an interregnum, defining that as "an irregular government between two regular governments."

He pointed out the term "union of states" was often extended (e.g. by Jellinek) to non-juristic relations between states, as, for example, the personal union, which is nothing more than the accidental fact that the same person rules two states. That fact creates political relations between the two states, but does not by itself create reciprocal rights and duties between them—that is, a juristic relation. He therefore left them out of his discussion and proceeded to examine "unions of the states" of a strictly juristic character. These legal relationships between states were of very diverse kinds.

A legal relation between states can be one either of co-ordination or of domination and subordination. The first gives rise only to reciprocal rights and duties between mutually independent states: the second results in the domination of one state over another or of one of a number of associated states over the rest.

Triepel said that there are two classes of unions of states formed by the co-ordination of federated states, namely, those which have and those which have not common organisations, i.e. collective organs for the fulfilment of the purposes of the unions. To the first category Triepel, like Jellinek, assigned the international alliance and its sub-species the protectorate and guarantee, the treaty-based occupation of one state by another, and also the treaty-based whole or partial transfer of the exercise of state power from one state to another. This class might also include the so-called "community of states," that is, the case in which

[1] von Treitschke: *Politik*, 1916 (Eng. Trans.), Vol. II, p. 381.

a plurality of states is subjected to a common system of international law.[1]

The organised unions of states, on the other hand, differ from each other not qualitatively but only quantitatively, that is, according as their common organs are set up to carry out a few or unimportant tasks or for many and important common tasks. They divide, from this point of view, into administrative unions and the confederation. The unions, which are based on the principle of domination, comprise the *Staatenstaat* and the federal state.[2] Triepel thus quite approved of the classification of the unions of states which Jellinek and Brie had already set up.[3]

He next endeavoured to formulate the idea of the federal state in connection with his discussion of the interregnum in the German Empire.

He defined the confederation as "a permanent political union of a number of states for the purpose of the common exercise of supreme rights by means of common independent organs."[4] He, like Laband, assumed that it is not a commonwealth, not a legal subject, not a state, but a legal relationship. It has no state authority but merely a social power; it has sovereign states as members and has no dominion over states. Consequently, if in one of the states there is an interregnum, its solution by the appointment of a new holder of the state power is arrived at independently of the authority of the society, because influence on the action of the state in this regard can be exercised only by a "subject" superior to and controlling it.[5]

The real union was considered by Triepel to be a special case of confederation. It is a confederation whose members are mutually bound by treaty to have one and the same physical person as the holder of their state authority. The fact of having a ruler in common does not involve the amalgamation of the associated states into one state, and therefore the real union is not a single monarchy. The common ruler unites in himself several ruling personalities; he is the "holder of several state authorities."

Then Triepel analysed the unions of states in which there is domination and subordination between federated states—that is, the consolidated states. In these he distinguished between the *Staatenstaat* and the federal state. He assumed that in the *Staatenstaat* the subordinate state or the vassal state is not sovereign, but yet is a state.

[1] Triepel: *Das Interregnum*, 1892, p. 90. [2] Ibid.
[3] Ibid., p. 91. [4] Ibid. [5] Ibid., pp. 91–92.

As an interregnum does not break the continuity of the state as such, so in the *Staatenstaat* an interregnum, whether in the suzerain state or in a vassal state, does not affect the special authority of the one over the other.[1]

Triepel next examined the relation of the member state to the collective state in the federal state. As he was discussing the interregnum he naturally confined his examination to the monarchical federal state, which was the expression of German federal ideas at that time. He pointed out that, accepting as the characteristic features of the federal state its consolidation from a number of states and its rule over their subjects, it is conceivable that the central state itself can be organised on a monarchical basis—that is, that the holder of the state authority of the collective state should be a physical person.

If the individual states which form the collective state are constituted wholly on a monarchical basis, and so also is the collective state, an interregnum can take place both in the central state and in a member state, or only in a member state or only in the central state. Alternatively, the collective state as such is not a monarchy and its dominion is not vested in a personal subject of its own inherent right, but is vested equally in a number of holders; but the member states are wholly or in part subject to single rulers. In that case the interregnum is conceivable only in a member state, but not in the collective state.

Of these possible constitutional forms of the "monarchical" federal state, history has furnished only two concrete instances, one being the monarchically organised central state with some monarchical and some democratic member states according to the constitution of March 1849, and the other being the North German confederation and its successor, the German Empire, an aristocratically organised collective state with some monarchical and some democratic member states.[2]

As regards the juristic nature of the Empire, Triepel argued that it was a state. It had that personality which is essential to the conception of the state, and had it because it had a will of its own.[3] What was manifested as an imperial will was not merely the sum of the wills of the various factors which made up the Empire, but a common will vested in the Empire as such, and distinct from this sum of wills. The Empire was a personality not because it gave substance to the conception of the federal state, but because its organisation gave it a will of its own, exercised in

[1] Triepel: *Das Interregnum*, 1892, p. 93.
[2] Ibid., p. 95.
[3] Ibid., p. 97.

its own name. It was an organisation of a people, not merely the organisation of many separate folk-units.[1]

The German nation as a unity was represented in the German *Reichstag*, whose members were representatives of the whole German people. That people was constitutionally organised into unity with power to will, i.e. into a personality. The Empire was invested with its own authority, capable of the enforcement of its purposes, and was "a subject of its own supreme rights." It was capable of extending its purpose and of determining its competence; it defined of itself the limits of its tasks. It was bound only by its own will; so that the Empire was a sovereign state. It was not a *Bund*, not a mere legal relationship; it was a personality, a legal subject, a state.

Triepel went on to affirm that the Empire as a state was not a unitary state, but a federal state formed of a number of states.[2] The twenty-five member states were gathered into the combined unity of the Empire, but that unity had not gone so far that they had lost their state existence. Therefore, like the Empire, they were subjects of their own wills and were charged with a great number of tasks not simply *like* states but *as* actual states with their own rights of authority.[3] Therefore, these states were no longer sovereign, because their actions were determinable by the will of the sovereign Empire dominating them. But they were not on this account degraded to the mere position of imperial provinces and self-administrative bodies; because the Empire had not taken from them state authority—that is, the sum of their own dominant rights over their subjects. Therefore the Empire was a federal state, but not a unitary state.[4]

Triepel's criticism in this work was entirely in agreement with the prevailing ideas of the German federal state, such as those of Laband and Jellinek. His later work on *Unitarismus und Foederalismus im deutschen Reiche* (1907), his study of *Die Kompetenzen des Bundesstaats* (1908), and a still later work, *Die Reichsaufsicht* (1917), were the result of his study of the federal states in which the idea of *Unitarismus* had gradually predominated over the idea of *Foederalismus*.

In the first-named work Triepel pointed out that for a long time political science had given the name "federal state" to those artificial political organisations in which a collectivity formed of states ruled in a prescribed sphere not only those states but also their subjects.[5]

[1] Triepel: *Das Interregnum*, 1892, p. 97. [2] Ibid. [3] Ibid., p. 98. [4] Ibid.
[5] Ibid.: *Unitarismus und Foederalismus*, 1907, p. 8.

The theories of the conception and nature of the federal state arose in connection with the constitution of the United States of 1787 and the Swiss federal constitution of 1848. At first many doubted if the North German confederation and the new German Empire could be included in the same category, since in some very important respects the new constitution of Germany was not in harmony with the traditional ideas as to the federal state. But gradually those ideas were revised and the theory of the federal state took a form which covered both the American and Swiss federations, and also the German Empire. Treitschke's formula, defining the Empire as "a constitutional monarchy with federal institutions" closely approximated that Empire to the "federal state" of the prevailing theory. The term "federal state" rightly indicated in Triepel's judgment the combination of "the union of the two principles on which the institution is based."

He defined the federal state as a "union of states, but not a mere confederation and not simply an international union with merely union authority over the member states and without direct domination over the subjects."

On this assumption the federal state is itself a state, but a state which shares the fullness of the state competence with the associated states—that is, it is "not a complete state, not a unitary state." It is intermediate between the confederation and unitary state; in other words, it is an organisation which takes some of its elements from the confederation and some from the unitary state, and is dependent upon a compromise between two tendencies, federalism and unitarism.[1]

On this assumption Triepel considered the federal state as a *forma mixta*—an intermediate between union (*Bund*) of states and the unitary state. No matter at what result logical discussion might arrive, the federal state is legally a state and not a confederation; but politically it is a form intermediate between the unitary state and the confederation. As the constitutional monarchy was the classical *forma mixta*, combining monarchical and democratic elements into a higher unity (but had never succeeded in doing away with the constitutional dualism of government and popular representation), so every federal state by the very necessity of its nature shows a dualism of equal importance.[2] "Because," Triepel said, "no federal state in the world, which possessed real political life, was conceivable without a continuous conflict between unitary and federal efforts."[3]

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 8.
[2] Ibid., p. 10.
[3] Ibid.

This conflict between the two contradictory conceptions was the main issue in the history of the federal state idea, in which the theory of nullification, i.e. particularism, sought to destroy the basis of that national unity which strove to bring about the final development of federalism into *Unitarismus*.

Triepel accordingly assumed that the federal nature of the organs of the German Empire as a federal state was shown permanently by the constitution of the federal council (*Bundesrat*), whereas the unitary character was shown by the *Kaiser* and the federal parliament (*Reichstag*).[1]

And he added that the blend of unitary and federative elements in the federal state showed itself, as in the federal organs, by the way in which the constitution had divided powers between the Empire and the member states.

In the constitution such matters as the organisation of the state and communes, the regulation of agriculture and forestry, mining, hunting and fisheries, the organisation of education and the determination of the relations between state and church, were assigned exclusively to the legislation and administration of the territorial states, free from any control by the Empire. And in respect of many other matters, and, indeed, of the majority, for which the Empire could enact a general law, it had been given in the constitution only a competence concurrent with that of the territorial legislative authority.

The Empire could, for instance, establish a general law relating to associations (*Vereinsgesetz*), but so long as the Empire had not legislated on this matter, the individual states were entitled to do as they chose in regard to that subject. And even in the sphere of imperial legislative competence, the task of carrying out the law—its interpretation and administration—remained to a great extent to the individual state, though under the supervision of the Empire.

Thus the rules of the civil and criminal codes and of the procedure thereunder were formulated by the Empire, but according to the constitution the decisions of the territorial courts in both civil and criminal cases were pronounced in the name of the territorial ruler. In this respect Triepel asserted that as any system must be regarded as federal in nature if it provides for the exercise of the state authority—i.e. the exercise of obligatory authority in legislation and administration within the federal state—to be entrusted to the individual states, then clearly there were federal elements in the constitution of the German Empire.

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 13–14.

Nevertheless, the Empire had an exclusive sphere of legislation not only in respect of its own organisation and the functions of its organs, its own officials, its finances, and its foreign relations, but also in respect of the army, navy, posts and telegraphs, and customs and certain taxes. The imperial authority in this sphere of activity showed *Unitarismus* in every legal function of deliberation and action.[1]

This combination in the Empire of both tendencies—unitary and federal—manifested itself in every function of the federal state. The imperial legislation was on the one hand federative in so far as the sanction of the law was vested in the federal-based *Bundesrat*, and on the other hand unitary in its existence and operation.

The imperial supervision was in itself a unitary institution, but its exercise was, to a great extent, "in the hands of the federal *Bundesrat*." The organisation of finance and of the military system was partly unitary and partly federal. In regard to the former there was a combination of the Empire's own revenues from its own institutions and from customs and taxes with the matricular contributions from each state. In the case of the army there was a system of state contingents, but unitary legislation, general staff and supreme command vested in the Emperor.

As regards officials a large number of appointments were made solely by the Emperor, but for others the concurrence of the federal council was necessary.[2]

Triepel pointed out that a federal state can be predominantly unitary or predominantly federal in character, and proceeded to consider if the constitution of the Empire showed a strong bias in either direction. There were two prevalent opinions which he criticised. One was that the German Empire was not a federal state but a confederation; Seydel's phrase, "the federative character of the imperial constitution," has gradually become a shibboleth of the extreme federalist school, which used it in the press and in parliament with great emphasis.

The other regarded the imperial constitution as having only a confederative, i.e. treaty basis. Some supporters of this doctrine admitted the federal state nature of the Empire without regard to its treaty origin; others regarded the question whether, in view of its treaty basis, it was a federal state or a confederation, as a matter of indifference, which was in the main Bismarck's attitude. Triepel designated the former as "ultra federal" and the latter as "semi-federal."[3]

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 18.

[2] Ibid.

[3] Ibid., pp. 22–23.

With regard to the ultra-federal idea he asserted that whilst from the formal juristic point of view the gulf between the confederation theory and the federal theory state was unbridgeable, the contrast from the dynamic standpoint was not so sharp. There were convinced federalists who persisted in calling the Empire a confederation, but tacitly admitted that it had unitary tendencies, and some recognised the difference between confederation and federal state to be only quantitative. "Juristic dogma" could not be satisfied with this. But Triepel regarded it as important in that it admitted that even a mere federal relationship could develop a federal authority; and that a confederation, viewed from the political standpoint, could contain strong unitary elements.[1] If that were so then the question becomes again one as to whether the Empire, in which he saw a state with federal elements and others a federation with state elements, had developed more on federal or on unitary lines.

Secondly, in his view the theory of the treaty-based foundation of the Empire was "as a juristic theory not tenable."

Admittedly the agreement of August 1866 and the treaty of November 1870 were stages in the formation of the German Empire. But these had ceased to be operative. As the federated states had taken the action which they intended to take—namely, to do everything requisite to bring about, first, the formation of the North German confederation, and secondly, its enlargement into the German Empire by the inclusion of the South German states—those treaties had been fulfilled. From the legal standpoint they had ceased to exist.

The legal relationship between the parties or between the Empire and the member states was determined by the constitution, and not by treaty.[2]

But he admitted that the treaties were constantly appealed to as the basis of the Empire; they still had a great influence on men's minds. To reconcile this fact with the principle just laid down Triepel thought it necessary to find an answer to the problem as to the basis of the validity of law.

His answer to that question was that "the law is binding for us, because in our hearts we feel ourselves subject to the will of which it is the expression[3]"—that is, "the feeling of dependence entertained by those subject to law towards the source of law is the valid basis of law." "We" in the first of these two dicta

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 23–24.
[2] Ibid., p. 25.
[3] Ibid., p. 26.

means not every individual, but the normally situated generality of those to whom the law is addressed.[1]

This conception of the feeling of obligation is the criterion of state authority and of the validity of law; it is the sole explanation of the legitimation of an originally illegitimate authority, of the power of a usurper or revolutionary.

This feeling of dependence can be due to very diverse causes, which may differ not only with time and space but also between those to whom the same law is addressed. But although various motives, such as fear of power, tradition or intellectual or religious considerations, may all play a part, Triepel thought one psychological factor predominated over all others—namely, the fact that people follow with the greatest degree of satisfaction a rule which they themselves have helped to make.

Triepel argued that in such a case the will which we obey is not entirely another's will, but our own. "It would be an exaggeration for the natural law theories if the social and state contract referred all law and every state system to agreements between those who are participators in the same law, and an error if they presumed to see therein at the same time the legal justification of state and law." But Triepel thought that the century-long influence of these ideas on men's minds was largely explicable by the forceful, if biased, use the natural law theories had made of this belief.[2]

It is a fact of the greatest importance that a wise legislator can make systematic use of this psychological fact—namely, that the feeling of subordination to the will of the law is strengthened if the subject has participated in the formation of that will. That is the essential meaning of the institutions of the constitutional state, and one to which the mechanical doctrine of the separation of powers does little justice.

The state grants to its citizens independent participation in legislation, and consequently the feeling of dependence on the law develops more easily among them. For to them the law is then not the dictate of a will ruling over them, but is the expression of their own will.[3] This idea has often been made use of by the absolutist state in the form of constitutional legislation for the transition from the old to the new legal state. The ruler has set up the new constitution in co-operation with a popular representative assembly.

So Triepel asserted that a constitution thus framed is not a

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 27.

[2] Ibid., pp. 27–28.

[3] Ibid., p. 28.

grant but a compact. The law is received by the subjects not as a gift of princely arbitrariness or caprice, but as having from the first the value of something which has been earned.[1]

Applying this idea to the North German union and the Empire, Triepel thought that, owing largely to the wisdom of Bismarck, the content of the constitution was regarded as the result of agreement between the states and not as determined by a victorious Prussia; and the constitution of the German Empire seemed to the member states to be "not the dictation of a victor exploiting the situation, but self-imposed rule." The "federal basis" was therefore nothing more than the historical fact that the constitution was formed by the will of all the individual states. And so the treaties remained of great political, though of no legal, importance.

But if the feeling of subordination to the law is strengthened by participation in its formation, it is weakened as the consciousness of that participation grows dim. Not that such weakening destroys by itself the moral authority of the law. The consciousness of participation is only one of the factors creating the feeling of subordination—and that may remain if sustained by other motives, such as tradition, moral or religious considerations, etc. But if memory of the "agreement" weakens before the other motives have asserted themselves, the moral authority of the law may be imperilled. Triepel held that the idea of participation has meaning and value only so long as one can count on it being shared by the other party. In the German Empire that other party was Prussia, and Bismarck was therefore entirely right when he said: "The basis (of the federal relation) must be confidence in the loyalty of Prussia, and that confidence should not be shaken so long as one keeps faith with us."[2]

Triepel thus endeavoured to show the one-sidedness of the view which held that politically the imperial constitution was on a purely federal basis. He emphasised the fact that the formation of the Empire was determined largely by Bismarck's resolve to use the "compromising and driving force of the national spirit" for the construction of the new edifice. Hence the co-operation of a popularly elected representative body in the formation of the constitution, which was agreed not only between governments, but also between governments and the *Reichstag*. It was a "pact constitution" in a dual sense. The new public law of Germany was not a "compulsory benefit." Triepel held that "it was intended to contain a part of the national will so that from the very beginning

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 29. [2] Ibid., p. 30.

there should spring up in the nation that feeling of dependence on the legal will on which alone the binding force of every legal order was based."[1]

Therefore he considered that the constitution was based not only on "federal" but also on "constitutional" foundations, and the imperial constitution took the form of an imperial law of April 16, 1871, which was issued for the purpose of fusing (in outward appearance) the November treaties.

Accordingly, he thought that the "state" basis balanced the "federal" in that respect. The conflict between unitary and federative elements was considered through his subjective conception of the law. The coexistence of these two contradictory conceptions in the German federal Empire was the general plan of the federal architecture under which the union of the state was "so far necessary, so far possible" and formed the centralisation of the constitutional organisation in legislation and administration.

In the interpretation of the constitution of the union it was not just that the authority of Bismarck should be appealed to as having favoured either the unitary or federal basis. That great statesman's whole policy was directed to the harmonising of the two forces. All that can properly be said was that with increasing years Bismarck became more federally minded than he was at the time of the North German confederation. But to him federalism was rather a useful form than a vital principle.[2]

Triepel asserted that "laws generally do not coincide wholly with the desires and purposes of their authors"; and of this principle there was no better example than the history of the creation of the imperial constitution. These events were stronger than men.[3]

The well-known jurist, Haenel, had been the first to show that one of the most elementary of the unitary organs, the federal presidency and with it the imperial office, had been introduced against the wish of Bismarck and the governments allied with Prussia. The presidency was originally intended to be only "the Crown of Prussia" as such; it was to have presidential rights within the federal council and Prussian hegemony rights "in the interest of the union" were to be exercised through the Prussian organisation. The Chancellor of the union was not to be "a real federal minister, but a Prussian state organ," who took the chair in the federal council, in the name of the Prussian State Govern-

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 31.
[2] Ibid., p. 34. [3] Ibid.

ment.[1] It was despite the opposition of the Government bench that "the *Reichstag* gave to the Federal Presidency and its Chancellor the constitutional position which they held in the German Empire."

The *Reichstag* was influenced by considerations which were in the first place not unitary but constitutional in accepting the amendment, whereby all decrees of the *Bundespräsidium* were to be issued "in the name of the union," and all were to require for their validity the signature of the Chancellor, who thereby assumed responsibility for them. It was on this responsibility that the *Reichstag* placed the chief weight—the responsibility of which in this form the original project had no idea, and according to its bases could know nothing. Triepel explained that "the collegial federal council" by its very nature could not be responsible, and that the Prussian Government, even with regard to its activities in the *Bund*, could be answerable only to the Prussian Parliament. Therefore the *Reichstag* was much less concerned with the establishment side by side with the federal council and the Prussian Government of an independent executive for the *Bund*, than with the creation of a federal government responsible to the *Reichstag*.[2]

The change introduced into the draft proposals by the *Reichstag* made a monarchical federal executive possible and so gave opportunity for a whole system of federal authorities. The *Reichstag* had, in fact, made itself one of the strongest unitary members of the Empire.[3]

This constitutional history showed that unitarism and federalism in the federal constitution had not maintained a balance, but that the unitary elements from the very beginning had attained a predominance over the others.

Unlike Rehm, who had argued that this was simply a political predominance of unitarism which was offset by the juristic predominance of federalism, Triepel contended that this predominance of unitarism had a legal basis, since it was due to legal institutions. Even though the German member states had generally the right of legal interpretation and administration even in the sphere assigned to imperial legislation, the activity of the territorial authorities was subject to the "supervision of the Empire." And the territorial administration was in the final instance subject to the control of the imperial authority. This control extended even to matters in which the Empire did not exercise its power of legislation.[4]

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 34–35.
[2] Ibid., p. 35. [3] Ibid., pp. 35–36. [4] Ibid., p. 36.

Therefore Triepel asserted that "in spite of the independence of the member states, their relationship to the Empire in that whole sphere within which the Empire was competent to legislate—a sphere to which the constitution had given very wide limits—was practically nothing more than the relationship between an individual state and its lower and higher communes possessing rights of self-administration."[1]

The member state had an extensive right of concurrent legislation. But this right could be set aside as soon as the Empire determined to make use of its own legislative power. Thereupon there disappeared not only the territorial law which had hitherto prevailed in the sphere now occupied by the Empire, but also any legal possibility of the member state legislating further in that sphere. This followed from the principle of the constitution that imperial law prevailed over territorial law. Thus the Civil Code of the Empire (*das bürgerliches Gesetzbuch*) not only set aside the existing Civil Code of Saxony, but made it impossible for Saxony to create any private law of its own in respect of matters dealt with by the Imperial Code.[2]

Triepel pointed out further that although a sphere of exclusive legislative power was left to the member states, the Empire could at any time by an amendment of the constitution enter into that sphere.

The possibility of the Empire enlarging its constitutional competence by means of legislation in which even great individual states could be out-voted, clearly indicated "the predominance of the state idea over the federative idea."[3]

The nature of a confederation, as a union under international law, requires that changes of its constitutional basis need unanimous assent, but in the German Empire neither Bavaria nor Saxony alone nor the three Southern states together could prevent an amendment of the constitution.[4]

The contention that a constitutional change such as would turn the Empire into a unitary state was excluded by the constituent agreement, which had the form of a treaty, was invalidated by the fact that since the 16th April, 1871, even the Preamble had only been part of an imperial law which was capable of being amended. In fact, so long as Prussia itself did not proceed along the "federal fairway," so long its constitutional position effectively barred any marked development of the constitution in the direction of federalism, for Prussia with seventeen votes needed only to

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 37.
[2] Ibid. [3] Ibid. [4] Ibid., p. 38.

get the support of three more to defeat in the Federal Council any proposal for constitutional change. And under special provisions Prussia could veto any proposed enactments as to customs duties and taxation, the army and the navy—matters in which the unitary elements in the constitution were strongest.

There was no possibility of the lessening of the imperial authority in favour of the federal council since the King of Prussia held the position of German *Kaiser*, and obviously would not attack himself, and the Prussian voting power in the federal council was strong enough to repel any attack from elsewhere.

In these circumstances Triepel could assert that "the constitution itself put relatively small obstacles in the way of the development of the unitary principle, but almost insurmountable obstacles in the way of the federalist principle."[1]

Thus whilst the unitary elements of the constitution could be gradually widened and deepened by the majority decision of the legislative organs, a federalist reaction could not be brought about even by the unanimous decision of the governments. This predominance of unitarism in the federal Empire was shown also in the relationship of the unitary organs to the federalist ones. In this respect political activities weighed down the balance. The Emperor and the *Reichstag* were national, which the *Bundesrat* could never be.

The substitution of the title of "Emperor" for the colourless name of "President of the Union" meant both for the political relationship of the holder to the princes and people, and his status abroad, much more than many of the unitary provisions of the constitution. In the official diplomatic language he was designated not only as "German Emperor" but also as *L'Empereur d'Allemagne*. The princes accepted the pre-eminence of the Emperor much more readily than they would have done that of the presidency or of the King of Prussia.[2]

In considering the relationship of the *Kaiser* to the federal assembly, it is clear that the monarchical possessor of executive authority must always be in a stronger position than a numerous board. And, finally, he who has at his disposal an armed force must always be the strongest person in the state. This told in favour of the Emperor, to whom, according to the constitution, all the troops were pledged to "unconditional obedience."[3]

Triepel developed his investigation to show that in addition to this political superiority of the unitary government organ

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 39.
[2] Ibid.
[3] Ibid., p. 40.

over the federalist one there was a legal superiority, "not so obvious but not, therefore, less important."

The Emperor in many spheres of the monarchical authority was formally restricted by the federal council, and needed its concurrence in respect of important state treaties, and in the dissolution of the *Reichstag*. The constitution provided in the latter case that the decision of dissolution was made by the federal council, but required the Emperor's approval. Indeed, the Emperor was in many cases legally dependent upon the federal council. He was bound to prepare any law approved in principle by the federal council, to submit to the *Reichstag* the draft approved by the council, and to carry out any "imperial enforcement" (*Reichsexekution*) determined by the council.[1] But on the other hand, even under the original constitution the Emperor had considerable indirect influence over the formation of the decision and policy of the Federal Council. He nominated the chairman of the Federal Council in the person of the Imperial Chancellor, and the number of the Prussian votes was in many cases a deciding, and in all cases an important, factor. The lack of political independence of most of the North and Middle German states had the result of giving Prussia always more votes than were allotted to her by the constitution. The constitution did not provide any check, by means of a decision of the Federal Council, on the Emperor's will. A law could neither be made valid nor enforced without the Emperor's approval.[2] Although the Imperial Chancellor was responsible to the *Reichstag* and the Federal Council for the refusal to sanction or enforce a law, yet there were no means of enforcing the responsibility of the Imperial minister.

In spite of the fact that the Emperor, as an imperial organ, was theoretically on an equality with the other organs, yet his superiority was manifested by the fact that the Federal Council could not operate without him, for he alone could convene, adjourn or prorogue it. True, he must convene it when the *Reichstag* was convened, or if one-third of the votes asked for a meeting; both these provisions were federalist in nature, but they were really *leges imperfectae*, since ultimately the Federal Council had no right of independent assembly, and if it met without the sanction of the Emperor its decisions were null and void.

Triepel asserted that every federal constitution is "a compromise between unitarism and federalism."[3] It indicates the extent of the

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 40.

[2] Ibid., p. 41.

[3] Ibid., p. 44.

reciprocal concessions which these two opposing principles feel able to make at a particular time, but there is no way of making the compromise a permanent one. Even in the United States, where owing to the "rigidity" of the constitution the disturbance of the relationship between centripetal and centrifugal forces was in the course of time almost unnoticed, there had yet been a gradual change to the advantage of the union.[1]

Changes in regard to the Swiss constitution had been much more marked. The partial revision of 1847 and the complete revision of 1874 had been of a strongly unitary kind, and the centralising movement had made undeniable progress since then. In Germany the course of development had not been a consistent one. Twice the federal movement had made marked advances.

The first case was when the South German states were admitted to the North German confederation. To induce them to come in, concessions in a federalist direction had to be made, although unitarism was politically strengthened by the introduction of the imperial title.

The establishment of the Federal Council, with its participation in legislative and executive functions, the provision that any proposal for the amendment of the constitution must fail if fourteen votes were given against it in the Federal Council (where Bavaria, Saxony and Württemberg had fourteen votes together), and the weakening of the principle of equality by the reservation of a number of special rights for particular states were all in one way or another a gain to federalism, despite the actual predominance of Prussia in the Federal Council and the overwhelming strength in the *Reichstag* of Prussia with 235 members as against 162 for the rest of the Empire.[2] The rights reserved to individual states were not only of a decorative nature, but were by their setting aside of the imperial competence very much to the advantage of the South German states. For example, there was the exemption of all the Southern states from imperial taxation on "beer" and "brandy" and of Bavaria from the legislation as to domicile, the right of Bavaria and Württemberg to have their own postal services, the special position of Württemberg in regard to army matters and Bavaria's exclusive rights in regard to railways and to the military forces.

The federalist significance of all this lay in the fact that in respect of important matters of state the centre of state activity was transferred from the Empire to some, though not all, of the member states, and this irregularity of the boundary between

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 44. [2] Ibid. p. 46.

imperial and territorial competence strengthened the federal idea.[1]

The second case was towards the end of the seventies, when the "Frankenstein clause" was inserted in the Tariff Law of 1879, and was followed by legislation as to stamps and a brandy duty. According to the constitution the Empire depended on its own financial resources, namely, postal and telegraph revenues and the yield of the Customs and internal consumption duties, and any deficiency was to be made up by "matricular contributions" from the states on a population basis.[2] This association system undoubtedly gave imperial finance a strongly "social" character. But according to the wording and intent of the constitution, this system of matricular contributions was intended to be only temporary, and to disappear with the introduction of new imperial taxes. The "Frankenstein clause" directed that the whole of the receipts from the customs and tobacco duties, in excess of a prescribed figure, and the whole of the proceeds of the stamp and brandy duties must be paid over by the Empire to the states, which thus received large subsidies from the Empire and on the other hand paid it large subsidies in the form of the matricular contributions. In Triepel's judgment this was a perpetuation of the federalist character of imperial finance, and for a long time it caused financial confusion, and deprived the Empire of financial independence.[3]

Nevertheless, Triepel believed that this enhancement of the federative elements in the constitution had not overcome the predominance of the unitary elements. Political actualities, resulting from the adoption of the terms "Emperor" and "Empire," had checked the advance of federalism in the year 1871. The events of 1879 had not affected the basis of the constitution; the tendency to unification had been checked in some directions—it had not been stopped. The "unitary" elements in the constitution were gaining ground against the federalist element and there was no real doubt as to the ultimate solution.

By the imperial constitutional law of February 24, 1873, the federalist stamp given to the constitution by the introduction of reserved rights in the voting system of the *Reichstag* and *Bundesrat* was removed. Moreover, a break with the reserved right system, which was the characteristic of German federalism, was made in 1887 when the Southern states gave up their exclusion from the imperial brandy duty, in return for a concession of a different

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 47.

[2] Ibid., pp. 48–49.

[3] Ibid., p. 49.

kind.[1] A little later Bavaria abandoned some of its special rights in military matters. The introduction of imperial postage stamps in Württemberg was the first step towards the renunciation by that state of its reserved postal rights.

And the federalist hope based on the "Frankenstein clause" was not fulfilled; on the contrary, it had gradually created for the states a very unsatisfactory dependence upon the changing financial position of the Empire. The experiment of 1879 had, in fact, done more for centralisation than several direct developments of unitarism. Therefore Triepel, like Schäffle, believed that by the "Frankenstein clause" federalism had taken a step of "particularist innocence."

In 1904 the so-called "Lex Stengel" repealed the "Frankenstein clause" in the customs law. The net proceeds of the custom and tobacco duties were to go wholly into the imperial treasury. An amendment to Article 17 of the constitution made the matricular contributions no longer a temporary or provisional arrangement, but a permanent source of income for the balancing of the imperial budget. This, however, was done solely for parliamentary considerations, and not for federalist reasons; it was to meet the desire of the parliament to have an effective control over the revenue. With the introduction of new taxes in 1906 the system of imperial contributions to the states came to an end, and financial federalism was ended also.[2]

The domination of unitarism over federalism in Germany was strikingly demonstrated in the development of the imperial competence and in the detailed application of the constitution.[3]

The legislative competence of the Empire was repeatedly widened by amendments of the constitution, and remarkable use was made of its powers, both by codification and otherwise; this applied not only to new subject-matters of legislation, but also to matters which were already dealt with more or less by territorial state legislation—in which event under the constitution the territorial legislation lapsed. And all such legislation involved an extension of the imperial supervision over the administration of the law. In both ways the idea of unitarism gained ground rapidly.[4]

Parallel with this growing legislative activity of the Empire there was a rapid development of machinery designed to provide for the uniform law a uniform administration. Thus there developed out of the single imperial office—that of the chancellor—

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 50–51.
[2] Ibid., p. 51. [3] Ibid., p. 53. [4] Ibid., pp. 54–56.

a great range of imperial administrative departments and a great imperial judicial and civil service.[1]

Triepel pointed out that those developments were bound to affect the position of the main constitutional organ of the Empire, that is, the Emperor. Steadily, if not so conspicuously, the unitary factor—the imperial office—had gained at the cost of the Federal Council.

This was manifested in a strengthening of the *Kaiser's* position in respect of legislation. With the growth of the range of subjects which the Empire took to itself, with the extension of imperial legislation and imperial administration, inevitably the Emperor and not the federated governments became responsible for the initiation and enforcement of legislation. The wider the scope for imperial initiative the smaller became the opportunities for the Federal Council and the states; the greater the influence of the Emperor and his officers on the general political situation, the more the rôles of Federal Council and individual states declined in importance.[2]

§ 5

After this survey of the internal development of the German Empire, in which he saw a steady advance of unitarism and the victory of centralisation over particularism and a growing Prussian hegemony,[3] Triepel (in 1907) considered the future of the Empire. He held that there was manifestly a permanent tendency towards the strengthening of the unifying factors in the constitution. This was less apparent in any changes in the relations between the unitary and federal organs of the Empire to the advantage of the former than in the extension of the competence of the Empire in legislation and administration in all directions into the sphere of territorial competence. The machine of imperial legislation was in 1907 working at high pressure. There could be, Triepel thought, no halt in social legislation, which must tend to centralisation.[4] This must mean in turn an increase in the power of the unitary organs of the Empire, of the imperial ministries and of the imperial dignity. There was as yet no sign that the imperial position would become a monarchical one, in the sense that it would destroy the "territorial" supremacy of the territorial princes in administration and

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 60–62.
[2] Ibid., p. 64. [3] Ibid., pp. 72–77. [4] Ibid., p. 78.

jurisdiction. But there would certainly be a marked increase in the strength of the Emperor's position vis-à-vis the Federal Council.

Triepel argued that the need of the nation for unity was not yet satisfied, and that the "development of national economics" demanded "a greater progress in the unitary direction." Trade relations and the need of unification in respect of railways and transport generally demanded unitary legislation and administration, even though that involved the overthrow of carefully guarded private rights.[1]

In the next place the international position of Germany in Europe and the struggle for a "place in the sun" on which she had entered, meant that she needed not only "soldiers, guns and ships," but also the consolidation of "all economic and moral forces under unitary leadership."[2]

One important consequence of this particular need was a change in the financial position of the states. The vast expenditure upon armaments had laid upon the German states financial burdens with which some of them could scarcely cope. It appeared to Triepel that the situation could only be met by the Empire undertaking the direction of the taxation systems of the states, and aiming at the transformation of the system from indirect to direct taxation on the lines adopted in 1906, by the enactment of the death duties as direct taxation. As Schäffle declared in 1880, "the unity of indirect taxation must politically be the first object; that of direct taxation will follow."[3]

Triepel believed that the German Empire had entered the history of the world as a unitary state. That unity had been shattered, and only by a long and painful process had the measure of unity existent in 1907 been achieved. He believed, with Treitschke, that that progress must and would continue. But the political forces which in Germany were ranged on the side of federalism were still strong enough to restrain unitarism.[4] So Triepel thought it necessary to enquire as to the possible sources of reaction.

The Federal Council had shown itself much less federally-minded since 1871 than might reasonably have been expected. The representatives there of the federated governments had never strongly resisted the centralising tendencies—they had shown themselves frequently willing to give up their "reserved rights." Actually the *Reichstag*, designed to represent the nation

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 79.
[2] Ibid., p. 80. [3] Ibid., pp. 81–82. [4] Ibid., pp. 82, 83.

as against the governments represented in the Federal Council, had frequently shown itself more federally minded (as in the case of the "Frankenstein clause") than that body.[1] It was natural that the bureaucracies of the individual states, and the aristocracies which had their centres in the various courts, should favour federalism and particularism, but they were not strong enough to strike a decisive blow. But the important matter was the support given to them by the great political parties.[2]

At this time the basis of the German political parties had not been determined primarily by the principle of centralisation or particularism, but by economic, social and denominational purposes adopted as the basic principles of their party programmes.

Owing to the historical origins of the individual parties and the internal relationship always existing between political opinions and between certain fundamental and "national" problems, it was quite evident that the larger parties must adopt a very definite attitude towards the principles of centralisation and particularism. Even if sometimes, in matters of federal development, the policies outlined in the party platforms were confused and self-contradictory, yet it was pretty certain that the parties could be classified, some as predominantly unitary and others as predominantly federative.[3]

German liberalism upheld the unitary tendency as a result of its conception of economic policy. The tradition of unitarism in German liberalism was strengthened by powerful economic considerations, and its ideas of industrial and commercial requirements naturally led it to favour unitary legislation and administration under the imperial government. The National Liberal Party, formed in 1866 from members of the Prussian Progressive Party and the "left centre," and strengthened later by a new social group, the aristocracy of industry and trade, had steadily favoured the unitary policy of the imperial government.[4]

The left wing of liberalism formed the Independent Union and the Independent People's Party (*freisinnige Vereinigung* and *freisinnige Volkspartei*), whose programmes were based on the unitary policy in national economics and on the idea of a democratic imperialism.

Even the Social Democratic Party, which opposed the monarchical parliamentary system of government and the social-political legislation of the Empire, and whose official programme had not a single word regarding the problem of the

[1] Triepel: *Unitarismus und Foederalismus*, 1907, pp. 85–86.
[2] Ibid., p. 88. [3] Ibid., p. 90. [4] Ibid., p. 92.

federal state, could, like the unitary radicalism, be on the side of unitarism. In a speech in the *Reichstag* in 1900 Bebel said that he would regard it as a great advance if, instead of the plurality of states and small states, there were a single German Empire and a great central organisation in which the financial and economic administration of the Empire would be discussed.

Opposed to these groups of liberal parties and social democracy (Socialism) which favoured the unitary policy of the imperial government there was in the Southern states a democracy, represented by the "German People's Party" (*deutsche Volkspartei*), which for the first time since the early days of liberalism stood for adherence to the federal state policy, in opposition to the national idea of Germany and to the Prussian hegemony.[1]

There were two parties in the Empire at the time Triepel wrote which were very strongly federalist.[2] The first was the Conservative Party, which was opposed to the development of the German Empire in a unitary direction for certain obvious reasons. One was its historical tradition; another was its conception of the state and of law as being directed towards the maintenance of that traditional organisation of society of which the individual states with their basis of legitimacy formed an integral part. And, thirdly, the Conservative Party was recruited chiefly in Prussia, and held a creed of Prussian particularism, and disliked the absorption of Prussia in, or rather its domination by, the Empire.[3] Consequently it was opposed to the extension of imperial legislation and administration controlled by the *Reichstag*, which was by history, constitution and party system much more democratic than the territorial parliaments. The Conservative Party was, therefore, federalist not for the sake of federalism, but because it was in these conditions anti-unitarian. The left wing—the *Reichspartei*—was unitarian in sympathy, but even there a federalist sentiment was gaining ground.

The other party was the Centre—the strongest in the *Reichstag* at the time. It was made up of very diverse elements—conservative, liberal, democratic—held together by common policy as to the relations between church and state in Germany. For this reason the ultramontaine party there co-operated in many matters with liberalism, though the latter was based on principles which officially the Roman Church condemned as the "pestilence of the age." The Centre was not anti-Empire; it needed a *Reichstag*, and a strong one; and a *Reichstag* presupposed a *Reich*. But from

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 94.
[2] Ibid., p. 96. [3] Ibid., p. 100.

the first it was federalist because a unitary Empire meant the predominance of a Protestant Prussia.

Writing in 1907 Triepel concluded that in the circumstances he had thus described the outlook for unitarism in the German Empire was not very encouraging. He hoped for a change in the balance of parties, but thought this would not be rapid, and that consequently in the immediate future unitarism would make only slow progress.[1]

Summing up, Triepel pointed out that his historical survey had shown that unitarism had predominated in the original constitution of the Empire, that during the following period the tendency towards unification had continued with only occasional interruption, and was still dominant at the time he wrote, but seemed unlikely to continue in the immediate future with the same rapidity. And he felt forced to try to answer the question as to which tendency—to unification or federalism—should be favoured.[2]

He recognised that the desirability of the "golden mean" could be urged, namely, that neither unification nor federalism, but a blend of both, should be the aim.

In answer to this he admitted at once that at the time neither extreme federalism nor radical unitarism could be regarded as appropriate to German conditions.

He could not wholly agree with the Swiss jurist Dubs, who described the federal state as being the "noblest form of state"; nor could he adhere to the doctrine of Jellinek, who considered the federal state as the normal form of political existence for the Germanic nations. But he was also convinced that "for us a return to confederation is permanently barred and the transformation into a complete unitary state is not yet expedient." As things were the two antagonistic powers were not equally armed, for the constitution had preferred the unitary idea to the federative and the development of the constitution had increased its predominance.

Those who wished to maintain the existing position must tacitly favour the dominance of the unitary elements; those who desired a return to the original balance—or, at any rate, the balance originally intended—must at least in private have an inclination towards federalism. Even the most conservative observer must, therefore, have a bias one way or the other.[3]

Even if it were agreed that the constitution had distributed

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 104.
[2] Ibid., p. 116.
[3] Ibid., p. 117.

"light and shade" evenly upon unitarism and federalism, and if one could be back at the beginning, it would, in Triepel's opinion, be impossible to remain neutral. For the latent antagonism between the two forces was certain to emerge, and in fact the question "Unitarism or Federalism?" presented itself at every moment in the life of the federal state.[1] The character of the consolidated state was such that every step taken by the legislator had unitary or federal consequences. Every law of the Empire moved on either unitary or federal lines. The state could not be condemned to inaction in order that a balance might be maintained; and it was impossible to offset every rule tending to unification by a federative makeweight. So Triepel assumed that "we must actually determine whether to be unitary or federative. If we vote for imperial legislation, imperial supervision and an Emperor, we are supporters of unification; if we vote for the maintenance of territorial legislation, reserved rights and the Federal Council, we are federalists."[2]

The position seemed to Triepel the same as with that form which was already regarded as a blend of two conflicting political forces, namely, constitutional monarchy, the result of an attempt to maintain an equilibrium of two ideas—monarchy and democracy. But in this also there is a constant necessity to choose between one and the other.[3] And for the sake of a political syncretism we cannot die of hunger because, like the ass in the fable, we are unable to decide between the absolutist and republican bundles of constitutional hay.[4]

In all cases where a political crisis requires a choice to be made between the two directions the decision must depend on the answer to the question as to the course one would take if one had to deal with all the consequences of taking that course, that is to say, would one take a step which must be quickly followed by others until the path has been travelled to the very end—always assuming that the only other path leads in the very opposite direction? That is to say, when only two courses are open to one—and they are diametrically opposite—one must take that which seems the more advantageous. It may not be the *most* advantageous; one may even think it an evil course, but if the choice is between two evils, one chooses the less. Triepel declared that he was himself neither an absolutist nor a democrat, but that if he had to choose between absolutism and democracy he would without hesitation prefer monarchical absolutism as

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 118.
[2] Ibid. [3] Ibid., pp. 118–119. [4] Ibid.

the lesser evil. So, where he had to choose to strengthen either the monarchical or the democratic elements in the constitution, he felt bound to favour the former, believing the "rule of an enlightened despot to be in the long run better than that of an always unenlightened populace."[1]

He held that the same principle must determine the attitude to be taken towards the unitary and federative tendencies in the federal state.

However undesirable one may think extreme federalism or extreme unitarism to be, where a choice is necessary it must be determined by one's opinion as to how far the ultimate consequences of the one or the other are worth striving for.[2] The end of the unification tendency is the unitary state; that of the antagonistic tendency is the confederation. And Triepel had no uncertainty as to his choice between the two conflicting movements.

He had reached the definite conclusion that confederation was a "political structure quite impossible for Germany." "A federation without independent legislation, without its own government, without the possibility of a jurisdiction of its own, without its own powers of a diplomatic, military and economic nature, a union of sovereign states," in short, a merely international union of states, could not be "the form in which a nation great in economic power and intellectual ability could have its political being."[3]

That was to Triepel so absolutely certain that it seemed idle to discuss the theory which upheld federalism as "the only condition for a happy existence of mankind."[4]

Rotteck's opinion of the importance of confederation for "the maintenance of freedom" was contradicted by the historical facts of the new German Empire. Müller and Heeren's doctrine that federalism was a necessity of the central state of Europe, because the state in that form would not be dangerous to its neighbours, was intelligible only in a time when national sentiment did not exist. Gervinus' view, expressed even in 1864, that the object of German statecraft should be to transform all the great unitary states into federations which would combine the advantages of large and small states, was to Triepel almost inconceivable.

He also disagreed altogether with Ottomar Schuchardt, the latest federalist exponent, who thought that if Germany were transformed into a confederation it would be the kernel of a Middle European union (*Mitteleuropa*), and sought to justify his political idea by a philosophy which was based largely on

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 119.
[2] Ibid., p. 120. [3] Ibid. [4] Ibid., p. 121.

a misunderstanding of the economic federalism of Proudhon and Marlo.[1] He professed complete inability to understand Schuchardt's doctrine that federalism was a new conception based neither on the sovereignty of the people nor on divine authority and his assertion that "federalism takes human things as they are." If Schuchardt's theory of federalism had any meaning at all it would destroy federalism as a principle of political construction, since federalism could only be realised in some sort of "legal form."[2]

Triepel held that whilst there might be nations whose cultural conditions inclined them to federalism, yet history showed that "even those communities which, by reason of their being made up of several nationalities and their division into separate organisations of approximately equal size, appeared to be driven to take a purely federative form—as, for example, Switzerland—have gradually sought and found a way from pure federalism to the higher form of unity."[3]

The confederation in the present-day state would represent a "grandeur that is done with." Triepel remarked that for the German people the decisive fact was their fifty years' full and painful trial of pure federalism. So he asserted that "the German union is dead and can never be resuscitated."

In the choice between confederation and the unitary state he concluded that, "compared with the confederation, the unitary state is the more advantageous."[4]

But as between the federal state and the unitary state he was not so certain. He pointed out that he could not share the "modern craze for the federal state." It was to him questionable if the federal state was really a sound ideal for all states, apart, perhaps, from the largest Empires (*Riesenreiche*).

The federal state to his mind had evident defects. He believed that "the political mechanism which combined constitutional member states into a constitutional collective state is more complicated than any other state form."

Consequently he asserted that "if it is right that political life is based on compromise, that applies in double and treble measure to the federal state." And, he added, not only the government and the popular representatives but also the governments are

[1] Proudhon, Economic Federalism in his work *Princip Fédératif*. Marlo, Economic Federalism in his work *Untersuchungen über die Organisation der Arbeit oder System der Weltökonomie*. Schäffle: *Kapitalismus und Socialismus*, 1870, pp. 256–307.

[2] Triepel: *Unitarismus und Foederalismus*, 1907, p. 122.

[3] Ibid.

[4] Ibid.

constantly forced to compromise with one another. "The consequence, especially in the monarchical federal states, is a continual 'diplomatic' game which carries the 'principles and usages' of foreign policy into the conduct of internal state organisations in a manner which gives rise in some apprehension."[1]

Triepel asserted that although excessive centralisation of administration was an evil, and one which a system of federalism avoided, yet, as experience showed, in the unitary state at all events it was less serious than excessive decentralisation. According to the actual history of the German federal state, unitarism had proved to be preferable to federalism.

So Triepel's final conclusion was that it was possible to work with courage for the development of the unitary elements in the German constitution, and that "German unitarism could be a force for the strengthening of the Empire and for the strengthening of the Prusso-German *Kaisertum.*"[2]

A year later, in 1908, Triepel published his work *Die Kompetenzen des Bundesstaats und die geschriebene Verfassung.* In this he began by examining the competence of the federal union of North America, and pointed out that according to the opinion which apparently prevailed there the union had powers which were neither based on written law nor simply "implied" in clauses of the constitution. There were some who maintained that "the union by no means possessed only delegated authority," but had "many competences" which were neither "delegated" nor yet "fairly implied"—powers which must be in fact regarded as "original" and "inherent."[3]

Though the competence of the federal state, either in a republic or in a monarchy, was derived from its own inherent right, yet juristically the constitutional competence of the union was founded on a federative basis. Triepel assumed that Article 76 of the German Imperial Constitution clearly indicated that any conflict between two federated governments, when it was not of a private law nature, should be determined by the appeal of either party to the judgment of the federal council. According to the spirit of the constitution, this provision must be understood to mean that not only did disputes which had actually arisen come within the competence of the Federal Council, but that the council is entitled to intervene to prevent by conciliation such

[1] Triepel: *Unitarismus und Foederalismus*, 1907, p. 122.
[2] Ibid., pp. 123–125.
[3] Ibid.: *Die Kompetenzen des Bundesstaats und die geschriebene Verfassung*, 1908, pp. 277–278.

disputes from arising, if invited to do so. And he argued that it was wiser to deduce from the basic ideas of the constitution the existence of undefined powers than to base those powers simply on "federal necessity." On this assumption Triepel reached the conclusion that "the competence of the federal state extends beyond the written constitution, but never beyond the law."[1]

His later (1917) great work, *Die Reichsaufsicht*, was his practical and juristic justification of the reasonable consequences of the predominance of *Unitarismus* over federalism in the federal empire. He said that "supervision (*Aufsicht*) is the great regulator of the machinery of the consolidated state. First in the legal form of the right of control, and then in its practical working, it is manifest whether the constitution of the federal state and its superiority over the member state is a reality or a falsehood."[2]

His comprehensive study of the right of supervision in the German Empire led to the conclusion that the federative tendencies and prejudices which sought to restrain the energetic manifestation of its supervisory authority would not have availed by themselves to stem the unitary tendencies of the "imperial supervision" in the preceding ten years, but they found a welcome aid in the opposition which Prussia was compelled as it were by a natural law to make to that tendency. The actual position of the hegemony of the Prussian state in the German Empire, especially in the Federal Council, presupposed that the exercise of the imperial right of supervision over Prussia existed before that over any other member state, and thus caused partly the weakness of its exercise in Prussian administration as compared with its exercise in the others.[3] It was obvious that both formally and practically the imperial supervision was not the same in respect to Prussia as to other states. The hegemony of Prussia, the identity of the King of Prussia with the German Emperor, Prussia's predominance in the Federal Council—all had the effect that the exercise of the imperial right of supervision was, in fact, weaker over Prussian administration than over that of the other states.[4] In these circumstances Triepel argued that the federative organisation of imperial supervision gave to the Prussian state greater possibilities than it did to any other state of withdrawing itself from the operations of the supervising authority.[5] But the relationship of the Prussian state to the imperial supervision could not remain without affecting the attitude of the other federal states. If the

[1] Triepel: *Die Kompetenzen des Bundesstaats und die geschriebene Verfassung*, 1908, p. 335.
[2] Triepel: *Die Reichsaufsicht*, 1917, p. 3.
[3] Ibid., pp. 708–710.
[4] Ibid.
[5] Ibid., p. 710.

Prussian Government exercised a decisive influence upon the supervisory administration of the Empire, whether inside or outside the federal council, the federal supervision resembled a purely Prussian control, and so was resisted by the middle states. If, conversely, the non-Prussian states found that Prussia was able to escape the supervision they naturally claimed the same liberty for themselves. And the imperial administration must, either from a sense of equity or from the desire to avoid any suggestion of partisanship, give to the other states the same measure of liberty as it allowed to Prussia.[1]

Triepel's ideal was a unitary monarchical state in which the supervisory power could and would be exercised in future with authority and without weakness; he believed that Germany's experience in the Great War (he was writing in 1917) would result in a revision of the federal constitution and a strengthening of imperial supervision. So he concluded that "firstly in the legal form and the practical administration of the right of supervision was the test made whether the constitution of the Empire was a piece of paper or a living reality, and whether the theory of the domination of the Empire over the member state was true or false."[2]

§ 6

Another comprehensive study of the confederation in this period was G. J. Ebers' work, *Die Lehre vom Staatenbunde*, published in 1910. He analysed and criticised the historical idea of federalism, and chiefly the theories of confederation.

In summarising the law of the historical confederations he remarked that "association or corporation, legal relation or legal subject," is the formula employed to express the conflict of opinion as to the legal nature of the confederation. He, like all his contemporaries, discussed the general nature of the historical formation of the confederation, according to its purpose, its organisation, its competence and its relation to the individual states of the union and also the relation of the citizen to the union.[3]

In the legal aspect he considered that in general the confederation may be defined as a union of states intended to be permanent and provided with a permanent federal organ and having as its object the preservation of definite common interests.[4]

[1] Triepel: *Die Reichsaufsicht*, 1917, p. 712–714.
[2] Ibid., pp. 715.
[3] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 259.
[4] Ibid., p. 268.

This gave two tests of the legal nature of a confederation; it was more than a mere alliance, and it was not a state but only a union of states.

An alliance was a union for defence and offence, for the purpose of common attack or common defence against a common enemy, and a confederation differs from an alliance only by its duration. Even when treaties of alliance were concluded for a long period, yet by their very nature they were of a temporary character, because they were entirely dependent on the political views of the parties concerned.

The confederation, on the other hand, depended on a close historic-political association and it was, therefore, intended to last. This was proved by the usual terminology of basic treaties, such as "everlasting union," "eternal," and so on.

If the content was permanent, we could not deny that characteristic to the form in which this content was manifested. Only one must not take too absolutely the conception of "permanent" or "eternal"; one must not identify it with "indissolubility."

Even in the German union, where the withdrawal of a member was not permitted and even its dissolution by the unanimous decision of the members was not possible, in the last resort it depended actually on good will as to whether they would keep together or not.

The conception of permanency was also to be taken only relatively in the sense of indefinite continuance without any fixed time limit.

Ebers next pointed out, in respect of the relation of the confederation to states not members of it, that it appeared as an international unity; it sent and received ambassadors in its own name, declared war and concluded treaties which were binding on its members.[1] In an alliance the allied powers always appeared as separate international persons: alliances could not by themselves exercise the right of sending ambassadors or making war or treaties; each of the allied parties must act for itself and in its own name.

Finally, the alliance differed from the confederation in respect of purpose. The alliance could have only one object—common defence against external enemies. The historical confederations had also, it is true, as their first object protection against attack from without. But beyond that they had always, in a greater or lesser degree, still wider interests which were common to all members and were treated as interests of the union, both in

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 270.

regard to intercourse abroad and in the relations of the members with one another. And in internal affairs they were not limited to defence against foreign attack and the maintenance of peace, or to protection against unrest which threatens the security of the union, but in most cases could intervene in the internal affairs of the member states.

The object of the confederation as determined by its national and historical basis did not comprise only its external protection. Rather the states desired, by uniting themselves into a confederation, to lessen the burden of the state duties, to complement one another and procure the advantages which were obtainable by a great united state organisation, without at the same time giving up their independence or limiting it more than was necessary.[1]

It was this wide range of purpose also which distinguished the confederation from administrative unions. For the latter had always pursued and could only pursue individual, definite and strictly limited aims. It was true, however, that they sought to make easier the discharge of the members' duties in the widest possible measure and therefore, for the sake of their predominantly political purpose, excluded the possibility of one and the same state belonging to several confederations.

If now the confederation were differentiated from the alliance and from the administrative union by its duration, its standing federal organisation and the wide range of its objects, it was still more differentiated from the other extreme, namely, the federal state.[2]

With regard to the competence of the union he assumed that the "confederation is a union of states, not of people, and its competence is limited."[3]

As was shown by a consideration of its historical forms, the confederation stood, at least as a rule, in no direct relationship to the citizens of the member states. Even if its decisions were binding on them, they were so only through the instrumentality of the individual states. The union did not obtain its material resources direct from the citizens, but was dependent on contributions from the states. There was certainly always to be found some direct influence of the federal organs on the subjects of the states, but these exceptions were in no way incompatible with the nature of the confederation and did not really affect the principle of confederation.

The confederation also lacked the personal basis (*Substrat*) of

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 270.
[2] Ibid., p. 271.
[3] Ibid., p. 272.

the state, and not being a union of people, its members were the states only and not the subjects of those states.

The far-reaching importance which attached to the claim of American statesmen that the authority of the union should directly influence the citizens of the individual states consisted in this, as Robinson had rightly demonstrated, that its realisation made the central power into a state power independent of the individual states, and raised the union to the position of a state.

Despite its wide range, the purpose of the confederation was not an all-embracing one, as in a certain sense might be said of the state.

The confederation desired to be helpful to the individual state in the discharge of its duties. Consequently it did not deal with every aspect of state life but only with those which the individual state either could not deal with for itself or to which it could do insufficient justice.[1]

However wide its competence might be, even if the affairs which were delegated to it exceeded in number and importance those which were left to the individual states, its competence was still limited and confined to a definite sphere of duties. The lack of so-called *Kompetenz-Kompetenz* was closely connected with this.

The state can at any time enlarge its scope at the expense of its members, even against their will. But in the historical confederations—except in the Southern States—the enlargement of the competence of the union usually depended on the agreement of all its members. The confederation lacked *Kompetenz-Kompetenz*, and therewith an essential characteristic of the state. From this it followed that, in cases of doubt, the presumption was always against the competence of the union and in favour of that of the individual states.

The essential question was whether the confederation was a society or a corporation.

There were two qualities which characterised the confederation, and according as emphasis was laid more strongly on the one or the other this was decisive for the advocates of the two sharply opposed views. The confederation had on the one side undoubtedly a strong stamp of association, and on the other side—especially in relation to the states outside it as well as to its own members—it appeared as a unity closer than that of a mere society relationship.

The legal nature of confederations could only be satisfactorily explained by regard to both its society character and its unitary character.[2]

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 272.

[2] Ibid., p. 273.

Discussing the idea of sovereignty in relation to the confederation considered as an association, Ebers pointed out that those features of a confederation which stamped it as an association were apparent from the point of view which he had previously adopted in determining the legal position of the states, namely, participation of the states in the organisation of the union, the carrying out of the decisions of the union by the states, unrestricted competence of the states.[1]

Examining the rival conceptions of the confederation as a mere society and as a corporation society, he reached the conclusion that obligations undertaken only by treaty did not prejudice sovereignty. Legally no limits can be set to the power of the state to impose restrictions upon its sovereignty. Even though in the transfer of its rights to another state it goes so far that its sovereignty appears to be reduced to the merest form, there are still no legal limits to its right voluntarily to impose limitations upon that sovereignty.

The realisation that a voluntary undertaking did not affect the sovereignty of a state had had a very fruitful and clarifying effect upon the modern theory of confederation. For it had cleared the way for the supporters of the "society theory" to give the right value to several features of confederation, which otherwise would have been deemed to be evidence of its "corporation nature."[2]

With regard to the sovereignty of the individual states, no matter what differences there might be in the theory, the individual state indicated the possibility—and nothing more—that the union authority could possess the right to enact legislation which was directly binding upon the citizens, and even judicial authority, without any doubt being thrown upon the nature of the confederation.

In particular, the Southern States of America showed that a legislature with wide powers, in fact an elaborate and complete government with legislative, executive and judicial powers, was fully compatible with state sovereignty.

In this respect that confederation—quite apart from the brevity of its career—differed so greatly from the ordinary type that, with Jellinek, we must regard it as a very special kind of confederation—for it certainly was a confederation. At the same time it must be observed that in addition to the administrative functions traces of that directly operative legislative and even judicial authority which was fully developed in the Southern States were to be found in the other confederations, though only exceptionally.

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 274. [2] Ibid.

The form of confederation worked out in the Southern States showed, however, one thing, namely, how diverse the forms of federation can be, and how it can come very near to being a federation without actually becoming one so long as the union authority is not given suzerainty over the individual states, and these do not enter into any relations of superiority and subjection vis-à-vis the union; in short, so long as they retain sovereignty.[1]

At the same time, with regard to the idea of unity in the theory of confederation, Ebers found himself confronted by a dilemma. If on account of the sovereignty of the members we regard confederation as an association or as a legal relationship based on international law, then we are not in a position to find a satisfactory explanation of its separate will and action, its unity founded on international law; or if in order to do this we ascribe to it the character of a "corporation," i.e. of a legal subject superior to its members, then we find ourselves in conflict with the sovereignty of the state.

If, then, we cannot adopt the solution which makes the confederation a legal relationship internally, a legal subject externally, is there no way in which we can escape from this dilemma? Le Fur believed he had found a solution.[2] He explained confederation, on account of the sovereignty of its members, as being an association of states. At the same time he regarded it not as a mere legal relationship, but as having, by reason of the facts previously discussed, rather the character of a legal person. For the union is actually the possessor of a will separate and independent from the individual wills of the members, possesses a separate organisation, and has independent capacity of the theory and practice of law, i.e. the making of laws and their enforcement.

On the other hand, this by no means required a relationship of superiority and inferiority between the union and the states, which would, indeed, be incompatible with the sovereignty of the latter. Even if in the federal pact the states transferred to the central authority a number of supreme rights, no power superior to them was formed thereby because they had done this of their own free will. There was a question of voluntary subordination to the will of the union only in certain respects, but not of subordination in principle. However promising at first glance

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 296.

[2] Louis Le Fur: *Etat fédéral et Confédération d'Etats*, 1896. German translation published by Louis Le Fur and Paul Posener: *Bundesstaat und Staatenbund.*

this solution of the existing difficulties seemed to be—even if it could explain on the basis of the association theory these actual contradictory facts without infringing upon the question of sovereignty so far as to accept the supreme power—it could not stand a very strict investigation.

The much-debated question of juristic personality involves in any case the formation of a united whole separate from the sum of its parts, endowed with a will superior to these parts and independent of those parts, capable of making and executing laws, having its separate rights and duties, and being a legal subject.

This is nothing different from what we understood by a "corporation." If now a number of corporations were states then this superior will was characterised as the prevailing will, as the will of states. The whole must be itself a state, a consolidated state, a super-state (*Staatenstaat*). A dominion over sovereign states was, however, a contradiction in terms.

The states which were members of a "corporation," i.e. of a super-state, could no longer be sovereign.

When Le Fur dropped from his conception of juristic person the characteristic of superiority and inferiority and recognised at most a voluntary subordination of members to the will of the whole in certain respects, he certainly tried to escape from the inconsistency involved in the acceptance of a juristic person consisting of sovereign states, but he stripped the juristic person of the characteristic which distinguished it (the person) from every kind of association.

Even if such an association in its internal arrangements approached ever so closely to the constitution of a "corporation," it could never become a juristic person, a "corporation," so long as that characteristic of superiority and inferiority was not realised in it.

But when that characteristic was realised it ceased to be an association. For one excluded the other, or, as Laband said, negatived the other. The way out that Le Fur believed to have found proved then to be a mistake. But was a solution really impossible? Ebers thought he could answer that question in the negative.

The legal competence of the personal unity is shown internally by the fact that the rights and obligations of the collectivity of the corporation can be enforced not by or against individual members, but only by or against the collectivity.

Whilst the individual state was in a position to exercise its rights independently within the sphere allotted to it—for example, to

enforce claims based on a separate treaty with a third party, and nevertheless to hold itself bound by obligations arising from such a treaty without regard to its relations to the union—it had individually neither rights nor obligations arising from treaties made by the union with third states.

As a "collective power forming a political unity" the union alone as a collectivity could enforce its rights vis-à-vis third states. It alone and not an individual state could be bound by obligations towards the other party to the treaty.[1]

In internal affairs on the other hand, so far as the common sphere extended, the personal unity, in sharp contrast in this respect to the corporation, could not be operative.

In this case the *gesamte Hand* was divided among the members into mutual rights and duties. The confederation exists "in its internal organisation as an association of independent states with the same reciprocal treaty rights and treaty obligations." This, however, was only valid in so far as it applied to legal relations within the collective sphere.

On the other hand, in the relations between the collective sphere on the one hand and the separate state, and particularly individual spheres, on the other hand, the association could appear as a personal unity with its own rights and duties vis-à-vis the individual members.

For in its quality as the sole occupier of the separate and individual spheres the single state remained unaffected by the personal unity to which it belonged only in the realm of the collective law. The federal power, in the formation of which every individual state had a share, had the right to claim the fulfilment of union duties by the individual members and could even enforce its rights by federal execution. Conversely the individual states might claim protection of the union for the above-mentioned particular rights as, for example, especially for their independence.

Naturally, the legal distinction between the collectivity and the individual states was shown more distinctly in respect of the free individual sphere. For the separate sphere had its being only through and in that of the collectivity; the individual sphere on the other hand was entirely independent of it. The individual state so far as it extended could have the same legal relationship to the collectivity as to third states.[1]

If the confederation was recognised as an association functioning as a collectivity, then, in spite of the fact that it was not an independent legal subject, there was an acknowledgment not

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 308. [2] Ibid., p. 309.

only of its legal capability (competence of making laws) but also of its legal capacity of action. This was shown by the fact that in the collective sphere, i.e. in the range of matters assigned to the union, the associated states formed and carried out a unitary will. As the rights and duties of the collectivity did not belong to any legal subject different from the members, and also not to the separate members as such, so also the will of the union—an associated will but not an independent will separate from the united individual wills—was formed just as little by the mere agreement of the individual wills. The formation of this collective will naturally manifested itself primarily in the union of the wills of all the members.

But this union of wills, because it was only the expression of the harmony of wills already existing, bore the character not of a treaty concluded from time to time, but simply of a decision in itself. Only in the case where there was a question of change in the federal relationship, the admission of new members, the extension of the federal competence and so on—that is, something going beyond the limits of the existing agreement—was a treaty necessary. If, on the other hand, for the extension of collective action to new matters a unanimity of votes was necessary—as, for instance, in the German *Bund* for ecclesiastical affairs, the *jura singulorum*, certain public institutions and the regulation of public utilities—then this union of wills, in spite of this requirement, would not have the importance of a new treaty, but only that of a mere decision.[1]

But as a rule, and in no way in conflict with the general collective relationship, the formation of the common will was entrusted to the majority of the states as being, though only a majority, the holder of the authority bestowed by the confederated wills, an authority to whose decisions the temporary minority submitted its own will in advance.

Thus the general will might come in conflict with the individual will not only in the relationship of the common sphere to that of the separate or individual spheres, but also within the sphere of the collective law itself.

In full accordance with the diversity of forms which the collective relationship might take, the carrying into effect of the association will might be vested in the federal assembly, i.e. in the collectivity of the states themselves, or in particular union organisations set up by it, or finally in the individual states. In particular the direction of foreign affairs, and in part also,

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 310.

representation might be vested in one of the members, in one state as the directory or president, or in some particular federal organisation as, for example, the Dutch *Statthalter*.[1]

As regards the administrative operations of the unitary person, so far as the collective sphere extended, Ebers held that these affected the members directly and they had direct rights and duties. The decisions of the union and the resulting actions based on them were directly binding on the states. Treaties concluded by the union with third states, declarations of war, etc., made by the union, required no ratification, no concurrence on the part of the individual states.[2]

As to the doubtful question of the dissolution of the union and unilateral secession, the body corporate furnished no direct basic principle, since it permitted the most varied kinds of dissolution, above all, agreement as to a unilateral withdrawal, and on the other hand it sanctioned the continuation of the collectivity with a change of membership.

Only this much was clear: that the collective relationship did not conflict with the prohibition of unilateral withdrawal from the German union, nor yet with the right of sécession of the Southern States, which might in the last resort belong to the states of every confederation.

Finally, then, Ebers defined the confederation as being an "international union, on a permanent basis, of sovereign states, in which these had come together into a unity formed on the basis of private personal law for the safeguarding of definite common interests; that is to say, a union which is the possessor of a unified common will and of its own rights and obligations inherent in the collectivity of the associated states as such, and which has established special organs for the formation and exercise of the common will." Or, more briefly: "The confederation is a permanent association consisting of sovereign states and possessed of a corporate character with permanent institutions for the formation and execution of the unitary collective will for the purpose of the preservation of certain definite common interests." A confederation differs from an alliance not only by reason of its duration, its standing institutions and its wider range of purposes, but by its very essence, in that an alliance is a purely voluntary society and not, like a confederation, an association founded on a legal personality with a sphere of activity assigned to it by law distinct from the activities of the individual states and assigned solely to the collectivity as such. The federal state, the *Bundesstaat*,

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 311. [2] Ibid.

on the other hand is a corporation made up of states, a community, a state in which alone, and not in its members, sovereignty is vested.[1]

§ 7

Georg Jellinek, in his later work, *Allgemeine Staatslehre* (1900; fourth edition, 1922), developed the theory of the non-sovereign state propounded in his *Gesetz und Verordnung* in 1887. He observed that in respect of the sovereignty of the superior state over the non-sovereign state there were the three following conditions: firstly, the negative control by the former of the activities of the latter; secondly, the power of the sovereign state to use the non-sovereign state for its own ends, be it as the direct object of its will or as a relatively independent member of a federal union; and, thirdly, the right of the sovereign state at all times to take upon itself in a constitutional manner the highest rights belonging to the non-sovereign state. He therefore assumed that the existence of the non-sovereign state as a state was determined by the sovereign will of the superior state to an extent to which no formal *a priori* legal limit could be set.[2]

In his main work, *Allgemeine Staatslehre*, he set forth his idea of the state on his own method which I have designated "juristic empiricism." His controversial exposition of the state against Gierke's conception of it was a striking manifestation of this method. He remarked that the mediaeval corporation theory and the natural law doctrine in their formation of a theory of the state started from the idea of a social union (*gesellschaftlicher Verband*), but treated it simply as a juristic problem, and failed to appreciate, or only partially appreciated, the problem of the historico-social basis of the state in the legal sense.[3] The law of nature regards mankind in the state as *unio*, i.e. a combination of the plurality into a unity. And the idea of collective unity was the basis, more or less clearly indicated, of the theories of modern political scientists as to the social nature of the state. The most complete development of the theory was by Gierke.

Jellinek assumed that although Gierke did not sufficiently differentiate the theory of union from the organic theory, and did not clearly show the contrast between the two kinds of conception of the state, "his important pronouncements on the

[1] Ebers: *Die Lehre vom Staatenbunde*, 1910, p. 314.
[2] G. Jellinek: *Gesetz und Verordnung*, 1919, p. 203.
[3] G. Jellinek: *Allgemeine Staatslehre*, 1922, p. 158.

Genossenschaft embody an elaborately worked out theory of the pre-juristic nature of the state in itself."[1]

He pointed out that to Gierke the state "appeared as a union formed by a fixed organisation and permanent purpose, as a unity different from the individuals, which, however, consists by reason of, and in, a plurality of individuals."[2] Jellinek, like Haenel, believed that the state as a corporative union was different from the state as a juristic personality; that its unity was without a parallel. He pointed out that Haenel had realised that the actual unity of the corporate body, its character of organism, existed as a whole and as an organism purely in the sphere of moral potentiality. This form of union, though not explicable by biological-physiological analogies, is not less real than the biological-physiological union. And he agreed with Haenel also in repeating the attempt to base the actual unity on a "collective spirit" or some such abstraction.[3] "All supporters of the collectivity theory regard the state as an entity. That is to say, we are compelled to think of that real unity as of something concrete. To do so gives to us that true understanding whereby we avoid substituting a moral object for that substratum which is postulated as the basis of the relations of the members of a social unit. By requiring for the collectivity a unitary holder (*Träger*), an individual, we do not assume a fiction, and not even an abstraction derived from given facts, but have recourse to a category requisite for the synthesis of the phenomena—a category which is justified by the theory of recognition so long as we do not, by that recognition, ascribe to it any transcendental reality."[4]

He assumed that our world of action, in which the state has its place, has to be based on the subjective actual condition of our knowledge, not on the objective reality of things which is perceptible only within narrow limits. Thus he believed that "scientific" caution must bring about a realisation of the relativity of this mode of consideration, but not its rejection.

To Jellinek the theory of the collective or federative unity explained the unity of the state in the plurality of its members, the position of its organs in relation to the whole and to the parts, and the continuity of the state entity through succeeding and changing generations.[5] By it both the spontaneous growth and transformation and its artificial creation and transformation could be readily conceivable. He assumed that "it was not a political theory but a purely scientific one which, so formulated, avoided

[1] G. Jellinek: *Allgemeine Staatslehre*, 1922, pp. 158, 159. [2] Ibid., p. 159.
[3] Ibid., p. 160. [4] Ibid., p. 161. [5] Ibid.

the error of the other theories. It was the super-conception within which the state was comprised." The unities of the union were not only the states, but numerous social structures in the state.[1]

The argument thus summarised illustrates Jellinek's method, which started from actual fact and ended with a juristic character. While Gierke and the followers of his *Genossenschaftstheorie* considered the state to be a corporation with territorial supreme authority, Jellinek, from his juristic empiricism, regarded the state as a juristic personality. The former conceived the state as a collective personality as contrasted with the fiction of the juristic person, whereas the latter considered the state as a juristic personality in contrast with the fiction of the union personality.

In the 1922 edition of the *Allgemeine Staatslehre* Jellinek summarised the nature of the union of states in a similar category to that given in *Die Lehre von den Staatenverbindungen.*

He defined the federal state as "a sovereign state, formed of a plurality of states, and with a state authority derived from its member states federated into state unity." The federal state was a constitutional union of states which set up over the federated states a domination in which those states themselves participated. In his discussion of the unity of the federal state he reached the conclusion that in that state a plurality of states are brought into a unity, i.e. so far as the competence of the federal power extends all differences between the states disappear. Therefore in it "the territories and peoples of the member states are consolidated into a unity."[2]

Accordingly, the members of the federal state, in so far as they take part in the *Herrschaft* of the union, are not states but organs of the federal state, and in so far as they are subordinate and cannot exercise an independent will, they are non-state unions; and it is only the physical identity of these unions with the member states which gives rise to the mistaken idea that the member state, as such, is subordinate to the federal state. Thus the member state has a state character in two directions: as a community which is free from the federal authority, and as possessor of public law claims on the federal state in accordance with the constitution.

Therefore the "federal state is no more a state corporation than the unitary state can be conceived of as a union consisting of all the communes of the state." Rather, so far as its sphere extends it approximates closely to the unitary state.[3]

[1] G. Jellinek: *Allgemeine Staatslehre*, 1922, p. 161.
[2] Ibid., p. 771.
[3] Ibid., pp. 771, 773.

On this assumption the federal state is based "upon a constitutional and not upon a treaty system."[1] Thus the foundation of the federal state is rather a "national act" which, like the foundation of the states, cannot be given a precise juristic form, but is done by the states in their quality as historico-social forces.[2]

But the agreements between the states which form the basis of the federal state are juristically important. Jellinek assumed that there is a juristic gap, a cleavage, between the preliminary events and the actual creation of the federal state which cannot be filled up by any deductive process.

All the constitutional theorists who built up a juristic conception of the Empire had had political convictions for which they sought a juristic justification.[3] Since the federal state was sovereign, and if he discredited the conception of *Kompetenz-Kompetenz*, the problem of the relation between the collective and individual states had to be dependent on the idea. Jellinek pointed out that "the non-sovereign states of the present era have a measure of independent activity in all branches of the state administration. They can have their own judicial, financial and internal administration and either their own troops or some rights in respect of the contingents which they furnish to the federal army." This is, however, in Jellinek's opinion, not essential, since the presence or absence of certain "supreme rights" does not provide a test of the existence or non-existence, being or non-being, of the state.[4] The division between non-sovereign and sovereign states is due to the fact that, as sovereignty is the capacity of exclusive and legal self-determination, only the sovereign state can determine with complete freedom the content of its authority within its self-imposed or self-recognised limitations, whilst the non-sovereign state also determines its action freely within its sphere of state activity.[5]

In the federal states of Germany and America, Jellinek believed that the trend of federal thought was moving towards the unitary idea, towards centralisation. He thought that the federal state offered the permanent form for the organisation of the collective life of a nation or of a number of fragments of different nations united by a common destiny.[6]

A great empire could develop its power more easily in a federalist form than could a great unitary state, however highly decentralised; and the federal state would play a great part in the organisation of the future state system of the civilised

[1] G. Jellinek: *Allgemeine Staatslehre*, 1822, p. 774. [2] Ibid., pp. 775–776.
[3] Ibid., p. 777. [4] Ibid., p. 494. [5] Ibid., p. 495. [6] Ibid., p. 786.

world.[1] This was already shown by the German Empire, the United States of America and the British Empire.

His supposition of the dominance of the federal state theory in the future was, in fact, not due to the preliminary legal structure of the federal state, but to the general notion of federalism as a large political organism.

In the discussion of the federal idea in Germany in the early part of this century the theory of the domination of the federal state over the member state was an outstanding feature in the assumption of a general transformation to be brought about by the unitary elements of the federal state overriding the federal elements.

This period witnessed the completion of juristic and political discussion of the constitution of the German Empire. Whilst jurists like Laband, Jellinek and Brie were still examining the legal basis of the federal state, Triepel, von Rehm, Anschütz and their followers demonstrated clearly Germany's federal development. At the same time Gierke's idea of the *Genossenschaft* gave great impetus to the general current of German federal ideas. His distinguished disciple, Hugo Preuss, with his successive contributions for the enlightenment of the German juristic and political conceptions, brought about a transformation of the German federal ideas from the juristic dogma to the *Genossenschaft* conception of "plurality and unity," on which subject he gave two lectures in 1916, on the "Authoritarian State and the Idea of the Greater Germany." In this he propounded the idea of the "greater uniformity of Germany and Austria in a real national state" and declared that the doctrine of the authoritarian state, which appeared as a governmental authority transcendent to the people, as *deus ex machina*, was in conceptional contradiction with the idea of the national as well as of the popular state.[2]

Thus the new German federal republic emerged out of the collapse of the Hohenzollern bureaucratic autocracy, and was the outcome of the latent forces of liberal and socialistic ideas in Germany after the historical failure of monarchical militarism in the Great War.

[1] G. Jellinek: *Allgemeine Staatslehre*, 1922, p. 786.

[2] Preuss: *Obrigkeitsstaat und Grossdeutscher Gedanke*, 1916, pp. 56–57.

CHAPTER VII

CONTEMPORARY GERMAN FEDERALISM

§ 1

Through the defeat of the Kaiser's military forces in 1918 and the consequent revolution of November 9th of the same year, the social and political structure of Germany shifted its basis from the German Empire under Prussian hegemony to the German Federal Republic.

With the exception of a group of persons, socialists and democrats, the political trend in Germany had reached the highest stage of *Obrigkeits-Kaiserreich* in 1914. The Great War is really an epoch in the history of the transition from the old régime of the *raison d'état* in central Europe to the creation of republican or socialist states. In the year 1914 international anarchy in Europe easily fomented world-wide upheavals by crystallising the ambition of each Great Power to establish its own supremacy.[1] The Alliance and the Entente between European Powers resulted from the clashing of interests due to capitalist dominance over the national states.

The Allied Powers—England, France, Belgium, Italy and Tsarist Russia—vis-à-vis the Central Alliance—Germany, Austria-Hungary and Turkey—brought about the closing of the chapter of the history of the autocratic, monarchical states based on capitalist economic supremacy and opened the new chapter of transition from the old political and capitalist state to the ideal socialist commonwealth.

Germany's political conditions and the minds of her people, under the discipline of Bismarckian dictatorship and Prussian hegemony in the name of the federal Empire, tended to concentrate all material and spiritual resources, in the whole of the German Empire as well as in her Germanic allied states, the Empire of Austria-Hungary, on the attainment of the single aim of victory in the war and with it realisation of the illusion of the Kaiser's Great Empire. In the early stages of the Great War any anti-war movement, stimulated by the socialists or pacifists, could not prevent the overwhelming tendency towards the mystical absorption of the war policy for the glory of the Germanic Empire.

[1] G. Lowes Dickenson: *International Anarchy*, 1926.

The real demands of the German people, hidden under the veneer of prosperity, were not revealed until the "hunger blockade" affected seriously the workers and people and led to the strike of 200,000 metal-workers in April 1917, and to successive strikes after that. The overthrow of the Tsar's domination in March 1917 gave to the revolutionary movement in Germany a concrete ideal.[1]

At the same time the formation of great economic associations[2] under the Imperial Chancellor had been started since March 1915 to centralise the nation's economic activities for the purpose of the War, and the system of *Annexionsreden* instead of censorship was set up; these two factors prevented any freedom of discussion directed against war.

The centralisation of the state functions and economic machinery under the Chancellor and the General Commissioner gave no opportunity to the socialists to make any propaganda in favour of peace, though the suggestion of peace had first been put forward by Hugo Haase in the *Reichstag* in March 1915.

The failure of the U-boats war in 1917 and the final victory of the Bolshevik revolution in Russia in November of the same year led the revolutionary leaders and the masses of the German proletariat into the direct action of the "Mass strike" in January 1918.

Peace had been made with Soviet Russia, and the message to the German workers from Trotsky and Lenin, and the Council of the People's Commissaries, was published in *Vorwärts* on December 1, 1917,[3] and the subsequent propaganda of peace and revolution by the Soviet Government on the German eastern front made headway and led to revolutionary outbreaks.[4]

After the failure of the offensive on the western front in April 1918 the only chance for the imperial government was to form a coalition government with the socialists and this resulted in the setting-up of the new government of Prince Max von Baden and Herr Scheidemann in September.[5]

General Ludendorf's offer of an Armistice on October 2, 1918, hastened the great catastrophe of the German imperial power, and manifested the apparent downfall of the bourgeois classes.

[1] Richard Müller: *Vom Kaiserreich zur Republik*, Vol. I, 1924, p. 96.

[2] Bund der Landwirte, Deutscher Bauern-Bund, Zentralverband deutschen Industriellen, Bund der Industriellen, Hansabund und Reichsdeutsche Mittelstandsbund.

[3] Richard Müller: *Vom Kaiserreich zur Republik*, Vol. I, 1924, p. 97.

[4] Ibid., p. 113.

[5] Ibid., pp. 121–124.

The mutiny of the *Kaiser's* fleet at Kiel on October 28th brought about the creation of the Soldiers' Council on November 4th, and the Red flag was hoisted on all warships. The dispatch by the government of Noske, a Social Democrat, to Kiel, to subdue the outbreak brought about the formation of a Workers' Council to join the Soldiers' Council.

The successive victories of the revolutionary movements in Hamburg, Lübeck and Bremen followed and the tide of revolution spread within a week from Schwerin to Hanover and Cologne and down to Leipzig and Frankfurt under the control of the Workers' and Soldiers' Council.[1]

The first republican declaration in a German state was made in Bavaria under the leadership of Kurt Eisner, under whose chairmanship the Workers', Soldiers' and Peasants' Council was formed on November 8th.

In agreement with the fourteen points of President Wilson, the resolution of the Workers' and Soldiers' Council and the historic letter sent to the Imperial Chancellor in the name of the socialist party by Scheidemann, a member of Prince Max of Baden's cabinet, demanded the abdication of the *Kaiser.* The socialist ministers resigned from the government and threatened to proclaim a general strike if the abdication did not immediately take place. On November 8th the ultimatum of Scheidemann brought about the abdication and the renunciation by the Crown Prince of the right of succession.

On November 9, 1918, the Berlin workers were summoned from the factories and there was a mass demonstration during the morning. The paralysis of the government assured the absolute victory of the workers.

The interview between Ebert, Scheidemann, and the Imperial Chancellor resulted in the proclamation of the abdication of the *Kaiser* and the transference of the sovereign power to the *Reichstag.* The resignation by Prince Max of the Chancellorship was the formal downfall of the old Empire and put the whole destiny of Germany and her sovereignty into the hands of the people and of the socialist majority.

The proclamation of Ebert on November 9th: "Fellow-citizens, the late Chancellor, with the assent of all his ministers, has transferred to me the direction of affairs. I shall form a government in association with the parties. The new government will be a people's government. Its aim must be to bring peace to the

[1] Richard Müller: *Vom Kaiserreich zur Republik*, Vol. I, 1924, pp. 134, 135, 136, 137.

German people as quickly as possible, and to safeguard the freedom which it has won. Fellow-citizens, I implore you to preserve tranquillity and order"; was the overthrow of the *Kaiserreich* and the creation of a new German Republic by a bloodless revolution.[1]

The history of the November revolution in Germany was a conflict not merely between capital and labour but also between labour and labour, because of the differing conceptions as to the socialistic approach towards the goal of the ideal socialist commonwealth. The November revolution started with the peaceful overthrow of the old régime, and a struggle then began between the groups of the majority socialists of the Social Democratic Party and the parties of the minority socialists—the Independent Social Democratic Party—and the communists of the *Spartakusbund.*

As Ebert was upheld as the leader of the country, the first thing which he and his colleagues ought to have done was to form a provisional government in harmony with the already formed Workers' and Soldiers' Council and other Socialist and Communist groups.

Consultations took place between Scheidemann and the representatives of the *Unabhängige Sozialdemokratische Partei Deutschlands* (U.S.P.D.) and the *Spartakusbund.* The main discussion between the leaders of the *Sozialdemokratische Partei Deutschlands* (S.P.D.) and those of the U.S.P.D. concentrated on the point of legal socialist policy and the consequent formation of the National Assembly based on universal suffrage. The majority socialists put forward six proposals:—(1) Germany should be a social Republic; (2) in this republic the whole of the executive, legislative and judicial powers should be exclusively in the hands of the elected representatives of all the working population and the soldiers; (3) exclusion of all civic members from the governments; (4) the participation of the independent members to be valid only for three days as a provisional arrangement, in order to create a government capable of concluding an armistice; (5) departmental ministers should be allowed as technical advisers of the actual and decisive cabinet; (6) equal authority of both leaders of the cabinet.[2] Liebknecht and his Spartakists refused to join in any government with the "legal socialists." But the U.S.P.D. made a conditional agreement to join the cabinet in order to secure the revolutionary socialist gains. It

[1] Richard Müller: *Vom Kaiserreich zur Republik,* Vol. II, 1924, pp. 22, 24.

[2] Ibid., p. 28.

claimed that the cabinet should consist of social democrats having an equal share of authority as representatives of the nation. This limitation, however, was not to apply to the departmental ministers who were only technical advisers of the cabinet; two members of the Social Democratic Party were to be allotted to each of these ministers as colleagues. There should be no delay in the inclusion of the independent social democrats in the cabinet, to which every party should send three members; political authority was to be in the hands of the Workers' and Soldiers' Councils, who were to be summoned at once to a General Assembly from all over the country; the question of the constituent assembly should be determined only after consolidation of the conditions brought about by the revolution and should therefore be reserved for future discussion.[1]

Under these conditions the U.S.P.D. was ready to agree to be represented in the cabinet by three members, Haase, Dittmann and Barth.

Although there had been a diversity of opinion as to peace between the leaders of the two parties, yet the opposition to the revolutionary dictatorship of the proletariat by the theoretical leader of the U.S.P.D., Karl Kautsky, had a great deal of influence on the majority of the leaders of that party and caused them to favour democratic legal socialism rather than the dictatorship of the proletariat.

The political controversy between the two different opinions in *Vorwärts* and in *Die Rote Fahne* took the form of sweeping criticisms of the contrasting tactics of the two parties.

Karl Liebknecht and Rosa Luxemburg and their Spartakist group stood quite aloof from this formation of the provisional government, in order to prepare both openly and secretly the proletariat revolution saying: free from "the naked, plundering interests of imperialism," "do not allow Scheidemann to stay any longer in the government, . . . as long as a government of socialists have a seat in it. There is no community with those who have represented it for the last four years. Never will we be capitalists and their agents!"[2] They strongly appealed to the working people to form "the revolutionary Workers' and Soldiers' Councils."

After long and stormy discussions the assembly of the Workers' and Soldiers' Councils elected on the proposal of Richard Müller the members of the provisional government. Ebert, Scheidemann,

[1] Richard Müller: *Vom Kaiserreich zur Republik*, Vol. II, 1924, p. 29.

[2] Ibid., p. 35. *Die Rote Fahne*, November 10, 1918.

Landsberg, Haase, Dittmann and Barth, and their provisional government, or "people's representatives" as they were called, the executive council (*Aktionausschuss*), obtained their mandates from one assembly and therefore this assembly was recognised by both of them as sovereign.

In this discussion Paul Eckert, Ernest Däumig, Georg Ledebour and Richard Müller adhered firmly to the principle of the *Räte* organisation, and, voicing their views in their paper *Arbeiter-Rat* and by other means, insisted on the completion of the revolution and the socialisation of economic resources against the survival of the capitalist system.

Thus in November the provisional government was created under the Presidency of Ebert.

So the fate of the whole of Germany was in the hands of socialists and workers who were confronted with much divergence of opinion as to the application of socialistic principles to the construction of the new German Republic.

I will now briefly describe the development of the socialist parties in Germany, so that this most important movement which has affected the future history of Germany may be fully understood.

In the fifties of the last century the German labour movement was concerned with the conflict between the Lassallean socialists and the materialist socialists who followed Marx and Engels, i.e. between the *Allgemeine Deutsche Arbeiter Verein* (A.D.A.V.), under the leadership of Lassalle, and the Radical group with the workers in the *Fortschrittspartei* under the leadership of Marx, Engels and Liebknecht. In 1868 Bebel formed an independent party, the *Verband der deutschen Arbeitervereine* (V.D.A.), which separated from the *Fortschrittspartei* and became the predominant party in Southern and Western Germany.

The creation of the German socialist and labour organisations in 1860 was the result of the consolidated effort of the *intelligentia* socialists, and however realistic the Marxists themselves might be, the outcome of their propaganda was the Utopian tendency of socialism. This discordant labour front, which was more than a difference as to socialist policies, was accelerated by the traditional consciousness of particularism in the German community.

The first important event in the German labour movement was the Congress at Eisenach in 1869, because of its formation of the Social Democratic Party with the co-operation of the V.D.A. and the A.D.A.V., which divided the German socialist

movement into two contrasting groups, the German socialist party on the one hand and the Marxian communist groups on the other.

Through the period of Bismarck's socialist laws, in the early period of the German Empire, the economic condition of Germany was transformed from the feudalistic industrial system to that of capitalistic industrialism. The new capitalism had grown up not merely to build profit-making machinery, but also to create the imperialistic economic structure, whereby the surplus value drawn from the wages of labour automatically went into investments in the colonial areas. The industrial revolution, however, proved the reality of the famous Marxian theory of progressive pauperisation (*Verelendungstheorie*) which was justified both by the Lassalleans, the advocates of the "Producers' Union," and the Marxists, the revolutionary realists. The foundation of the capitalist structure and the growth of German imperialism in the rising *Kaiserreich* brought about a fundamental change in the German labour movement, in which the growth of unskilled labour faced the old skilled trade unions, whose principles were, more or less, based on Lassalle's "iron law of wages."

The movement of revisionism in the Socialist Democratic Party, mainly instigated by Bernstein, was based on the principle of surplus value distribution over a wider sphere of the population, and in fact the working class were to have every opportunity of getting a fair share in the distribution of wealth, as was advocated by the earlier Lassallean theory. The revisionists also insisted on opposing Marx's theory of the centralisation of accumulated capital in the hands of a few; "the large capitalists compromise the increase of the number of the small capitalists," among whom the capital would be more divided than it was before when it presented an "unshakable barrier."

After the suspension of the Socialist Law, the first congress of the Social Democratic Party at Erfurt in 1891 issued the famous Erfurt Manifesto, which was a landmark in the progress of continental socialism and became the guiding star of the German socialist and labour movement for the next twenty-seven years, till the November Revolution.

The success of the idea of class conflict was only a shadowy one; and the compromised issue of the historic programme was in the nature of a Pyrrhic victory.

Bernstein's revisionism was naturally fiercely opposed to Karl Kautsky's complete acceptance of the Marxian *Verelendungstheorie* and his theory of the concentration of capital in the hands of

the few as shown by the actual development of trusts and combinations in the capitalist organisation. In these circumstances there was a conflict between the labour aristocracy who had been in co-operation, especially in their aim of economic colonial expansion, with the capitalist government, and the dissentients, Kautsky and others, who had gradually crystallised into the Centrists (the school of Otto Bauer, theoretically formed by Austrian Marxists) and developed into the Independent Socialist Party of Germany during the War.

In the course of the development of the capitalistic imperialism, the great challenge of the German Social Democratic Party was the publication by Rosa Luxemburg of the *Akkumulation des Kapitals* in 1913, which was the first lucid explanation of Marxian theory in face of imperialism.

Rosa Luxemburg developed the Marxian theory of the distribution of capital which regarded the "world of economics as if it were one nation and assumed for the sake of argument that capitalist production was established everywhere and dominated every branch of industry," and she held in addition that "the assumption in the Marxian analysis is that a society exists containing only capitalists and workers, and the problem which Marx sets himself is to establish an economic law showing how the two classes, whose consumption capacity is insufficient to cover the accumulation, could be compelled alone from year to year to consume this accumulation." She, however, assumed the Marxian theory in the first volume of *Kapital*, which served its special purpose admirably and put the study of the accumulation of capital, as a process, on the basis of economic exchange taking place between the capitalist countries and their "real" surroundings. Thus the accumulation of surplus capital was not *a priori* to be spent on the search for imperialistic markets, but was to be used in one year for the extension and founding of a new business and in another year to be returned to workers in various forms of employment and services or to establish new factories. As Otto Bauer, the champion of the Centrists, expounded to Luxemburg, this could not in practice work smoothly in "such a machinery of merry-go-rounds," that "with a couple of turns and creak came to a stop"; the capital of a given country shows a total annual profit in the form of money and "this must be continually increasing"; but it is impossible to accumulate "if a part of it only wanders from one pocket to another of persons living in the same country."

This attack on Bauer's *Mechanical Theory of Capitalism* and

Hilferding's *Das Finanz-Kapital* was a definite blow to the principles of the revisionist social democrats; and the new independent socialists defended their persistent doctrine that the final aim of the capitalist society was imperialism and that war would be inevitable as an outcome of the struggle in the capitalist economic world. Therefore the workers, not only in Germany but throughout the world, must return to the precept of Marx's Communist Manifesto, to capture the state and put it under the command of the workers of the world. So Rosa Luxemburg and other radicals, in co-operation with Karl Liebknecht, finally crystallised the formation of the *Spartakusbund* in the spring of 1917 with revolutionary members within and without the Centrist and the I.S.P. The first Conference was held in October 1918, and proposed the establishment of the proletariat Soldiers' Councils to prevent any reactionary formation of Parliaments and Leagues of Nations, and to destroy the individual states and dynasties, so as to set up the real proletariat state in co-operation with their Russian Soviet comrades. Lenin sent a fraternal message to congratulate them on "the most energetic steps taken to promote the formation of the workers' and soldiers' councils throughout Germany" and sent "best wishes to the German revolutionary social democratic Internationale." He said: "The time is now at hand; the swift-advancing German revolution summons the Spartakus group to play a most important rôle, and we confidently hope that the German socialist proletarian republic will soon strike a decisive blow at the world imperialism. We hope also that the book written by the renegade Kautsky will exercise a certain amount of deterrent influence against the dictatorship of the proletariat. The truth of what the Spartakus group has always maintained against Kautsky's adherents will be confirmed and the masses will be rid all the quicker of the depraving influence of Kautsky and Co."[1]

Luxemburg finally declared that "the fight for socialism" was the "most gigantic civil war in history and the proletariat revolutions must prepare every defence for this war. This defence of the compact masses of the workers, this arming of them with full political power for the accomplishment of the revolution, is what is known as the dictatorship of the proletariat. This and only this is true democracy." In order to bring down the whole authority of the state "like the hammer of the god Thor on the heads of the ruling classes—this alone is true democracy without deceit and illusion." This was an uncompromising protest and

[1] *Illustrierte Geschichte der Deutschen Revolution* (6), p. 179.

the renunciation of any participation in the National Assembly in which Ebert and Scheidemann, the social democrats, tried to form the constitution of the future Germany by the general consent of all classes of German citizens.

Between these two extreme groups in the labour and socialist ranks the independent socialist party of Germany stood midway, on the one side propagating the socialist state, in the form of the "*Räte* system," through the National Assembly, and on the other side refusing any participation in the National Assembly except to advocate the *Rätestaat*. Max Cohen and his group supported the former and Richard Müller, Däumig and Ledebour the latter.

From November 9th to the day of the election of the National Assembly the German Revolution was a fierce fight between these two divergent socialist programmes—politically it was a conflict between the communist dictatorship of the *Rätestaat* and the socialist democracy of the constitutional commonwealth. The deaths of Karl Liebknecht and Rosa Luxemburg, the brain and heart of the *Spartakusbund* of 1918, on January 15th practically put an end to the militant plans and cleared the way to the victory of the majority socialists in placing German destiny in the majority of the National Assembly.

The dominant factor in the formation in 1918 of the new German constitution of the Republic was thus the contest between two contrasting principles of socialism, constitutional socialism on the one hand and communism on the other; whereas the guiding ideas of 1848 in the formation of the Frankfurt constitution were the result of the conflict between monarchical liberalism and conservatism.

The drama of the German Revolution was the real test of socialist policy in the transition period from the capitalist state to the ideal socialist commonwealth. The main political aim of the U.S.P.D. and the *Spartakusbund* was the creation of the *Rätesystem* and the subsequent state control of economic functions by means of the socialisation of the whole system of "social production." The main purpose of the *Spartakusbund* was the creation of *Arbeiter- und Soldat-Räte* by the majority consent of the workers. The manifesto issued by the *Bund* reads as follows: "In all former revolutions it was the small minority of the nation which conducted the revolutionary struggle, provided its goal and direction, using the mass of the people only as a tool to lead to victory their own interests, namely, the interests of the minority. The socialist revolution is the first which in the interest of the great

majority and by means of the great majority of workers alone can attain to victory. To the masses of the proletariat we appeal not merely to bear clearly in mind the aims and objects of the revolution; they must also by their own action gradually introduce socialism into their lives. The nature of socialistic association is this, that the great mass of the workers ceases to be governed, but the whole political and economic existence itself comes to life and takes control with conscious and free self-determination. Therefore from the highest pinnacle of the state down to the smallest community the proletariat must replace the conquered organs of the ruling classes—the federal councils, parliaments, local councils,—by their own class organs—the workers' and soldiers' councils—occupy all posts, supervise all functions, compare state requirements with the interests of their own class and the socialist problems, and only by means of constant reciprocity between the mass of the nation and their organs, the workers' and soldiers' councils, can their activity fill the state with the spirit of socialism."[1]

Though theoretically plausible these demands, for which violent action is inevitable, are in practice illogical, since the Soviet system of political organisation, according to the German communists, required as its democratic basis the general interests of the workers as a whole. Then what was the *Rätesystem* which the communists hoped to organise? The first comprehensive appearance of this political organisation was the result of the Paris Commune of 1871.

Karl Marx's distrust of constitutional parliamentarianism and his criticism of its functions formed the starting-point for the establishment of the *Rätesystem*. In his judgment the parliamentary republic was nothing but "the proper form of their joint stock government" which "divided the rival factions and adventurers of the ruling classes." And in accordance with Rousseau's discussion on representative government, the rule of parliament had an hierarchic predominance over the electorate, provided that the members of the ruling classes took a firm stand during their term of "three or six years."[2]

In Marx's conception of political organs this commune was "the positive form of the social Republic," that is, "the working,

[1] Rosa Luxemburg and Karl Liebknecht: *Was will der Spartakusbund*, December 1918, p. 3.

[1] Karl Marx: *Address and Provisional Rules of the International Working Men's Association*. Printed by the Westminster Printing Co., 56 and 132 Drury Lane. *The Civil War in France*, 1921. Trans. by R. W. Postgate, pp. 29–32.

not parliamentary, body, executive and legislative at the same time." The ending of social suppression of individual freedom, by the abolition of the physical force of the old régime, i.e. the standing army and police, and the repudiation of the private property monopoly of social functions, brought the "real democratic" rule in which not only municipal administration but also the whole initiative hitherto exercised by the state was placed in the hands of the commune. The breaking away from the spiritual forces which made for repression, educational instruction for all without any interference from church and state, and the application of science freed from the fetters of class prejudice and government force meant great progress towards the liberty of the people. On the principle of public service, "done at workmen's wages," all public servants and even magistrates and judges were to be "elective, responsible and revocable."

Thus to Marx the communal régime had to give way to the "self-government of producers."[1]

According to him the commune was not only a political form of even the smallest country hamlet, but also that of the national state. In the communal constitution the rural communes of every district were to administer their common affairs by an assembly of delegates in the central town, and these district assembles were again to send deputies to the national delegation of the national commune. These delegates were to be at any time revocable and bound by the *mandat impératif* of their constituents.

The few, though important, functions which still would remain for the central government were not to be suppressed, as had been intentionally misstated, but were to be discharged by communal, i.e. strictly responsible, agents.

In these conditions the national unity would not be destroyed, but, on the contrary, would be more strongly organised by the communal constitution and become a reality by the destruction of the old state authority and the establishment of parliamentary communal suffrage.

But Marx emphatically stated that his new communal body politic was something quite different from a reproduction of mediaeval communes, which "first preceded, and afterwards became the substratum of the actual state power." He also asserted that the communal constitution was by no means an "attempt, as dreamt of by Montesquieu and the Girondins, to break up into a federation of small states that unity of great nations which, though originally brought about by political

[1] Karl Marx: *The Civil War in France*, 1921. Trans. by R. W. Postgate, p. 31.

force, has now become a powerful coefficient of social production." Nevertheless he protested that a Prussian municipal constitution degraded the town government "to a mere secondary wheel in the police machinery of the Prussian state."

The conclusion as to the commune was that in reality the communal constitution brought the rural producers under the intellectual leadership of the central towns of their districts, and thereby secured to them in the working men the natural trustees of their interests. The existence of the commune involved, as a matter of course, local municipal liberty, but no longer as a check upon the now superseded state power. Since the political rule of the producer could not co-exist with the perpetuation of "social slavery," the commune served as a lever for uprooting the economic formation "of a class existence and for the creation of instruments of free and associated labour."

In this respect it supplied the Republic with a basis of really democratic institutions, and essentially with a working-class government, founded on the gospel of "co-operative production."[1]

Marx definitely disagreed with federalism as a political system and Engels also strongly opposed the revisionist proposal of the compromised idea of an economic organisation where, as capitalism became monopolistic capitalism, it could already be called "state socialism," and he protested that the *Reichstag* under the omnipotence of the government was merely a "fig-leaf of absolutism."

Engels declared in 1891 that the idea of bringing about peacefully the establishment of a republic—and a communist republic at that—in Germany was a "colossal illusion." But he thought the aim should be the concentration of all power in the hands of a popular representative body. He wrote:

"As regards the re-constitution of Germany, on the one hand the system of small states must be set aside—there can only be a revolution of society so long as there are reserved rights of Bavaria and Württemberg, and the map of Thuringia, for example, presents the existing lamentable picture. On the other hand Prussia must cease to exist, must be dissolved into self-governing provinces, so that the present special Prussianism ceases to weigh upon Germany. The system of small states and the special Prussianism are the two sides of the antithesis within which Germany is bound, and in which the one side always serves as the excuse and *raison d'être* of the other. What is to take their place? In my judgment the proletariat can make use only of the form of the one and indivisible republic. In the huge area

[1] Karl Marx: *The Civil War in France*, 1921. Trans. by R. W. Postgate, pp. 33, 34.

of the United States the federal republic is still as a whole a necessity, though in the east it is already an obstacle. It would be a real advance in England, where four nations live on the two islands, and where despite a single parliament three systems of law exist side by side. In little Switzerland it has already become an obstacle, and is tolerable only because Switzerland contents itself with being only a passive member of the European state system. For Germany federalism of the Swiss kind would be a most retrograde step. Two things distinguish the federal state from the unitary state; first, that each allied individual state, each canton, has its own civil and criminal law and its own judicial system, and secondly, that at the side of the popular assembly there is a 'House of States,' in which each canton, great or small, has a vote as such. The first thing we have happily got rid of and shall not be so childish as to restore; the second thing we have in the *Bundesrath*, and could very well do without it, as our 'federal state' would form the bridge to the unitary state. And we have not to reverse the revolution made in 1866 and 1870 from above, but to give it the necessary enlargement and improvement by agitation from below.

"And a unitary republic. But not in the sense of the present day French republic, which is simply the empire founded in 1798 without the emperor. From 1792 to 1798 each French department, each commune had complete self-government according to the American pattern, and that we also must have. How self-government is to be attained, and how one can be ready without a bureaucracy, is shown by America, the first French republic, and to-day Australia, Canada and the other English colonies. And such a provincial and communal self-government is much more free than, for example, Swiss federalism, where the canton is independent of the Confederation, but also of the district and the commune. The cantonal governments appoint district administrators and prefects who are unknown in the English-speaking countries and whom we hope equally politely to get rid of in the future, like the Prussian *Landraths* and government district councillors."[1]

Therefore Engels' ideal of "democratic centralism" was the democratic centralised republic with "complete self-government for the provinces, districts and communes through officials elected by universal suffrage, and the abolition of all local and provincial authorities appointed by the state."

[1] Engels: *Zur Kritik des sozialdemokratischen Programmentwurfes*, 1891, in the *Neue it*, Year 20, 1901–1902, pp. 11–12.

Marx also defended Engels against Karl Heinzen's project that the best republic would take the form of a federal republic with social institutions. Marx believed that, though Rousseau sketched the best political world for the Poles and Mably for the Corsicans, Heinzen's prediction was just as if "a man who knows how to make flowers out of petals, even if it is only a daisy, cannot fail to devise the best republic, whatever an ill-natured world might say."

The adoption of the North American federal constitution by Germany would make that country "resemble the idiotic merchant who copied the ledgers of his rich rival and imagined that being in possession of this copy he had also come into possession of the coveted wealth."

Marx concluded with the remarkable sentence: "persons, who had made much noise in the world, were made shorter by a whole head, because they happened to claim the 'American federal system' to be 'the best political form.' And thus it will befall all other Goliaths, to whom it may occur, in the midst of any democratic revolution in Europe, and especially in still quite feudal dismembered Germany, to put the 'American federal system' in place of the one and indivisible republic and its levelling centralisation."[1]

Engels' conception of federalism, as Lenin explained the "programmatic view" of the Marxian unitary republic, did in one way or another manifest the real federal idea out of the long history of federalism. He denied the traditional form of the federal state, but his ideal of a centralised republic was a decentralised unitary state with wider autonomy of local self-government, on the basis of his "proletariat democracy."

Engels' criticism of Proudhon's expression of the "Free People's state" indicated that for the introduction of the socialist order of society "the state was a transitory institution which we are obliged to use in a revolutionary struggle in order forcibly to crush our opponents," but since the state was required only in the interests of the true proletariat freedom, the state,—as it was by its very nature the "proletariat organised as the ruling classes," i.e. the machinery for the "conversion of the proletariat into the ruling class" and "the conquest of democracy"—must cease to exist. Engels' famous sentence, "the state will not be abolished; it will wither away," was, according to the communist interpretation a description of the gradual progress towards the highest stage

[1] Karl Marx: *Moralizing Criticism and Critical Morality; Polemic against Karl Heinzen*, in *Selected Essays* (Trans.), pp. 163–168.

of the centralised democratic republic evolved from the dictatorship of the proletariat in the transitional revolutionary period. Thus Engels preferred the word "commonwealth" (*Gemeinwesen*) to the traditional word "state"—connoting the state authority of the oppression of the proletariat classes by a ruling class—for his ideal unitary decentralised republic of the proletariat with equality and freedom.

The democracy of Marx and Engels was the democracy of the proletariat without classes, which was the main distinction from the federal idea of their days. The question remains whether the real ideal community must be a free commonwealth with political and economic equality and liberty, or one with social diversity and degrees of approximate equality and liberty. If the federal idea is free from the traditional conception of federal organisations it can in our time be valued not merely as a piece of mechanism, but essentially as an idea which has been and is to be the root of social organism and institutions in the past, present and future. If Engels pointed out that the commune—the democratic unitary commonwealth with wider decentralised local self-government—was evolution from the bottom, not from the top, his final aim of an ideal commonwealth was in no way different from the organised totality of mankind as envisaged by the *Genossenschaft* theory.[1]

The main difference between them, although both were theories striving to the same final goal, was due to the divergent theoretical approach to the body politic, resulting from their differences in philosophy and method.

Though the political doctrines of both aim at the decentralised unitary state, yet their approach to their ideal form of commonwealth is from unity to plurality in the case of the Marxian theory, and from plurality to unity in the case of the *Genossenschaft* theory. Philosophically the Marxian doctrine is based on the materialistic-dialectic, historical-evolutionary *a priorism*, while the *Genossenschaft* theory is based on historical evolution and scientific *a posteriorism*. Although both admit the biological conception of evolution, and reject any kind of rational and mathematical conceptions, yet the methods of historical deduction are entirely distinct. The former reaches its conclusion from the *a priori* ideology of material dialectic philosophy, whereas the latter starts from the standpoint of a natural organic process.

So the two predominant conceptions of our time—even though

[1] J. L. Sassen: *Die Entwicklung der Genossenschaftstheorie im Zeitalter des Kapitalismus*, 1914, pp. 135–148.

the second one might develop from the organic to the pragmatic theory of association, stand in complete antagonism to one another, both in academic speculation and in practical application.

Thus Nicholai Lenin, a Marxist apostle of revolution, agreed entirely with Marx and Engels' state theory; he denounced the confusion made by Bernstein between the Marxian view of "the destruction of the state as parasite" and the federalism of Proudhon. At that time, 1917, he did not fight on the point at issue between the orthodox and revolutionary Marxists. Arguing from Marx's discussion of the commune and Engels' criticism of the federal republic, he stated that "Marx agreed with Proudhon precisely on that point which has quite escaped the opportunist Bernstein, while he differs from Proudhon on the point where Bernstein sees their agreement." He pointed out that "Marx concurs with Proudhon in that they both stand for the demolition of the contemporary machinery of government. This common ground of Marxism with Anarchism (both with Proudhon and with Bakunin) neither the Opportunists nor the Kautskians wish to see, for on this point they have themselves diverged from Marxism."[1]

In this respect Lenin asserted that there was a difference between Marx on the one hand and Proudhon and Bakunin on the other on the "point of federation." "Federalism," he said, "is a direct fundamental outcome of the anarchist petty middle-class ideas." Marx was a "centralist"; his aim was the creation of "democratic centralism," that is, the possibility of voluntary centralism, of a voluntary union of the communes into a nation, of a voluntary fusion of the proletariat communes in the business of destroying capitalist supremacy and the capitalist machinery of government. To Lenin, Marx's phrase "to organise the unity of the nation" meant "to oppose the conscious democratic proletarian centralism to the capitalist, military, official centralism."

To Marx the true secret of the communal constitution was the creation of "the government of the working class, the result of the struggle of the producing against the appropriating class," in that without the political form, at last discovered, under which labour could work out its economic emancipation the communal constitution would have been "an impossibility and a delusion." To Lenin therefore, Marx did not undertake the task of "discovering" the political "forms" of the future stage of the transition from the political state to the non-political state, which would

[1] Lenin: *The State and Revolution*, 1921 (Trans.), p. 54.

be bound to disappear in consequence of the completion of the political struggle of socialism.

Marx, arguing from a close examination of the French Revolution, asserted that this transitory state would be "the proletariat organised as the ruling class."[1] Lenin therefore concluded that the commune was the "first attempt of the proletarian revolution" which was to break up the bourgeois state and constituted "the political form 'discovered at last' which can and must take the place of the broken machine." In this respect he was convinced that the Russian revolutions in 1905 and 1917, in different conditions and environments, "have been continuing the work of the commune and have been confirming Marx's brilliant analysis of history."

Lenin assumed that "as long as the highest phase of communism has not arrived, the socialists demand the strictest control by society and by the state of the quantity of labour and the quantity of consumption," in order to establish the expropriation of the capitalists and the control of them by the workers and to set up the working-men's government; that is, the "conversion of all citizens into workers and employees of one huge 'syndicate'—the whole state—and the complete subordination of the whole of the work of this syndicate to a real democratic state—to a state consisting of the Councils of Workers' and Soldiers' Deputies."[2]

Lenin, like Marx, pointed out that the scientific difference between socialism and communism was a quantitative distinction. To him "that which is generally called socialism" was the "first and lowest phase of communist society; in so far as the means of production become public property, the word communism is also applicable, providing that we do not forget that it is not full communism."

Therefore the great importance of Marx's interpretation was its consistent application of materialist dialectics, "the theory of evolution, looking upon communism as something which evolves out of capitalism." He perceived that in the early stage communism cannot as yet be economically mature and quite free of all tradition and all taint of capitalism. Therefore democracy is of the first importance in the working-class struggle for freedom against the capitalists; but it is merely a stage in the development. Democracy implies equality, and the power of such a battle-cry in the struggle of the proletariat for equality is obvious, if it is rightly interpreted as meaning "the annihilation

[1] Lenin: *The State and Revolution*, 1921 (Trans.), p. 57. [2] Ibid., pp. 99, 100.

of classes." Nevertheless this "equality of democracy is formal equality—no more"; that is, the attainment of the equality of all members of society in respect of the ownership of the means of production, that is of equality of labour and equality of wages." But humanity required far more advanced equality—"equality which is real"; and realises in life the formula: "From each according to his ability; to each according to his needs."

Lenin did not explain by what stages or by means of what practical measures humanity would "proceed to this highest aim."

In this respect he was convinced that democracy is a form of the state and the formal recognition of the equality of all citizens. It provides the means of overthrowing the old capitalist régime and substituting a more democratic but still *state* machinery in the shape of armed masses of the working class. It declares that "if everyone really takes part in the administration of the state," capitalism cannot retain its hold, and the way is in fact being prepared for bringing the whole economic system under one national state "syndicate with all working to an equal extent" and "all receiving equal pay."

Then when all members of every branch of the state activities and economic organs "have learnt how to govern the state, have taken this business into their own hands, and have established control over the insignificant minority of capitalists and their hangers-on, the need for any government begins to vanish." Lenin emphasised that "the more complete the democracy, the nearer the moment when it ceases to be necessary. The more democratic the 'state' consisting of armed workers, which is no longer really a state in the ordinary sense of the term, the more rapidly does every form of the state begin to decay."[1] For this reason he was convinced of the growing opportunity for the transition from the first phase of Communist society to its second and highest phase and along with it to the complete withering away of the "States," which Bukharin indicated by means of the "Law of social equilibrium of classes." The mass will have ceased to be a mass and will become a single, harmoniously constructed human society.[2] Lenin and his colleagues looked on the Soviet political organism as a transitory political form of the dictatorship of the proletariat and took as their slogan "All power to the Soviet of Workers' and Soldiers' Deputies, which are only to be considered in reality as organs of insurrection, as agents of revolu-

[1] Lenin: *The State and Revolution,* 1921 (Trans.), p. 105.

[2] Bukharin: *Historical Materialism* (Eng. Trans.), 1926, p. 241.

tionary power."[1] As Trotsky explained: "Bolshevism is not a theory (that is, not merely a theory) but a revolutionary system for teaching insurrection to the proletariat."[2]

In this respect the Soviet republic applied the main principles of federation to the Soviet republics of Russia by the decision of the All-Russian Congress of Soviets leaving to the workers and peasants of each nationality the right to decide freely, at their national Congress of Soviets, whether they desire, and upon what basis they desire, to participate in the federal government and in other federal soviet institutions.[3]

But the essential object of the constitution of the Russian Socialist Federal Soviet Republic, in the present transitory period, as asserted in the constitution, "consists in the establishment (in the form of a strong Soviet government) of the dictatorship of the urban and rural workers, combined with the poorer peasantry, to secure the complete suppression of the bourgeoisie, the abolition of the exploitation of man by man and the establishment of Socialism, under which neither class divisions nor state coercion arising therefrom will any longer exist."[4] Although the constitution proclaimed that the Russian Republic is "a free Socialist community of all workers of Russia" and "all authority is vested in the entire working population of the country" organised in urban and rural Soviets, yet the supreme authority is vested in the All-Russian Congress of Soviets and, during the period between the Congresses, in the All-Russian Central Executive Committee of Soviets and its executive organ, the Council of People's Commissaries. The Congresses of Soviets consist of (i) regional congresses, made up of representatives of town Soviets and of county congresses; (ii) provincial congresses of representatives of town Soviets and rural district congresses; (iii) county congresses, composed of representatives of the village soviets; and (iv) rural district congresses. The whole system is thus elaborately federalised.

The authority with which the All-Russian Congress of Soviets (A.R.C.S.) and the All-Russian Central Executive Committee (A.R.C.E.C.) is invested in the division of powers made by the constitution, is *de facto* more extensive than in any other federalism

[1] Lenin: On the slogan "All power to the Soviet," October 1917, in *Preparing for Revolt* (Eng. Trans.), 1929.

[2] Trotsky: *The Lesson of October 1917* (Eng. Trans.), p. 80.

[3] Andrew Rothstein: *The Soviet Constitution*, July 1918. "Declaration of Rights of the Labouring and Exploited Masses," Chap. IV, 8.

[4] *The Soviet Constitution.* "General Principle of the Constitution of the R.S.F.S.R.," Chap. V, 9.

existing at the time. The chief matter of controversy in respect of federalism is not the distribution of powers, but the functions and the method of representations of the federative organisation, i.e. the characteristic example of the misrepresentation of the Soviet federation is due to the method of indirect representation. The value of the federal idea is to be measured not merely by the mechanism it sets up, but by the technique it serves. The A.R.C.S. and the A.R.C.E.C. are entrusted with all questions of national importance, including the amendment of the constitution of the Russian Socialist Federal Soviet Republic (R.S.F.S.R.), the determination of frontiers and boundaries and the competence of the regional unions of Soviets which are part of the R.S.F.S.R., and arbitration in disputes which may arise amongst them. Nevertheless the Soviet organisation itself, according to the literal terms of the constitution, is that of a decentralised unitary state with a federal basis; especially was this marked in the formation of the Union of Socialist Soviet Republics on December 30, 1922, as a decentralised "single united state" on a federal basis, by a treaty between the four Soviet unions, the Russian Socialist Federal Soviet Republic, the Ukrainian Socialist Soviet Republic, the White Russian Socialist Soviet Republic and the Trans-Caucasian Socialist Federal Soviet Republic.

But the leading ideology of the Soviet state was and still is the dictatorship of the proletariat to which Kautsky as the upholder of the Marxian theory of the democratic state was opposed, in entire disagreement with Lenin and his German comrades, the Spartakists and the radical advocates of the *Rätesystem*. Kautsky's objection to the dictatorship of the proletariat was that dictatorship is a form of government and a state of domination, as "literally the word dictatorship means the abrogation of democracy."

Lenin argued that "according to Marx dictatorship is authority relying upon force and not bound by any law," and the "revolutionary dictatorship of the proletariat is an authority maintained by the proletariat by means of force over and against the bourgeoisie and not bound by any law."[1]

Kautsky pointed out the actual nature of the Assembly of 1789 and of the Paris Commune of 1871, where universal suffrage had been set up. He quoted Engels' assertion that the Paris Commune was "the dictatorship of the proletariat." "The Commune was composed of town councillors chosen by general suffrage in the various departments of Paris," and "universal suffrage was to

[1] Lenin: *The Proletarian Revolution* (Eng. Trans.), p. 18.

serve the people, constituted in communes, as individual suffrage serves every other employer in the search for the workmen and managers in his business." Therefore the dictatorship in this sense was a "form of government," but not the rule of a single class, of a single person, or of an organisation of a proletariat party.

He quoted from the Communist Manifesto that "the proletarian movement is the independent movement of the immense majority, in the interest of that majority" and not like previous movements "in the interests of minorities," and pointed out that there was actual freedom of universal suffrage in the Paris Commune. And he asserted that the proletarian government must not rule by a dictatorship of force, as Lenin predicted, for "it would be committing suicide to cast aside such a strong support as universal suffrage, which is a powerful source of moral authority."[1]

The repudiation of parliamentarism as a "talking shop" system by the revolutionary Marxists is to Kautsky due to a complete misunderstanding, in that "the dissatisfaction of the workers is not due to the institution as such, but to the weakness of the workers in society."

Marx foresaw a national delegation in Paris fulfilling all the functions of a central government and constituting a single body combining both legislative and executive powers and elected by universal suffrage as in the case of the Paris Commune, but Kautsky believed that parliament, if it consisted of a compact and determined socialist majority, would be a "working body" and "the parliamentary mill will supply the right grain on the new basis of the combination of legislation and administration, even if it merely exercises legislative functions." Dictatorship to him was "a state institution which constitutionally excludes all opposition to the state power and raises the possessor of state power, be it a person, a corporation, or a class, above the laws of the state, which, of course, apply to the rest of the population"; and he concluded that the dictatorship of the proletariat as a means for the introduction of socialism must be rejected and "as long as the dictatorship does not collapse" Soviet Russia will continue to go downhill despite all concessions to the capitalists, and "the governmental form of dictatorship is not only incompatible with industrial capitalism, but also with democratic socialism."[2] Since democracy alone offered "the one means of avoiding despotism and of coming to some calm and positive construction," "democracy with its universal equal suffrage is

[1] Kautsky: *Dictatorship of the Proletariat* (Trans.), pp. 46–48.

[2] Ibid.: *The Labour Revolution*, 1925 (Trans.), pp. 82, 84, 89.

the method to transform the class struggle out of a hand-to-hand fight into a battle of intelligence, in which any one particular class can triumph only if it is the one and only method through which that higher form of life can be realised which socialism declares is the right of civilised men." Although the German National Assembly had a bourgeois and unsatisfactory character, yet the one and only institution at this time that might to some extent keep the *Reich* together could be secured not through the Workers' Councils nor through dictatorial governments, but through the National Assembly, consisting of representatives from all parts of the *Reich*.[1] Kautsky not only agreed politically with the system of the National Assembly, but was economically opposed to the *Rätesystem*. He asserted that in order to create a new organisation of production entirely new methods must be employed, which neither allow the worker the exclusive appropriation of the fruits of his labours nor permit the state authority to assume control of all capitalist property to be administered by government bureaucracy. His ideal was that "every branch of production should be so organised as to benefit equally workers, consumers and science, and influence in the requisite manner the shaping of the processes of production."[2]

In this respect socialism, to him, was important "not merely for the expropriation of the capitalists," but also for the organisation of production and marketing (*Absatz*) by the common work of organised workers and organised consumers on the basis of scientific knowledge."

Therefore socialisation requires the organisation of production as well as that of consumption. Since these two economic functions are different and the latter has a wider sphere of human activity than the former, the commune and state, if democratically organised, are of great importance as organisations of the collectivity of consumers. They are important, not only as the forces which overthrow the capitalist ownership of the means of production and convert it into collective ownership, but as the forces which have to represent the interest of the consumers in the socialist organisation of the process of production. Workers' Councils are not only necessary for the interests of their own

[1] Kautsky: *Terrorism and Communism*, 1920, pp. 229, 232.—"Democracy offers far better prospects for Socialism in West Europe and America. These regions, especially the Anglo-Saxon countries, have issued from the World War less weakened economically than others. Every form of progress and every gain of power on the part of the proletariat must immediately bring with it an improvement in the conditions of life."

[2] Ibid.: *Die Sozialisierung und die Arbeiterräte* (Pamphlet), 1919, p. 8.

workers, but the workers must also enter into the organisation of production as organised Workers' Councils. Kautsky urged that whoever would hasten the socialisation of production must, above all, assure that the Workers' Councils shall be closely united, not merely in name, so that together with the consumers they may systematically regulate the process of production.[1] For the essential condition of freedom from any expropriation, socialisation must be extended not only to the production of commodities, but also to all forms of the production of wealth, including transport and distribution and exchange operations such as banking.

In this respect Kautsky warned the existing coalition government that it would return to the old capitalism, through dangerous experiments, unless it created a commission of socialisation as an "expert corporation" to carry out socialisation with "wide and supreme authority."

The Workers' Council system could not create a single dominating authority so long as any division existed in the proletariat; any government would only mean the dictatorship of one part of the proletariat over the other. So he asserted that it was necessary to form the "collective whole" of producers and consumers through the National Assembly with its complete exercise of universal suffrage, in which there was no room for the right wing dictatorship of Noske and Heine.

In this respect Kautsky, as an orthodox Marxist, stood on his interpretation of Marx's state theory in favour of the state as a complete synthesis of consumers and producers.

Kautsky's protests against the *Rätesystem* resulted in the final declaration of the central council of the German Workers' and Soldiers' Council at the date of the National Assembly.

Max Cohen, on behalf of the central council of the German Socialist Republic, made the following statement:—

"I. The political and economic development of the German Empire already showed before the revolution the urgent need of transforming the Empire into a unitary state."

"II. The revolution of the workers and soldiers has already confirmed this need to the fullest extent and declared the removal of all obstacles to the unitary state to be one of the most important tasks for the political, economic and social internal and external development of the German Republic, so soon as Prussian domination has been overthrown."

"III. The systematic establishment of the revolutionary

[1] Kautsky: *Die Sozialisierung und die Arbeiterräte* (Pamphlet), 1919, p. 11.

organisations (Workers' and Soldiers' Councils) for the ultimate formation of the socialist republic, as the unitary working power in the whole new structure of Germany, is also an indispensable condition for the creation of the unitary state."

"IV. Recently the former federal states, the present free states, have again raised such strong claims to the supreme rights of individual states in the new Republic—and not merely for the temporary but for the final Republican constitution—that the development into a unitary state appears to be seriously jeopardised, and a speedy recovery from the blows of the world war and the probable peace treaty threatens to be checked by a split between the individual states."

"V. Together with the incorporation of the Workers' and Soldiers' Councils in the future constitution of the Republic, for the strengthening of the Workers' representation and their productive interests, as well as for the constitutional formation of means of defence, it seems that the next most important task of a Workers' and Soldiers' Council in the whole of Germany is to fight strongly against the injurious re-enforcement of the individual state supreme rights, which prevail over the validity of the provincial self-administrative and cultural interests, and to exert all their power to secure that the work of the constitution in Weimar is directed in the prescribed manner to a German unitary state."

"VI. It is incumbent on the National Assembly of the Republic to prepare for the new structure of Germany in political and economic respects, as well as to undertake the territorial reconstruction of the whole German territory. In this task it must not be limited by any other association, and especially not by the National Assembly of each state."

"VII. In the confidence that the National Assembly will establish its complete sovereignty, the Central Council places in the hands of the German National Assembly the authority delegated to it by the Republican Congress of the Workers' and Soldiers' Councils, and wishes for its labours every success, for the happiness and salvation of the whole of the German nation and all the German races united in the New German Republic."

"VIII. The Central Council will exercise the powers delegated to it, especially its position as supreme court of appeal for the Soldiers' Councils given to it by the new law concerning the regulation of command, until such time as the National Assembly shall entrust these powers to another association."[1]

[1] *Der Arbeiter-Rat*, Jahrgang I, Nr. 3, 1919, p. 4.

Neither Marx, Engels, Kautsky, nor Cohen and his colleagues adhered to the federal state. The German syndicalists aimed at the federation of the *Reich* on the basis of economic federalism of the whole group instead of the centralised *Rätesystem*. Therefore, however divergent the origins or the motives of the council system state (*Rätestaat*) might be, it is the decentralised unitary state, evolved either from the bottom[1] or from the top; and no matter how contradictory the conception may be to orthodox federalism, yet inasmuch as the dictatorship could be considered along the lines of Kautsky's dictum of the democracy and universal suffrage and not of Lenin's revolutionary dictatorship of minority and force, it is the unitary state with federated authority and economic and political decentralisation.

Now I will return to the formation of the National Assembly and the provisional government.

The personnel of the *Reich* government was not made up entirely of socialist members, but included a number of prominent democrats, such as Hugo Preuss, as state secretary for home affairs, and a capitalist such as Koeth, as minister for demobilisation. Hugo Preuss was the draftsman of the new constitution, and Koeth, as a great industrial director, had the heavy task of bringing the war-time industrial and economic system back to the normal.

The main task was the establishment of the socialist economic system, in order to complete the Revolution of November 9, 1918. But politically the National Assembly considered and framed the new constitution according to Preuss's ideal of democratic republicanism and his long desire to transform the decentralised unitary state by eliminating as much as possible the traditional federal evil of particularism, and, by guarding against reactionary attempts, to ensure the complete security of the "right of equality" without any prejudice of class consciousness.

The formation of the "commission of demobilisation" tended to make the socialisation of production revert to the pre-war economic organisation. In the transitional period from the old capitalist régime to the socialist commonwealth, the main difficulty unquestionably was how far both politically and econo-

[1] *Kommunistische Aufbau des Syndikalismus. Das Rätesystem von unten auf*, published by *Der Syndikalist*, p. 9.

mically the socialist programme could be put to practical realisation without undue disturbance and hardships in regard to existing economic requirements, with the existing capitalist social basis.

The formation of the National Assembly on the basis of universal suffrage resulted in a majority which transferred authority from the socialists to the democrats and nationalists, that is, there were 185 delegates from the Socialist groups against 227 delegates from the other groups.[1]

The National Assembly of Weimar, convened for the purpose of formulating a new German constitution, had in its method of formation nothing more advanced than its historical predecessors in America of 1787 and France of 1871, and kept strictly within the limits of practical expediency.[2]

Ebert's inaugural address at the first sitting of the National Assembly was the declaration of German democracy of to-day. He said: "In the Revolution the German nation revolted against an old corrupt authoritarian dominion. As soon as the right of self-determination of the German people was secured, it returned to the way of liberty. Only by the broad highway of parliamentary discussion and decision can the inevitable changes in economic and social matters be made without destroying the *Reich* and its economic life. Therefore the government of the *Reich* salutes in this National Assembly the highest and sole sovereignty in Germany."[3]

Then he added that "inasmuch as the National Assembly has a great republican majority, so the old divine dependence is removed for ever. The German people are free, remain free and will in the future be the rulers themselves."[4]

Regarding the Revolution, which was the result of the loss of the War and the resultant social distress to the people, Ebert asserted that Germany had laid down its arms in reliance upon the principles formulated by President Wilson. He demanded a "Wilson peace" as a right. "Our free democratic republic, the whole German nation, seeks nothing more than to enter on terms of equality into the League of Nations, and to win an honoured place there by its industry and ability."

He advocated the union of the whole German nation in

[1] As the result of the elections to the National Assembly of Weimar, the votes of People's Parties totalled 15,173,529 with 227 delegates; of the Socialist Parties, 13,826,338 with 185 delegates.

[2] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, Einleiteinder Teil, pp. 4, 5.

[3] Ibid., Vol. I, *Die Sitzungsberichte der Nationalversammlung nebst Anlagen*, p. 3.

[4] Ibid., p. 4.

Germany and Austria into the realm of the new republic, saying that "our comrades in race and destiny may be assured that we welcome them wholeheartedly into the new *Reich* of the German nation. I may declare my expectation that the National Assembly will empower the future government of the *Reich* to negotiate as soon as possible with the government of the German-Austrian free state as to their ultimate consolidation. There should be no boundary between us, for we wish to be one nation of brothers."[1]

He referred to the unity of Germany, saying that history and geographical situation had prevented the building up of a strong centralised unitary state. Many races and dialects existed side by side in Germany, but they must act as one nation and speak in one language. The division between the rights of the empire and the rights of the various states might in some matters remain unchallenged. But in the main there must be unity. But "in this strong German democratic state every race can develop its best qualities freely and fully."

In this respect, according to Ebert, a National Assembly which gives a government the incontestable right to act in the name of the whole German people, promotes thereby a high degree of peace both abroad and at home.[2]

He asserted that the provisional government was, in the truest sense of the term, "the trustee in bankruptcy of the old régime," and that, supported and encouraged by the Central Council of the Workers' and Soldiers' Councils, it had put forth its utmost powers to overcome the danger and misery of the period of transition.

He urgently appealed to the industrialists to encourage to the utmost the revival of production, and to the workers to devote themselves with all their powers to the same object, "which alone can save us. The ideal of socialism is only possible when production offers a sufficiently good basis for toil. Socialism means to us organisation, order and solidarity, instead of property, selfishness and destruction."

Repudiating "private monopoly" and "easy capitalist profits," he proclaimed that "we will systematically put an end to profits where the economic development has made an industry ripe for collective ownership."[3] And he concluded by saying: "We will set to work, having as the great purpose before us to secure the right of the German nation, to assure a strong democracy in

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 7.

[2] Ibid.

[3] Ibid., p. 8.

Germany, and to do our work in a true social spirit and with true socialist deeds."[1]

David, the president of the Assembly, defined the German democracy as the "expression of the highest political ideal," and asserted that democracy, in bestowing on a nation the lofty right of self-determination, placed on it also "the high responsibility of political self-discipline."

In contrast to the Jeffersonian democracy of 1787 in America, the German notion of modern democracy had developed into the new conception that "the democratic right of the individual is limited by the democratic right of others," and "it is only by mutual respect for democratic rights that such a state can flourish."[2]

He declared that "there is among the masses of the working people a new and higher ideal of economics and sociality." The idea of socialism was the overthrow of the old economic system and its consequent evils, and "only by the solution of this problem can a lasting peace be secured and maintained within the peoples." So he concluded that the work of the National Assembly must be to increase the contentment of the German people with their political and social institutions and the new National Assembly was "the widely visible sign of a new and great national will."

Hugo Preuss, as draftsman, explained the constitution at the third sitting. He began by quoting von Gagern's saying at the Frankfurt National Assembly of 1848, that "We are here to create a constitution for Germany, for the whole *Reich*. The summons and the full authority to do so are based on the sovereignty of the nation."[3] He asserted that the right of the Weimar Assembly, representing on a democratic basis the will of the sovereign people, to undertake this task, was beyond question. "What has been created by the Revolution now needs to be put in legal form and placed on a firm foundation by this Supreme Assembly. The *Reich* as such, the totality of the German nation—which we can confidently expect will be completed by the accession of our German kinsmen of Austria—that is the assured possession which we carry with us into our new status."[4]

Preuss declared his conviction that there was a great and powerful striving towards greater unification—a striving that was the result not merely of sentiment, but of hard economic and material

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 9.

[2] Ibid., p. 18. [3] Ibid. [4] Ibid., pp. 28–29.

necessity. But he recognised that there was opposition to such unification—opposition arising not only from the dynasties, but from "a characteristic quality of the German people—a quality often beneficial and fruitful—namely, its wholehearted adherence to the institutions and life of small communities." Such communities soon become strong organisms which display the impulse of commonwealths towards self-maintenance.[1] Even for the sake of the unity of the *Reich*—the importance of which could not be over-emphasised—it would be a mistake to try to destroy that tendency, which properly used and conditioned would be a source of strength to the German people.

Applying his *Genossenschaft* idea, he remarked that the task was to be carried through by friendly agreement, in a common German spirit. If possible, majority decisions should be avoided. "It cannot be denied that a little done voluntarily may be worth a great deal more than much done under compulsion. But in the last resort the vital needs of the whole body must not be allowed to suffer."[2]

But he admitted that "the conscientiousness of the Germans made it perhaps more difficult than in other nations to attain that state of mind in which each is conscious of representing to the best of his knowledge the interests of a collectivity and at the same time believes it his duty to protect to the utmost the interests of a smaller community."

Consequently, in order to establish as quickly as possible a legal system which by the sanction of the sovereign Assembly would indicate the organisation which should exercise within Germany a democratically recognised authority he presented a draft which was "a compromise, as experienced politicians have readily seen." He pointed out that the most far-reaching and difficult problem was that of "competence between the *Reich* and individual states," and this, like other competence problems, had been deliberately shelved. Hugo Preuss had already realised the deep-rooted tradition of orthodox federalism, and, moreover, the creation of the free state took place not nationally but locally through the November Revolution.

He distinguished between two kinds of legislation which the National Assembly was competent to undertake. There was "constitution-making" legislation on the one hand, and on the other such urgent legislation as could not be left to the legislative organ which would be finally set up. But this difference did not

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 29.

[2] Ibid.

matter much so long as representatives of the individual states at the National Assembly could co-operate satisfactorily. In this respect Hugo Preuss assumed that the National Assembly "is as the representative of the sovereign people sovereign in its activities." But obviously the National Assembly had the right, and indeed the duty, to restrict its sovereignty of its own accord, where necessary for the common good.[1] But this self-limitation could not apply to the especial work for which the National Assembly was called together, namely, the setting up of a constitution. In accordance with the urgent wish of the individual states, the Committee of States would have the right to give preliminary consideration to the draft, and indicate its attitude towards it. But whatever that attitude might be, it would remain possible to put the draft before the National Assembly, and the Assembly's decision as to the constitution would be final. But there was to be one limitation—Section 4 provided that the territorial boundaries of the "free" states could not be altered except with their consent; "so the individual states could rest assured that the territorial map of Germany could not be changed against their wishes by a mere vote of the National Assembly."[2]

Preuss told the Assembly that although it was necessary to have the sanction of the individual states for any such decisions of the National Assembly, yet the final provisions as to the legal procedure to be adopted in regard to the territorial re-groupings which would presumably be necessary, must be left to be settled in the definitive constitution on which the Assembly had to decide.[3]

In regard to other urgent legislation not of a constitution-making nature, there was provision for the concurrence of the representatives of the individual states. So Preuss recommended that the National Assembly, whilst sovereign, should yet in certain matters compromise with the states, and that in regard to these laws there should be agreement between the Committee of States and the National Assembly. But there was this difference between the position of the Committee of States vis-à-vis the Assembly and that of the old *Bundesrath* vis-à-vis the *Reichstag*, that the rejection by the Committee of States of any proposal of the Assembly would not be the last word, but the issue could be determined by popular vote, that is by a referendum ordered by the President of the *Reich*.[4]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 31.

[2] Ibid. [3] Ibid., p. 32. [4] Ibid.

The Committee of States in the draft constitution differed from that of the old federal council, in that representation there was to be on a population basis (which would give a distribution of voting power not greatly different from the old one), and that an adverse decision by it would, as already pointed out, not be final, but the issue would be submitted to popular vote.

As in the United States of America, there was to be a President at the head of the *Reich*. In general he was to have the powers customarily given to republican heads of states, such powers to be exercised upon the responsibility of a Ministry answerable to the National Assembly and dependent upon the confidence of that body.[1]

This responsibility of the Ministry to the National Assembly was to Preuss the crucial point for discussion in view of the previous ideas as to the federal council system.

In regard to international relations, the President was not entrusted with the right to declare war and make peace; this could only be done by *Reich* legislation. So if Germany should enter the League of Nations, which imposes treaty obligations on all its members, the treaties would need separate parliamentary decisions. In this way a break would be made with the system of secret treaties.

Regarding internal organisation, the main difference of the new republican ministry from the old ministry of the Imperial Chancellor was the responsibility of the new ministry as a whole and also in its departmental administration directly to the National Assembly. This was to avoid the risk of the kind of evils resulting from the old Imperial Chancellorship.

So Preuss ended by declaring that the new constitution was essentially a compromise; wishes of parties, even of territories, had had to be put aside, for the sake of *Deutschland über Alles*.[2]

Next, Löbe, in the name of the Social Democratic Party, emphasised the sovereignty of the constituent German National Assembly and declared that this party would support the draft constitution in all the circumstances, but would retain complete freedom of action in regard to the definite constitution. Von Payer, on behalf of the German Democratic Party, remarked that "the German people has exercised the sovereignty vested in it by electing the National Assembly and entrusted this body with the further exercise of the sovereignty. . . . The National Assembly must set an example of the will to work."[3]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 33. [2] Ibid., p. 34. [3] Ibid., p. 42.

He also accepted the draft constitution in principle, as an immediate necessity: later, in quieter times, it would be possible to deal with the problem of how, for the good of the whole, to combine the overriding necessity of the unity of the *Reich* with regard for the historical past and for present conditions, for the individualities of the German races, and for differing views as to the closer or looser combination of the individual forces of national life.[1]

Praeger, the Bavarian delegate, strongly asserted on behalf of the governments of Bavaria, Württemberg, and Baden, that the acceptance of the draft constitution must not in any way prejudice the position as to individual free states.[2] Heim, a delegate of the Centre Party, in the name of the Bavarian People's Party, also insisted on the recognition and maintenance of these particular rights of the individual states. He pointed out that "the authority provided for in the draft goes so far that it is possible for the National Assembly to set aside some or all of the federal states and to create a German Unitary Republic." He claimed that the National Assembly was exceeding its task and competence, which was to safeguard the federal character of the *Reich*, and declared that his party must vote against the proposals.[3]

Delbrück, for the German National Party, expressed grave doubts as to the draft constitution, and particularly as to the provisions relating to the future constitutional position of the head of the state, but indicated that the party was prepared to accept the draft as a provisional constitution; it would make this sacrifice because "the Fatherland is more than party."[4]

Heinze, delegate of the German People's Party, indicated that for political reasons the party was prepared to waive technical and legal points of criticism. It was desirable that a legislative authority should be set up in Germany as quickly as possible. He hoped that all Germans would, for the sake of order and security, respect the provisional constitution, for which his party would vote, whilst reserving its future freedom of action.

Lastly, Cohn, who represented the Independent Socialist Party, agreed that the provisional constitution should be set up by the sovereign National Assembly, but that constitution could, he declared, be only a transitional one. Any attempt that the National Assembly might make to treat the Revolution as com-

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, pp. 43, 44.
[2] Ibid., p. 41. [3] Ibid., pp. 44, 45. [4] Ibid., p. 45.

pleted, and to legislate from that point of view and with the purpose of making it appear that the Revolution was at an end—any such efforts must fail before the hard facts of life and economic development, which "have a stern logic of their own."[1]

Criticising Ebert's assertion that "as soon as the right of self-determination is secured to the German people, that people returns to the path of constitutionalism," and opposing Preuss's draft constitution as essentially based on compromise and the attitude of the Bavarian and Central Parties towards federalism, he asserted that "the history of the German Revolution will not be finally judged by the words spoken during the preparation of the project of law and at the opening of the National Assembly, but will base on the legislation of that Assembly its answer to the question whether the German people, when it became sovereign, had shown itself worthy and used its sovereignty rightly. Therefore it is essential that the law itself in its form, content and phraseology, shall show unequivocally that we have nothing more to do with the old state form of the German Empire, and that the Revolution has given not only the power to make something new, but the responsibility of doing so."[2]

On this principle he denounced the proposal for a Committee of States (*Staaten-ausschuss*), in that it did not represent any constitutional advance from the position on November 9, 1918; it would be a hindrance and not a help to the future development of the German unitary republic. Cohn emphatically asserted that in the work of constitution-making and in the construction of the new state the only purpose must be the creation of a unitary republic of Germany, despite South German and Bavarian complaints.[3]

Cohn attached little importance to the fear expressed by Preuss that the abandonment of the idea of the Committee of States would lead to undue unification. He asserted that the unitary republic would not be an obstacle to the independent development of different cultural interests in Germany; political uniformity did not necessarily involve cultural uniformity. In a politically divided Germany a unitary German culture had developed in the past, and within that unitary culture there had been very diverse forms of activity, though the participants in

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, pp. 46, 47.—"None of us realises whether and when this provisional constitution has become a definite constitution on the basis which they will create by the provision for the future constitution."

[2] Ibid., p. 49. [3] Ibid., pp. 49, 50.

any one of them lived under differing political institutions in the common German land. So on behalf of the Independent Socialists Cohn objected to the Committee of States *in toto*, to its mode of formation, the position of its members as mandatories, and to its functions.[1]

He also strongly objected to the proposed creation of the office of President of the *Reich*. Germany had had enough of monarchy and would not have it again even in a republican form. The example of France and the United States should not be followed. For in Germany, with its traditions, the presidency threatened dangers very different from those it presented in the two countries named. The Independent Socialists therefore proposed that at the head of the German Republic there should be a board (*Kollegium*) of five members, with equal rights—that is, a presidency instead of a president, as in Switzerland. Cohn pointed out that, in law, the German Emperor was, as such, not a monarch, but only President of a Federation. Historical experience had shown that a long-period presidency, especially with the possibility of re-election, could lead to actual, though it might not be nominal, monarchy. "We wish for a five-member presidency, so that any such retrogression to monarchy is made impossible. At the same time we reserve the right, in the consideration of the definite constitution, to raise the question anew, whether the office of president or the five-member presidency is not superfluous in the German free state, whether the highest authority of that state cannot be vested solely in the minister-president or in the ministry which, depending upon the support of the National Assembly and of the people, has to conduct the business of parliament, of the National Assembly and of the whole land."[2]

Cohn then discussed the question whether provision should be made in the law for the establishment of a special organ which should embody the Revolution as a living and continuing force, and should so supervise and act. It was a complete mistake to think that the Revolution came to an end when once the election of the National Assembly had taken place. The process of historical development is entirely independent of this form of the exercise of the "right of self-determination"; and it would be determined and characterised in the immediate future by the same objective economic and political forces that had determined the past stages of the Revolution. He pointed out that the Revolution possessed, outside the state organism, "its own heads and hands,

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 50.

[2] Ibid., p. 52.

its own organs of will and movement; the need for revolutionary organs continues and will continue for an indefinite future."[1] He proposed therefore the legislative recognition of the chief organ of the Revolution—the central body of the Soldiers' and Workers' Councils, on which the government of the *Reich* had by its own repeated admission been dependent since the November days. Cohn proposed that this *de facto* recognition of the Central Council as the highest organ of the living revolutionary development should be made into a legal recognition by the provision that:—

> "If the Central Organ of the Soldiers' and Workers' Councils lodges within two weeks an objection to a law which has passed its third reading in the National Assembly or against a regulation made by the National Assembly having the force of law, such law or regulation shall not become operative, but shall be submitted to a popular referendum."[2]

Moreover, he said that the power of the Revolution was impossible to control and that even if it were deprived of its organs, others would immediately be created in their place. It would be a more far-sighted policy to frame their own "council and legislation" in harmony with the living force of the revolutionary spirit. Otherwise the revolutionary movement might create organs more opposed to the present government than they formerly were in the old central council.

He concluded by expressing the fervent hope that the new National Assembly and the new sovereign government of the German Nation might not suffer shipwreck on the old mistaken belief in the authoritarian state with its military and civil oppression.[3]

Hopeless as the effort of the U.S.P.D. was, their proposal of a Central Council was favourable to the central unitary republic. So with the exception of the Bavarian People's Party and the Centre, nearly all the parties in the National Assembly aimed at a unitary state on a federal basis.

The discussions as to whether the new *Reich* should be based on the unitary or on the federal state, as well as those in the committee, indicated the leading tendencies of contemporary German federal strivings. In the debate on the programme of

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 53. [2] Ibid., p. 54. [3] Ibid., p. 56.

the first government formed after the adoption of the constitution, Gröber, a member of the Centre Party, made a great speech in which he declared that "We want the democratic republic, but not a socialist republic. We want the democratic republic on a federal basis, corresponding to the previous character of the German Empire and its whole many hundred years long historical tradition. We in the Central Party have always represented this standpoint; we have always sought to maintain the characteristic institutions of the German peoples. As to this principle we have never had a doubt; at most the conflict has been as to the boundary, how far should one go and how can the federative character best be maintained." And he remarked that "an unhealthy unitarism has had a disastrous effect most of all in cultural matters, particularly in problems of church and school, art and science," and yet religion, education, art and science suffer most of all from formalism and centralisation.[1]

The idea of centralisation manifested in the discussions of the National Assembly of Weimar was an outstanding characteristic of the formation of the new German federal republic. One of the delegates, Koch, representative of the German Democratic Party, explained that the first and essential foundation-stone of the new constitution must be "the unity of the *Reich*." Asserting that his party did not wish to take away from the people its belief in socialism, though they doubted if a period of economic disorder was the right time for collectivist experiments, he said that equally they did not desire to take away from the people its belief in democracy, and that the form in which democracy can best express itself is parliamentarism. He went on to argue that in a great state, even though it be a unitary state, decentralisation is necessary. If the Empire had not used all its powers with so strong a centralising purpose, if it had not always tried to regulate from Berlin everything coming within its competence, if it had worked on decentralising lines, there would never have been the extreme bitterness of feeling in the southern states towards Prussia and Berlin.[2]

He believed that this hostility was not due to the fact that the power was in the hands of the *Reich* and of Berlin, but to the manner in which that power had been exercised, particularly in the matters of food supplies during the war and of demobilisation afterwards. The present opportunity should be taken to warn earnestly the new holder of authority in Germany and

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. I, p. 121.

[2] Ibid., Vol. II, p. 974.

Prussia against over-centralisation. The danger of too much bureaucracy in the future must not be ignored. His party was convinced that "the less the *Reich* exercises its authority on centralised lines, the more will it diminish the opposition of the federal states to a strengthening of the unity of the *Reich*. The division of powers between the *Reich* and the individual states should not be such that some large fields of administration were assigned to the *Reich*, and other large fields, such as education and agriculture, were left to be dealt with without the co-operation of the *Reich*.[1]

Nor could it be, as it was in some cases under the Bismarckian constitution, that the task of legislation was given to the *Reich* and that of administration to the states. Koch held that the separation of powers should in most cases be of such a kind that so far as possible in all matters of legislation and administration the *Reich* should have the right of making general rules, and all the details of administration should be left to the states and to the provinces of Prussia and Austria.[2]

Heim, of the Bavarian People's Party, drew attention to the attitude taken by Eisner who, when he became Minister-President of Bavaria, had in the interests of federalism strongly opposed the centralising and unifying doctrines of Cohen and Haase. It had been argued that the failure of the Revolution to kill the federal idea in Germany only showed that centralisation had not been carried far enough; Heim asserted that on the contrary the Revolution was partly the result of an anti-centralisation feeling and consequently in Bavaria it was directed in the first place against Berlin and against unitarism. The development was, however, in a direction quite different from that for which the mass of Bavarian people had originally hoped. Some of the Bavarian social democrats in the National Assembly at Weimar were inclined towards unification. Their watchword was "Centralisation at any price; unitarism through and through." Heim remarked that this was the prevalent current of opinion in all the parties. Even parties in whose traditions the idea of federalism was an integral part had abandoned it. Everywhere there were supporters of centralisation. But he asserted his belief that "the main body of the German people thinks federatively and not of centralisation."[3] He held that the people had been artificially inoculated with the idea of

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. II, p. 974.

[2] Ibid., pp. 974–975.

[3] Ibid., Vol. V, p. 3028.

centralisation which was really held only by upper class intellectuals. The federalist idea as it existed in Bavaria, Württemberg and Baden, had never found adequate expression in the life of the whole nation. He himself rejected both extreme federalism and extreme unitarism. "The particularists are usually regarded as backward, hostile to the *Reich*, unfavourable to its unity, un-German, selfish." That sort of thing had always been said when the South Germans had taken up an independent position on any parliamentary issue; and though the situation had altered a little it had not greatly changed. But it must not be forgotten that the history of a thousand years could not be swept away at one stroke.[1]

It was said that the particularism of the individual states and federalism was no longer warranted, and could be understood only in connection with the history of dynasties. But that was untrue. He believed that the dynasties had not created the particularist sentiment, but were the representatives of "domestic" and racial feeling. The states which had chanced to come into being in consequence of the history of dynasties were accidental formations, but the racial feeling of the people was not at all accidental. Therefore this racial sentiment was one of the important factors to be taken into account in the formation of federative Germany. Heim declared that the draft constitution was unacceptable to him, but not mainly because it made a clean sweep of the old reserved rights. People were accustomed to think of the particularist as one who was very stubborn on the subject of reserved rights and would not surrender one jot of them. That had never been his own position. So far as reserved rights existed they must be examined from the standpoints of practicability and utility.[2]

Nevertheless, the new constitution which abandoned the idea of reserved rights naturally tended to the creation of the centralised state. In regard to foreign policy the new constitution made little change, for despite various constitutional provisions in the Empire the states had exercised very little influence on the conduct of foreign relations. But in home affairs the position was quite different; the National Assembly was in future to be superior to the provisions of the constitution, and the separate states, or, as they were now called, *Länder*, would have no right of veto.

In its authority the National Assembly was to be simply

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 3029. [2] Ibid.

unrestricted and sovereign, subject only to the limitations of Article 76 of the constitution, which, however, in fact only safeguarded Prussia. The individual states were not even to be secure as to their territories, since under Article 18 they could be broken up and partitioned against their will, and it was well known that originally much more drastic proposals had been contemplated. In this regard Heim had in mind the ideas of Hugo Preuss, which contemplated the regrouping of Germany into a number of completely new states.

Heim proceeded to point out that under the new constitution there was to be in taxation a marked advance of centralisation; in internal administration generally, and in cultural matters and economic affairs, it was to be quite unrestricted; all legislative and administrative authority was to be in the hands of the *Reich*. The bureaucracy of the *Reich* would be supreme.

What was being created was essentially a centralised state, and Heim asserted that henceforward Germany would be a federal state only in appearance; only the shell would be left.[1] What amount of self-government, of independence would be left to the member states? Heim, as a federalist of Bavaria, naturally asserted that "we do not fear unity, but we fear unity under the rule of Berlin," quoting that remark of a Bavarian statesman during the discussion of the *Reich* constitution in the Bavarian Assembly. He believed that excessive centralisation would inevitably destroy the idea of the unity of the *Reich*. "It is a dangerous game to try to coerce the member states." A strong and united Germany could not be created in that way. History showed that ideas which have their roots in the people do not die. The federalist idea would be certain to retain its vitality, and the farther centralisation was carried, the stronger would that idea become. "That I guarantee, for I know the Bavarian people." The new constitution would put an end to the federal state; it created a centralised state, a Great Prussia, which would be omnipotent, and there would be danger of a new Imperialism.

This speech of Heim was an uncompromising statement of the Bavarian attitude towards federalism. Another federalist declaration was made by Beyerle of the Centre Party. He asserted that unitarism was an old ideal of the Left, and had obtained a strong body of supporters among the socialists; now it had reached its height in the demand that the individual

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, pp. 3034-3035.

states should share the fate of the monarchs, and there should be one single strong central authority in Germany.[1] On the other side there was strong support for particularism or, as he preferred to call it, state independence.

The draft of the new *Reich* constitution which Hugo Preuss had worked out for the socialist cabinet ministers was intentionally strongly democratic and unitary. It was democratic in the sense that the balance of state authority was to rest with the German people and its elected representatives; it was unitary in the sense that the draft aimed deliberately at strengthening the unitary power of the people as a whole, that the hitherto individual states were to be reduced to the status of self-administrative bodies, whose very dubious statehood was to be merely a device for winning or quietening public opinion.[2] And even this was defended by the responsible minister as a compromise adopted instead of even more far-reaching plans of unification only for reasons of immediate practical politics.

But Beyerle argued that the constitution must from the first be based on the idea of federalism. "We shall have regard not so much to juristic conceptions, such as sovereignty and *Kompetenz-Kompetenz*, as to the creation of sound individual institutions, which shall not be too much ahead of their times and therefore unable to develop in accordance with the spirit of the times, and shall also not be so bound by tradition as to be unable to respond to new needs."[3]

Like other federalists, he argued that federalism was necessary for the racial community in such a country as Germany, but nevertheless the interest of the nation and *Reich* must be predominant. He remarked that "we advocate the federal state not out of petty selfishness or because of particularist inclinations, not because of distrust of the central power, and still less because we are prejudiced in favour of any special juristic form. We favour a healthy federalism which shall render to the *Reich* what belongs to the *Reich*, and will not overshadow the member states, because we are convinced that the federal state is adapted to the nature of the German people, corresponding to their struggle for freedom in association."[4]

The internal expediency of the federal state was shown by its existence and its favourable development on both sides of the ocean. It is not appropriate only to monarchical powers or

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. II, p. 1149.

[2] Ibid., p. 1150. [3] Ibid., p. 1151. [4] Ibid., p. 1155.

petty states; it is best adapted to the free organisation of the larger national communities and is therefore a source of national well-being.[1]

He considered the modern great state to be a gigantic machine which all too easily crushes individual personality. He remarked that "the affairs of a small state community which is part of a larger union give rise in that narrower sphere to activities which are to the common good, and encourage and reward powers which are put at the service of the state because they are not withdrawn from the cognisance of the larger national collectivity. The member state of a great realm must, however, be a state, not merely a province; that is to say, it must both in external form and in its internal competence be a political institution of such a nature that it can be the symbol of the smaller community, and have the rights necessary to enable it to discharge its tasks adequately."[2]

He concluded that "it is not for us to exaggerate the sovereignty of the National Assembly, but it is for us to retain the sound elements of the federalist constitution which has maintained itself in the consolidated republics elsewhere, and should with us so maintain itself as to arouse and unite all our powers, to drive out all discontent with the *Reich*, and have in mind what we all so earnestly desire, the accession of German Austria."[3]

Hugo Preuss answered this speech by denying that the *Reich* is an entirely bureaucratic institution, whilst the individual states are the representatives and promoters of "culture." He asserted that what the *Reich* lacks is bureaucracy, i.e. administration, and that the real administration, and with it bureaucracy, has its stronghold in the individual states and gives them their strength. No one would undervalue what the individual states had done for German civilisation. The nature of the federal state offered a wide field for discussion, in particular the question as to the precise distinction between the member states of a federal state and the autonomous self-administrative state was one on which he had written long ago, but no one had yet given a satisfactory answer to the question. He would himself not be disposed to treat the difference as one of fundamental importance.[4]

With regard to the idea of centralisation, which to some extent had been discussed in the National Assembly at Weimar, there were two ways of approach, either through the socialist

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. II, pp. 1155, 1156.
[2] Ibid., p. 1156. [3] Ibid., p. 1164. [4] Ibid., p. 1165.

conception or through the democratic idea of the unitary decentralised state. The opposition to the centralisation of legislation and administration, as well as of jurisdiction in the hands of the *Reich*, was derived from the traditional conception of the German federal state which was advocated by the southern peoples and the Centre Party. Preuss explained in the Assembly the juristic conception of the centralised tendency of the constitution. He remarked that on the whole the constitution was based on compromise after much consideration of the wishes of the individual states and their representatives and governments. He did not understand how anyone could speak of the centralised coercion of the individual states, as on many sides the complaint had been made that by these compromises and regard for the wishes of the individual states the strong movement towards unification which the Revolution could have set free had been restricted and indeed repulsed.[1]

As regards what was alleged to be the guiding motive of the draft constitution—that is to say, the domination of the whole of Germany by Berlin and the spirit of Berlin—Preuss declared that the constitution would assuredly not work in that direction. "The question whether the cultural centres of the individual states will again bloom and flourish does not depend on the constitution, but on the totality of economic and other conditions. I believe that, in accordance with the true German spirit, if our economic and other circumstances improve generally the cultural centres of the individual territories will, under this democratic constitution—so far as the constitution affects them at all—revive and prosper better and more freely than they did formerly under the political hegemony of Prussia."[2] With the repudiation of Prussian hegemony by the democratic constitution there could be much less talk than formerly of the domination of Berlin.

Haas, of the German Democratic Party, remarked that the proposal of the German People's Party to omit the provision that each territory must have a democratic (*freistaatliche*) constitution, had been supported by the argument that this was a blow to the sovereignty of the German federal states. He could not understand that argument, since the German People's Party was ready to accept the rule that all the federal states must have democratic and parliamentary constitutions.[3]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 3036.

[2] Ibid., p. 3037.

[3] Ibid., pp. 3072–3073.

If the *Reich* was to be republican, it would be quite impossible to have monarchical constitutions in any of the individual territories.

The question had also been raised as to whether an individual federal state could declare itself to be a "council republic" (*Räterepublik*). The answer was a direct negative. According to the constitution of the German *Reich* which had been the subject of debate, the *Räterepublik* would be unconstitutional because by its very nature it conflicted with the fundamental principles of the democratic state, namely, that the representative assembly must be chosen by universal, equal, direct and secret vote, and the territorial government must have the confidence of the representative assembly. These two principles were sufficient to show that a *Räterepublik* would not be possible in any individual state; it would be in conflict with the provisions of the constitution.

A member of the Social Democratic Party, Quarck, remarked that the socialists were in favour of democracy and opposed to the idea of the *Räterepublik*, but he did not understand why so much alarm had been caused by the proposal to set up such a republic in the state of Gotha. In the first place the popular vote there had not yet been taken, and, secondly, "if a little country like that is sufficiently self-sacrificing to allow itself to be used as a trial ground for such a thing, it can well be given a certain amount of time in which to discover that it is proceeding on wrong lines."[1]

In any event the question remained whether the new German constitution was to be that of a unitary state according to the model of France, or a federal state like that of the United States of America, i.e. a unitary and centralised or a federative state. This was the main point of controversy.

Alpers declared that unified France is ruled from Paris by uniform laws and methods. Paris is supreme. All other centres of French civilisation have sunk into insignificance. The farther from Paris the lower is the average cultural level of the French people. The super-culture of the capital has been created at the cost of the neglected provinces. Unitarism had even before the war led to proposals for the federalisation of France.

For German politicians to try to take foreign ideals and foreign theories, suitable enough to other peoples, and put them into practice in Germany would be a disastrous mistake.[2] The federal system on the other hand had given to the German

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 3075.

[2] Ibid., Vol. II, p. 1122.

fatherland a number of cultural centres in the capitals of the individual states and in their university towns. This contrast with unitary France was not to the advantage of unitarism. The federal system in the German fatherland had given to the individual states full freedom in their internal affairs—freedom which extended even to their form, so that the German Empire had included numerous monarchical states and also prosperous republics.

The federative order corresponds to the individuality of the German people. The racial divisions of that people might be regrettable, but they were a fact, and a constitution, to be suitable for its purpose, must take them into account. All attempts to turn the German nation into a unified nation were certain to fail, as in the past. Unity is necessary in the modern state. Political unity vis-à-vis foreign states was necessary in the new German *Reich*; it was necessary in military affairs, in legislation relating to trade and communications—there must be economic unity to meet strong competition. The efforts towards unity only became dangerous when they sought to interfere with racial individuality; they called forth an amount of justifiable opposition which, if it developed into particularism, would imperil the essential political and economic unity.

The problem to be solved was therefore that "of bringing the natural racial divisions of the German people into harmony with that unity which political and economic development had made necessary."[1]

Dealing with the question of the attitude of the *Reich* government towards the proposed constitution of the state of Gotha, Preuss agreed with Kahl that in a federal state there is no sovereign state.[2] Nevertheless, in all federal states, in both Switzerland and in North America, there were rules determining the form of the constitutions of the constituent states. But it was one thing to have in the former monarchical Empire three republican states like the Hanse towns; it would be quite a different thing to have a monarchical state forming part of the German republic. The latter position would be an impossibility. To have a monarchy subject to the republic would be a contradiction in terms. Therefore he was firmly convinced that "it is absolutely necessary in the interest of the homogeneity of the individual states and the *Reich* to maintain this unity in respect to the essential form of the state."[3]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. II, p. 1123. [2] Ibid., Vol. V, p. 3068. [3] Ibid.

Haussmann, a representative of the German Democratic Party, discussed not so much the state form embodied in the constitution as the question of the unitary or federal state.

He pointed out that the main organic difference between the new constitution and the previous one was that "the federal council is no longer the central point of the policy of the *Reich* and of the federated governments."[1]

This was obviously a marked advance towards the unitary state. This step had been taken by all parties. The pressure of hard times did not permit of that freedom for the individual states which had formerly been possible. Haussmann was convinced that whatever might be the rival merits of the conflicting principles embodied in the federative state and the unitary state respectively, "we must admit, whether we like it or not, that in regard to many matters unified legislation and administration are absolutely necessary."[2] As examples he mentioned the railways and postal services, *Reich* expenditure and taxation, waterways and a defence force.

Haussmann was not, however, prepared to go so far as to do away with all organic ties between the *Reich* and the states. He welcomed the institution of the *Reichsrat* as showing a regard for historical development and also for practical needs.

This *Reichsrat* was to be neither a first nor a second chamber, neither a parliament nor a "house of states," i.e. not a federal state, but it was to be a *Kollegium*. Haussmann was not in favour of a "house of states" nor a bi-cameral system, since he considered that the requirement of the state was the creation of a unitary state will which could be manifested only in "one corporation, but not in two."[3]

As regards the reorganisation of the *Länder* by the regrouping of their parts, he pointed out that the proposals were that such reorganisation should take place only with the consent of the *Länder* directly concerned and by *Reich* enactment. This was to be under the constitution the normal and desirable course, but a constitutional law of the *Reich* could enforce such recognition provided that either such a law was demanded by a free popular vote, or the general interest clearly made it expedient. In the latter case there must be a two-thirds majority in the legislature.[4]

A new feature, namely, the referendum, had been introduced

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2937.
[2] Ibid.
[3] Ibid., p. 2938.
[4] Ibid.

into the constitution. In that case the people themselves become the legislators, and the legislation is enacted not by the representative assembly but by the sovereign, who is the source of the state power.

After discussing the election of the president of the *Reich*, the organisation of the government, the referendum and its relation to the legislature, and the system of proportional representation—with which he was not entirely agreed[1]—Haussmann remarked that "if this constitution be adopted, then no nation in the world has a freer constitution. This solution is in accord with the spirit of the nation. The German *Reich* is a unitary, national and democratic state, based on a free self-determination of the whole nation. The *Reichstag* is the holder of the sovereignty which is vested in the people. This freedom is not to be surpassed in any constitution. A condition of the proper functioning of this free constitution is that the state and the popular representative body has the force requisite for the formation of the unitary will." He declared that "if that force is lacking democracy breaks down, and we must the more earnestly bear this danger in mind because the trial has to be made in the most difficult conditions imaginable. For domestic freedom needs for its development external freedom also, and we lack that external freedom after all that the world war, time, this year and this month have brought upon us."[2]

Preuss had called for "the national self-consciousness of a people organising itself into a state." This supreme demand the constitution ought to meet and did meet. Besides its constitutional purpose the constitution could serve an educational purpose, applied to all parties and to all classes. "Every worker must be a citizen and every citizen must be a worker." He quoted Fichte's phrase: "The state must be inspired with the spirit of the nation, and the nation must be inspired with the spirit of the state."[3]

Kahl, a member of the German People's Party, in a speech on the federative doctrines of the new constitution, remarked that the heading of the first section was *Reich* and *Länder*. In the government's draft this had been, "The *Reich* and its constituent States," a phrase much in vogue among political scientists, to express the organic relation of the parts to the whole. The majority of the committee had, however, attached

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2939. [2] Ibid., p. 2940. [3] Ibid.

little weight to precise juristic phrasing and had thought it should use the term *Land*, so firmly embedded in German popular and poetic speech, in place of the more abstract term "State," which had for so long been used in connection with the creations of constitutional law.

To him the expression *Reich und Länder* (*Land* meaning in fact the individual state) implied the constitutional principles that the state structure to be created by the new constitution was not a unitary state but, now as formerly, a union of states, a system of states.[1]

It had been asserted on many sides and on various occasions that the establishment of the German unitary state was the "final political goal," but it was also not disputed that in existing political circumstances the form of a union of states must be maintained. The precise juristic nature of this union was not a matter for the legislator to determine. One thing was beyond all doubt: "The new *Reich* is a federal state."[2] To determine the precise extent to which juristically it differed from the former constitution, in what respects it showed retrogression or progress was a matter which could be left to the scientific specialists. The real touchstones were the establishment of the *Reichsrat* and the division of powers between *Reich* and states.[3]

So he contended that no matter how large or small the changes, there was a legal continuity between the old and new federal state; both were the same legal subjects. So the new source of public law styled itself "the constitution of the German *Reich*" instead of that of the German Republic.

He first discussed the state form and the state authority. These were inseparable, for the nature and content of the state authority determines the form of the state. The *Reich* was a "republic," because as the result of the Revolution the state power was derived from the people. This fundamental principle was to apply in future to both the *Reich* and the *Länder*. Duality of state forms, such as had existed under the previous constitution, was not possible in future. The *Länder* were bound in three other matters—their electoral systems, their parliamentary systems and the adoption of universal franchise for local government elections—to follow the *Reich*. Consequently in the *Reich* and the *Länder* the people were placed in possession of the state authority.[4]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2941 [2] Ibid.
[3] Ibid., p. 2942. [4] Ibid., pp. 2942–2943.

But as regards the exercise of that authority the executive organs were to be determined for *Reich* affairs by *Reich* legislation and for *Länder* affairs by *Länder* legislation.

Secondly, Kahl discussed the problem of the territory of the *Reich* and *Länder*, which was one of the chief questions arising under the new constitution.

The territory of the *Reich* consisted of the state territories of the *Länder*, but there was to be no such enumeration of them as in the German constitution of 1871. In the present constitution—after the Treaty of Versailles—there was no direct *Reich* territory. An extension of the territories of the *Reich* could be made by an ordinary *Reich* enactment if the population of a state in the exercise of its right of self-determination desired admission; this provision had of course regard to German Austria.

But in respect of territorial boundaries the new *Reich* laid claim to a much greater influence than its predecessor. In 1871 the existing territorial position was taken as decisive; the territory which each state brought into the Empire was constitutionally guaranteed. In the new constitution this principle of historical possession had been replaced by the principle of the expediency of the distribution of territory, which according to Article 18 was to be made "with the purpose of securing cultural and economic efficiency with the greatest possible consideration of the will of the population concerned."[1]

He asserted that this principle of expediency could be applied in two opposite ways; it could result in either division or union. During the drafting of the constitution there had been profound differences of opinion as to whether, and if so how far, legal compulsion could be applied to one or other of the territories concerned. In the end it had been laid down that as a rule the consent of the *Länder* concerned must be a prerequisite, and the change of the territory must be confirmed by a law of the *Reich*. But it was also provided that if the consent were refused or withheld, recourse could be had to a *Reich* enactment amending the constitution in cases when the change was demanded by the inhabitants of the territory in question, as clearly shown by a popular vote, or was necessary for reasons of high policy.[2]

As to the division of competence between the legislation of the *Reich* and that of the *Länder* there were two possible courses. One could lay down the general rule that the legislative power

[1] *Die Deutsche Nationalversammlung im Jahre 1919*. ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2943.

[2] Ibid., pp. 294.

of the *Reich* was "unlimited," and then draw up a list of all the matters reserved for the time being to the *Länder*, or one could follow the example set by Article 4 of the existing constitution and enumerate the subjects of legislation reserved to the *Reich*.[1] For sound reasons of history, of law and legal technique the committee had adopted the second course.

In this respect Kahl, like other federalists, urged that the right formula to govern the relations between the legislative power of the *Reich* and that of the *Länder* must be such as to have regard to the necessity of increasing and maintaining the unity of the *Reich* on the one hand, and on the other hand of securing to the *Länder* the continuance of their independent statehood. And he pointed out that with this object in view the draft constitution provided for an exclusive, a concurrent and a regulative (*normativ*) legislation of the *Reich*.

The importance of the exclusive jurisdiction was that "the *Länder* cannot legislate on the subjects enumerated, and are not entitl :d to do so, even if the *Reich* has made no use of its legislative power."[2]

The concurrent legislative authority related to matters on which the *Länder* might legislate only "so long and in so far as the *Reich* had made no use of its right of legislation."[3]

Lastly, regulative (*normativ*) legislation meant that in respect of certain enumerated matters "the *Reich* can only lay down general rules, leaving the details to be dealt with by the legislation of the *Länder*."[4]

With regard to the relation of legislations of *Reich* and *Länder* there were two other points to be settled. There was first the question of the "conflict of laws." The main principle was that "federal law overrides state law." That did not need to be argued; it was a consequence of the very structure of the federal state, and was in accordance with the position in the old Empire and in the Empire of 1871. It was subject to no reservation whatever. "The law of the *Reich* is absolute, not merely subsidiary, general law"; that is to say, it applies not only to cases in which the law of the *Länder* has not set up rules differing from it, but in the sphere of its authority it takes the place of the law of the *Länder*. Therefore the constitution is "the rule for, and the limitation upon, the formation of law of the *Länder*."[5]

[1] *Die Deutsche Nationalversammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2945. [2] Ibid., p. 2946.
[3] Ibid. [4] Ibid., p. 2947. [5] Ibid., p. 2948.

With regard to the carrying out of the laws of the *Reich*, Kahl pointed out that this was, as hitherto, a matter for the officials of the *Länder*, unless the law expressly provided otherwise. This applied to the sphere of concurrent legislation; for obviously there could be no question of *Länder* officials in matters which were subject to the exclusive legislation of the *Reich* and its direct administration. But it had been wisely provided that the *Reich* officials employed in the *Länder* should be chosen generally from the subjects of those *Länder*.

Finally, he drew attention to the important question of the relation of constitutional law to international law. Objection had been taken earlier in the debates to the provision that the "universally recognised rules of international law are valid as though incorporated in the law of the German *Reich*."[1] The objection was based on two grounds. The first was the uncertainty as to what constituted the "universally recognised rules of international law," and the second was that international law, that is the law of states, would thereby be given the status of domestic law, whilst hitherto the subjects or citizens of a state had become subject to international law only in consequence of legislation in their own state. The provision had therefore been replaced by one which simply laid down that, besides treaties and the rules of any future League of Nations, the generally recognised rules of international law should apply to the relations between the German *Reich* and foreign countries. But on the strong representations of the Foreign Office and the Ministry of Justice the original text had been re-inserted. Kahl declared that both those departments of the government attached great importance "to this reversion to a principle which had for a long time prevailed in Anglo-Saxon jurisprudence and state practice. The proposed constitutional recognition of the value and validity of international law would deprive Germany's enemies of the opportunity of reproaching her that the law was less regarded in Germany than in the region of Anglo-American law, a reproach to which it could be replied that Germany had during the war offended against international law much less than her enemies."[2]

The right of supervision of the *Reich* was strengthened to the extent that the government of the *Reich* was to be empowered to issue to the *Länder* officials, besides general administrative orders, definitely binding instructions, and was to have full

[1] *Die Deutsche Nationalverammlung im Jahre 1919*, ed. by Justizrat Prof. Ed. Heilfron, Vol. V, p. 2949.

[2] Ibid., pp. 2949–2950.

powers of inspection with the assistance of the authorities of the *Länder.*[1]

Finally, Kahl considered the "settlement of disputes between the territories and between the *Reich* and the *Länder.*" He pointed out that care had been taken to secure that in all circumstances such disputes should be peacefully settled by the supreme court of the *Reich* whose decision would be enforced by the President of the *Reich.* Kahl concluded by declaring that in his judgment the fair adjustment of state claims between *Reich* and *Länder* was the most difficult, but also the most important, problem of the new constitution-making, and expressing the hope that the discussion would continue without theoretical bias in favour of either unitarism or federalism, but seeking a settlement which would satisfy the *Länder* and yet secure and develop the unity of the *Reich.*[2]

Cohn's attack on Preuss's view as to the continuity of the old and the new constitution, and his resentment at the use of the word *Reich* instead of the word "Republic," were due mainly to his socialist doctrine that the question of a unitary state or the preservation of the federal state system had already been settled, since the revolution in November made a definite advance towards the unitary state and rejected any system of individual states.[3]

Preuss replied to Cohn's proposal of the German Republican unitary state, that if there had been a strong body of opinion in favour of such a state for Germany, it would, under the external pressure which Germany had felt during the past few weeks, have made itself felt with great force and have swept away all state particularism. Preuss was convinced that under the pressure of circumstances the unification of political life in Germany would make irresistible progress, but the movement must come from inside. At the present time, this progress would not be helped, it would be hindered, if those who believed in unification were to declare it to be essential. He added, "I believe that the provisions put before you in this draft—apart from details which can be debated—provide as a whole and in the main for the *Reich,* and for the unity of the *Reich,* all that is absolutely needed at the present time. They give the *Reich* the strength it requires to bear the burdens of to-day, and leave to the *Länder* such independence as is possible without imperilling the dominant interests of the *Reich.*"[4]

[1] *Die Deutsche Nationalversammlung im Jahre 1919,* ed. by Justizrat Prof. Ed. Heilfron, Vol. V, pp. 2950–2951.

[2] Ibid., p. 2952. [3] Ibid., p. 2955. [4] Ibid., p. 2961.

Therefore he urged that this compromise between the unity of the *Reich* and the independence of the *Länder* should be adopted, and the ideal of unity be left to "natural development" and internal progress.

§ 3

Political literature on German federalism since the formation of the new constitution of Weimar has not shown any fundamental development, since the basis of the new German constitution itself is a compromise and marks a transitional stage from the federal state to the decentralised unitary state.

The leading figures during this period have been broadly divided into five political and juristic groups. Of the first the representative was Hugo Preuss, the second was represented by Triepel and Anschütz, the third by Nawiasky and the Bavarian school, the fourth by Thoma and the federalist group, and the fifth and last by the Austrian school of Kelsen.

Hugo Preuss, the great contemporary exponent of the *Genossenschaft* ideas, had, as already indicated, taken a leading part in the shaping of the new federal constitution.

Preuss asserted that as the "modern national political development will be determined by the principle of the democratic state," the ideal of the "people's community" (*Volksgemeinschaft*) is misunderstood and misrepresented by those who rank class interests above the civic solidarity of the national commonwealth.[1] This, he declared, was done by the German adherents of the Communist International, but not by their Russian master.

He remarked admirably in his address to the Trade Union Congress of the AfA-Bund in 1925, on the "Importance of the Democratic Republic to Social Thought," that "from two entirely antagonistic sides it is contended that democracy and republic are of no value to social ideas and social progress."[2] There were those who argued that "formal democracy"—meaning thereby the constitution of Weimar—was of no social importance, so long as the capitalist economic system was not destroyed; that the democratising of the form of the state would be an insubstantial vision unless accompanied by the socialisation of the means of production; and that the civic equality resulting

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 20.
[2] Ibid.: *Staat, Recht und Freiheit*, 1926, p. 483.

from democratic freedom would be as deceptive as the private law freedom of the so-called free contract between the possessor of the means of production and the proletariat which possesses nothing except its labour. And there were others who contended that under the democratic republic the workman would be even worse off—for in it the propertied classes would rule altogether unchecked.

As Preuss was a democrat, but not a socialist, though his argument clings to liberalism, his underlying conception of the *Genossenschaft* is revealed in his criticisms of the democracy of the capitalist republic. His first and last argument was that freedom under the democratic and republican constitution would be helpless and untenable if there were not in existence legal securities of the right of equality of citizenship, and checks and limitations on the free action of the propertied classes. There were, he pointed out, still those who claimed that in the capitalist economic system the only possibility of real social reform lay in the existence of a strong monarchy which is superior to class interests and ambitions and immune from class egotism and can bridge them.

As regards the complaint that the democracy established by the constitution of Weimar was only formal, Preuss admitted that every system of law is in a certain sense only formal. It assigns formal limits to the "spheres of will" of individuals and groups. Even the Soviet constitution is largely "formal," in that it deals with mere organisation, modes of election and franchises.[1] He pointed out that "the value of a constitution to social ideas is determined by whether the shape, the formal shape, which the constitution gives to the state organisation is favourable to and promotes social development, whether on the legal side it opens to that advance the freest possible road or hampers it by privileges on the one hand and the withholding of rights on the other, and whether it gives artificial encouragement or presents artificial obstacles to the natural development of social reform.[2]

Not that a constitution, even that of a democratic republic, could create the future socialist state. Its value from the social point of view depended on the relation between the legal principles and rules which it laid down and the principles of progressive socialisation. Although Preuss was "not a socialist" he accepted this principle (*Satz*) of progressive socialisation with the "calmest certainty" because it is an "undeniable

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 484. [2] Ibid., p. 485.

fact."[1] The law of socialisation has a certain natural necessity, illustrated by the development of common means of communication, of lighting, of the supply of power and water, etc., with all its consequences. As a result of the world war there had been, contrary to general expectation, a retrogression of this movement, in spite of the increase of the number of socialist votes; there had been an ebb-tide of socialisation and the growth of anti-socialist super-capitalism. To Preuss's mind this was due to the fact that the Great War tended to disintegrate mankind not only spiritually but also economically, since by exaggerating the difficulty of international exchange and intercourse it had in some measure enlarged the distances between peoples; so long as it lasted, it prevented or interrupted the working of the law of increasing socialisation. It is of the utmost importance whether a system of law impedes the development of this law of increasing socialisation, or—otherwise expressed—the intensifying of communal life, by artificial restrictions, legal inequalities, privileges and deprivations of rights, or smooths the way for it by democratic equality of rights. This levelling does not lead immediately to the ideal goal; these obstacles do not prevent the ultimate attainment of the goal. They affect only the pace of the development and above all determine if it is to take place by the way of healthy, peaceful, internal development or by means of internal struggles and conflicts.[2] That is the main difference.

Preuss argued that though freedom of contract in respect of labour results in formal equality between employer and worker, it admittedly does not, in fact, remove the social and economic inequality between them. But that does not mean that it is worthless. For without it the whole of the modern socio-political movement is inconceivable; it could not have taken place in conditions of slavery or serfdom, or the compulsory craft and gild system. So he asserted that the formal democracy of the constitution offers the "basis, the starting-point, and the necessary presupposition for an ample, powerful, if gradual and step-by-step development, of the social idea."[3]

And amongst non-socialists, Preuss declared, it must never be forgotten "that despite many mistakes and lapses socialism, whilst attaching great importance to material things, had always stressed the fact that men, the workers, do not live by bread

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 485.
[2] Ibid., p. 486.
[3] Ibid., p. 487.

alone, and that their idealistic claims to freedom are a necessity of their lives."

And in regard to much social work there was often the conviction among the workers that material gain in this respect could be purchased at the cost of personal freedom and self-respect. This was true of the social policy of the "police state" and of the later imperial social policy. Politically, both the liberals and the social democrats had taken a wrong line in regard to that policy; but it was not disputable that a social advance, a real social conciliation of the various classes of a unitary people, could be brought about by means of a social policy from above.

Preuss declared that "just as the enlightened labour policy —if you like so to describe it—so the authoritarian social policy was a means to an end, namely, power. The immediate evidence for that is the fact that the social legislation was set in the frame of the exceptional laws, the anti-socialist legislation. It had not social reform as an end in itself, not the introduction of social ideas into the organisation of the state, into the communal life of the state, but it was an instrument for the attainment of power."[1]

For the attainment of this social ideal there were two contrasting forms of the state. As the socialists called themselves "comrades" (*Genossen*) there must be the *Genossenschaft* idea of organisation, developing from the bottom upwards, and on this basis the republic and the democratic principle could rest. "They derive their authority not from above but from the community of the members, the citizens, rising up from the narrower to the wider unions, from the bottom to the top." Contrasted with this there is the authoritarian, domination state formation, imposed from above, which lays claim to an "*a priori* authority."

Max Weber had defined state authority as "the monopoly of legitimate application of power." If the exercise of this monopoly of legitimate power was not in the hands of the collectivity but in those of a dynasty, a class, a caste, or an authority, the *Genossenschaft* spirit of the collectivity would be entirely destroyed.

Preuss pointed out that democratic equality of rights is not the same as the fiction of complete personal equality. Men are not alike; they are, in fact, very unlike. Further political organisation, like all organisation, means differentiation, division of labour, that is, inequality.

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 488.

Why, then, is equality of electoral right, political equality, everywhere the basis of the democratic state system? The answer is that at the present state of social, cultural and economic conditions, formal legal differences in the allocation of political rights would lead to arbitrariness, privilege and deprivation of rights, and the proper assignment of different rights according to differences of personality is impossible. It is argued by those who want what they call an "organic," i.e. an unequal, franchise, that the highest legal principle is not equality for all, but equality for equals and inequality for unequals. But how can this differentiation be applied? It was possible at a time when the rights of the various social classes were definite and effective; it was not possible when those rights were in ruins, and could only be maintained at all by cunning and force. At the time when they were in force the system of rights could properly be applied to classes as a whole. Some individuals came outside their class, but these were exceptional. So Preuss asserted that from this point of view modern social development means the differentiation of individuals and integration of classes.[1] He was scientifically convinced that "our development is characterised not by the deepening of class antagonisms but by this integration of classes." There is a levelling of moral and spiritual differences and of class-types; that is, they are levelling up to the same degree that individuals are becoming differentiated and spiritually diverse. Modern democracy means this differentiation of individuals, the marking them off from their class, and the integration, the equalising of the various social classes and vocations.[2]

Economic conditions also promote the elimination of class distinctions. As this is inherent in modern development, the legal system can no longer attach differences of rights to differences between strong and compact groups. "Therefore democracy, in the sense of unrestricted equality of rights, is not a doctrinaire whim or a dogma elaborated in the study, but it is the natural and legal consequence of the whole new economic, social, cultural and moral development."[3]

But this modern conception of democracy, on the basis of equality of rights, does not involve atomisation, it does not mean the break-up of society into a plurality of unrelated individuals. The security—essential and unavoidable for the state entity—against such a consequence is the voluntary self-organisation of the people, so possessed of equal rights, into parties.

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 490. [2] Ibid., p. 491. [3] Ibid.

Preuss went on to contend that there was no antagonism between the older liberalism and democracy, and that the economic doctrines of that liberalism were not anti-social. It was only when "competitive capitalism" turned into "monopolist capitalism" that it became necessarily what competitive capitalism, so long as it is healthy and vigorous, is not, namely, "anti-democratic and anti-social."[1] And on the contrary the democratic and social ideas have their roots in the *Genossenschaft* principle of the commonwealth of the democratic republican state.

Preuss declared his conviction that the attitude of the majority socialists in the crisis of 1918–1919 had been statesmanlike and "national in the true sense of the word." The social and democratic principle had alone offered the possibility of creating a new state structure based on the combination of the democratic, social and national ideas. And he added: "A nation, which believes itself not to be bound together any longer by subjection to a number of related dynasties, what is it other than an association community, the associated collectivity of a people having a common history, a common language, a common civilisation, a people wishing to be itself, developing itself with its own individuality, of its own nature, on its own moral basis, as a complete and worthy member of the international community? But if this national community is to hold firmly together, it must—at the stage of civilisation and moral development which a people like ours reached long ago—live in a legal state (*Rechtsstaat*) which promotes and facilitates the improvement of the status of all sections of the people and makes clear its path, so that the natural development of this upward movement is not hampered and harmed by antiquated privileges and legal inequalities of a formal but none the less effective nature."[2]

The necessity of the democratic equality of rights must be a reality of the *Rechtsstaat*. The collective work of the community for the democratic state creates at the same time the common ground for the diverse economic and social interest groups and classes. Preuss held that "We must not think that economic and social conflicts will disappear from even the finest democratic state system any more than party conflicts. Such stagnation would be disastrous." But "common political action, mutual understanding, the sense of comradeship and the habit of political association, create mutual respect and mitigate friction and conflict."[3]

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 493.
[2] Ibid., p. 494.
[3] Ibid., p. 495.

The great mass of the citizens possessed of the franchise more than offsets the aggression of monopoly capitalism.

Without the democratic and social spirit of community it would have been impossible during the difficult years since 1919 to uphold the German *Reich*.

As he was a champion of the *Genossenschaft* theory Preuss believed that "without this spirit of community, without a communal sense arising from this national democratic and social principle, all would have gone to pieces. A policy aiming at power, a mere authoritarianism, would have failed completely on the Rhine and in the Ruhr to keep the sons of the Fatherland at home. They had remained truly national in spirit, not because they were ordered to do so from above, but because they themselves willed it."

Admittedly serious weaknesses in the state had shown themselves even during that period. At the time when all the so-called citizen class feared that the red wave of socialism would engulf them, monopoly capitalism had been most rampant and unrestrained. Preuss declared that in those circumstances he had often declared: "I do not fear socialism, but social reaction. That will not be the result of what has actually happened, but of your fear."[1] And he asserted that the fact that large numbers of citizens had become impoverished during the period that the Weimar constitution was in operation was not due to the working of that constitution or to its social content or to socialism, which had perhaps done much that was wrong and unfortunately had not done some things that were right, but was due to these "orgies" of monopolistic capitalism.[2]

But a change had come, and that capitalism had shown itself disposed to modify its natural antagonism to democracy and the republic: it seemed even "formally" to recognise the republic. Perhaps they remembered the scoff that it was only a "formal" democracy, and for the merely "formal" the monopolist capitalists have little respect or fear. There were signs that their policy was to be: "Recognition of the republic as a constitutional scheme, and a middle class united front against socialism." But such terms would in Preuss's opinion be too high a price to pay for that recognition. It would mean destroying the kernel and leaving only the empty shell.[3]

Consequently all adherents of the democratic, national and social republic, all who were animated by its spirit, must stand

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 495.
[2] Ibid., p. 496.
[3] Ibid.

together against the struggle of the anti-democratic and anti-social monopolistic capitalism to obtain the mastery. These adherents might differ in their ideals of political freedom, national unity and social progress, but their goal was essentially the same. Preuss therefore concluded that the national unity within the community of nations, political freedom, democratic equality of rights, and social progress in accordance with the natural development of things must be served and fought for in common.[1]

Preuss's ideal, derived from his *Genossenschaft* theory, was the decentralised unitary state based on equality and liberty, in which the ideal of socialism should be the inevitable and natural necessity for the modern democratic state.

In *Um die Reichsverfassung von Weimar* Preuss discussed the problem of the Rhineland and the Ruhr, which at that time (1924) had become accentuated by the French occupation of the Ruhr. There had been a revival of the idea of the separation of the Rhine districts from Prussia, eventually also from Bavaria and Hesse, and their formation into a separate territory, which would, however, remain a constituent member of the German *Reich*. This proposal was at first sight very attractive, because it seemed to combine two hitherto antagonistic movements into a higher synthesis. The national unity of the *Reich* would be unaffected, and yet the Rhine territories would be given an autonomy and freedom of development appropriate to their particular situation.[2]

Preuss recognised that when the constitution of the *Reich* was drawn up at Weimar there was a strongly expressed opinion that the traditional territorial division of Germany, which was largely due to dynastic causes, did not offer a secure basis for the new national state, and that such a basis could be obtained only by a redistribution determined by racial and economic considerations. If this conception were applied, the centralised unity of Prussia in particular could not be maintained; its great provinces, such as the Rhineland and Hanover, would enter into the same direct relations with the *Reich* as did the other German *Länder*.

With this line of thought Preuss had much sympathy, but he thought any movement to give effect to it in the case of the Rhine and the Ruhr would be fraught with great danger in

[1] Hugo Preuss: *Staat, Recht und Freiheit*, 1926, p. 497; Cf. Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 22.

[2] Ibid., *Um die Reichsverfassung von Weimar*, 1924, p. 24.

the political circumstances of the time. Apart from the obvious purpose of French policy to use such a Rhineland state to weaken German unity, and the risk that the success of particularist efforts there would stimulate them elsewhere, the great need was to restore Germany's economic life, and he believed that to be impossible unless the national unity of the *Reich* was maintained. The overthrow of the egotism of the small states (*Kleinstaaterei*) had first given Germany the possibility of becoming a great economic state; a return to the régime of the early nineteenth century would restrict and impoverish Germany's economic life. Only as part of a great state had the Rhineland and Ruhr attained their development.

So he concluded that "not only national duty but economic insight and foresight also must impel the leaders of large-scale industry to place their power and influence unreservedly at the service of the unity of the *Reich* and the national Republic."[1]

The natural centre of gravity of the compact mass of the Prussian unitary state and its territorial position in the old *Kaiserreich*, with its elaborate scheme of Bismarckian federalism, brought the small states in all important matters into helpless dependence upon Prussia, a dependence which had been completed by Prussia's state railway policy. Preuss asserted that from the point of view of Prussian authoritarian government this hegemony was not purchased too dearly by concessions to the particularism of the dynasties and authoritarian governments of the larger individual states, and especially of Bavaria.[2]

As regards the cardinal problem of the internal structure of Germany, the obstacles which the traditional position of the dynasties had presented to the attainment of true national unity had been removed by the Revolution, but a new danger had arisen in that the then existing states had been disposed to make new constitutions of their own without waiting for the new constitution of the *Reich*. This was an obstacle to the reorganisation of the whole German nation in accordance with the needs of the modern national state. The small states, which had hitherto, despite apparent independence, been entirely subject to Prussia, could not continue to be so in the new *Reich*. But some of them were surrounded by Prussian territory; and this raised the central problem of the future internal organisation of Germany, namely, the continuance of a Prussian unitary

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 28.

[2] Ibid.: *Staat, Recht und Freiheit*, "Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung vom 3 Januar 1919," p. 369

state, with its strong particularism, within the future German republic. "In place of the obstacles which it has swept away the revolution has allowed new obstacles to come into existence in the form of Prussian particularism, the most dangerous of all particularisms to German unity. It would certainly greatly simplify the making of the new constitution if it could avoid dealing with this delicate and dangerous problem; but to ignore it would mean throwing the work of constitution-making into confusion."[1] Because, as Preuss explained, the establishment of a unitary republic of forty million inhabitants within a republic of altogether seventy million inhabitants, organically distinct from it, was simply a constitutional, political and economic impossibility.[2]

An individual state comprising four-sevenths of the whole *Reich* must exercise an hegemony; if Prussia was not to have such hegemony then a unified Prussia became impossible. Preuss argued, therefore, for the lowering of Prussia's status by means of the division of her territory, which was not in any respect an organic whole. The putting of the resultant parts on the same footing as other territories would tend, as Anschütz pointed out, not to orthodox federalism, but towards the decentralised unitary state. This was to Preuss the hard logic of political facts; it was also the only means of salvation from that German traditional "ideology which consciously and unconsciously stamped dependence, based on community of interests, on the dynastic military and bureaucratic *Länderstaatlichkeit*, as patriotism"; and it was the only way of removing a danger, as great as any demagogy, to the new creation of the democratic national state.[3]

He insisted on rearrangement of territory in the new national state because the "senseless confusion of the traditional territorial boundaries was not compatible with the necessities of a decentralised unitary state or with those of a federative national state structure; on the contrary, within these meaningless territorial boundaries the spectre of *Länderstaatlichkeit* maintained itself in being in hostility to the idea of the national state."[4]

With regard to Bavarian particularist rights, Preuss remarked that, in order to secure the "pseudo-federative forms" which were to veil the Prussian hegemony in the German Empire, Bavaria had to be conciliated by Bismarck with all kinds of

[1] Hugo Preuss: *Staat, Recht und Freiheit*, "Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung, vom 3 Januar 1919," p. 374. [2] Ibid.
[3] Ibid.: *Um die Reichsverfassung von Weimar*, 1924, p. 30. [4] Ibid., p. 33.

reserved rights and preferential treatment. If at the present time Bavarians opposed the German Republic and the Weimar constitution, and appealed to the Empire and the Bismarckian constitution, they counted on the shortness of the public memory. For despite reserved rights and so-called federal guarantees the very incomplete national unity under the *Reich* went too far for Bavarian particularism. As Preuss said, "one fought then against Prussian militarism in the same way and with the same undercurrent of anti-Semitism as one does to-day against the Marxians of Berlin."[1]

After an overthrow of the old system in consequence of the world war the only hope for the political maintenance of Germany lay in the union of nationality and state into a national democracy. But even then the German people could not free itself from the consequences of its unhappy history; the overthrow threatened dissolution and destruction rather than national union and cohesion. This fact only enhanced the value of the work done by the Weimar assembly, which was based on the largest attainable measure of national unity and organised the democratic national state without destroying the individual life of the *Länder*.

Even Bavaria, which during the discussions had insisted on the permanent maintenance of the reserved rights, had seemed disposed loyally to accept the new constitution. But the politically, economically, socially and morally disastrous consequences of the Treaty of Versailles had made it impossible for the new constitution to come into being and had affected worst of all the *locus minoris resistentiae*, namely, the incorporation of Bavaria in the *Reich*.[2]

Bavaria's attitude was clearly indicated by her government's attempt to replace the constitutional term *Länder* by that of "federal states" (*Bundesstaaten*).[3] Preuss thought that the Weimar constitution would have deserved to be called "doctrinaire" if it had attempted to deal with the vexed question of the statehood of the immediate members of the *Reich*. It had avoided this and "useless memories and futile strife" by using the term *Länder*, which was rooted in German history and customary speech.

The older expression "federal state" (*Bundesstaat*) must in any event be put aside, because—quite apart from the debatable question of statehood—it was meaningless alike for "unitarists" and for the "federalists." The federalists wanted not a unitary

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 47.
[2] Ibid., p. 48. [3] Ibid., p. 99.

state but a federal state, but in this respect the *Reich* was the federal state, and not Prussia, Bavaria, Lippe or Hamburg.

In the terminology of the Prussian-German *Reich*, the use of the designation *Bundesstaat* for the individual states was derived, like many other expressions, from the phraseology and ideas of the old German confederation. That aimed at being not a state or a federal state, but "an international union of the sovereign princes and free towns of Germany; its members were the states confederated in the *Bund* and in that sense could be called federal states."[1]

But it was not possible for anyone who regarded the Bismarckian imperial constitution as the constitution of a federal state to apply the same designation to the members of this federal state; that was fully recognised by the dominant doctrines of the former imperial constitutional jurisprudence. Bismarck had not troubled himself about the question because he knew the true relationship of his constitution to federalism, and that behind all forms there lay the real fact of the unrestricted hegemony of Prussia.

In this respect Preuss asserted that the other states, whether called "federal states" or anything else, were practically only Prussia's "vassal states."[2] The fact was that the Bavarian government's memorandum sought the regaining of the status of "federal state" by the territories of a *Reich* free from Prussian hegemony. This was clear evidence that Bavaria wanted to revert, not to the Bismarckian constitution, but to that of the German confederation. That is to say, it wanted an international union, not now of sovereign princes, but of sovereign free states. It was customary to contrast with the "unitarism" of the Weimar constitution the "federalism" of the American union.[3] Preuss agreed that American experience set the Bavarian purpose in a clear light, but held that the result was not a favourable one. Bavaria, he observed, had always been antagonistic to the *Reich*, ever since, more than eleven hundred and fifty years ago, Tassilo struggled for the "statehood" of his duchy of Bavaria against the unifying policy of Charles the Great. But the Bavaria of von Kahr and von Knilling was not the same as Tassilo's duchy; actually fragments of the Bavarian race had been combined with many other tribes into a "state personality" which was not ancient or deep-rooted, but was merely the century-old product of the administrator's art. In was, in fact, the product

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 99.
[2] Ibid., p. 100. [3] Ibid., p. 101.

of a highly centralised bureaucracy, and it was this bureaucracy that had been and was still the champion of Bavaria's independent statehood against unification in the *Reich.*[1]

Preuss pointed out that the last generation of the higher Bavarian officials had been directly or indirectly influenced by Munich's constitutional lawyer, Max Seydel. His doctrine of "federalism" wholly denied the possibility of a "federal state"; to him there were two possibilities only—unitary state or confederation. To him the Bismarckian *Reich* was only a league of sovereign states. The spokesmen of the Bavarian bureaucracy still held that opinion.

Seydel himself was in this respect the disciple of John C. Calhoun, the American exponent of the doctrine of "state rights" and nullification and secession. The controversy to which that doctrine gave rise had been finally settled only by the great Civil War. This was an alarming portent. Bavaria was always invoking the "treaty basis" of the *Reich*; it had begun the nullification of *Reich* laws. Preuss asked if it was ready to go on to the logical conclusion.[2]

The Bavarian memorandum spoke of the "unitarism and centralisation" of the Weimar constitution. As to this, Preuss remarked that it was absurd to suggest that the government of the *Reich*, which unfortunately had no subordinate institutions in some of the most important branches of administration, was centrally organised. Finance was an exception, but a revision of the Weimar constitution was not necessary in order to rearrange the financial system in the interests both of the *Reich* and of self-government. But the constitution of Weimar admittedly, in accordance with its own basic ideas, needed subordinate institutions on the lines of decentralisation of self-administration. The great grievance expounded in the Bavarian government's memorandum was that the constitution had degraded the *Länder* by making them "something intermediate between a state and a superior self-governing body." That seemed to Preuss to show the true bureaucratic spirit; self-government meant to it degradation of rank. And yet decentralisation was treated at the same time as something most desirable. He declared that "the obstacles to the attainment of this goal of the constitution of the *Reich*, namely, decentralisation by means of self-government, are the principles for which the Bavarian memorandum fights most strenuously, the 'statehood' of the *Länder* and in

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 102.

[2] Ibid., p. 103.

connection therewith a formation which makes decentralised self-government impossible."[1]

On the subject of the controversy as to the unitary state and the federal state, and the conflicting criticisms of the new constitution on the one hand that it had not secured the unitary state, and on the other hand that it had destroyed the federal basis, Preuss remarked that these showed that the new constitution had done what was possible and necessary in the particular circumstances. Actually there had been substantial progress towards unification in respect of the legislation, administration, organisation and competence of the *Reich*. It was impossible then to go further.

For many decades there had been much discussion as to the conceptual difference between the "federal state" and the "unitary state," or, to put it in another way, the conceptual difference between the states which are constituent members of a federal state and the self-governing bodies of a decentralised unitary state. And Preuss asserted that the industrious and minute work of all the German constitutional thinkers for three generations had failed to find a satisfactory answer to that question. He declared his own belief that "the member states in a federal state and the autonomous self-governing bodies in the decentralised unitary state are historical and political manifestations of state organisation, stages in centralisation and decentralisation which have in the course of history shown many variations in degree, but between which it is impossible to find any conceptual difference, because none exists."[2] Nevertheless, in the discussion of the new constitution the old phrases had reappeared—"federal state," "unitary state," "loss of individual state sovereignty," "degradation from the rank of a state to that of a self-governing corporation." Preuss declared that he himself had put the questions: "What is the fundamental difference? Where do you think the state ceases and the self-governing corporation begins?" But he had never received a satisfactory answer.[3]

The predominant opinion that the constitution of the Empire was in the same category as those of the Swiss and North American unions was based on certain external similarities and ignored some vital differences of internal structure. The chief of these were (*a*) the monarchical character of the German states, (*b*) the position of the federal council and (*c*) the pre-

[1] Hugo Preuss: *Um die Reichsverfassung von Weimar*, 1924, p. 104.

[2] Ibid., *Deutschlands republikanische Reichsverfassung*, p. 43.

[3] Ibid.

dominance of Prussia. As regards the first, Preuss pointed out that actually the existence of a super-monarch over inferior monarchs was to monarchical ideology a very difficult proposition. Consequently the doctrine of Laband, which for a long time dominated German constitutional jurisprudence, had very ingeniously, but quite wrongly, presented the German Empire as a "republic made up of states."[1]

As regards the second and third points, the *Bundesrath* had not only checked the development of an independent and strong imperial government, but had powerfully aided the hegemony of Prussia. In all other federations the independence of the central authority was and had been common form: the German system had been the direct contrary. The difference was due to the fact that the other federations were republican both as a whole and in the parts, and neither of them had a member state which was four-sevenths of the whole.[2]

"A union of twenty-five 'sovereign' peoples would have been the antithesis of the national state. The foundation and starting-point of the constitution of the democratic republic must be the national unity of the German people, one nation setting up for itself a constitution within which that nation could divide itself into tribes and territories."[3]

But the main difficulty in attaining this aim was that as the result of the particularist nature of the November Revolution the new constitution-making of the individual states seemed to take precedence over that of the *Reich*. There was danger of the same disaster as in 1848. But in contrast to what happened then the distribution of power in 1919 progressively became more and more to the advantage of the National Assembly at Weimar and the provisional government of the *Reich*.

Preuss, therefore, repeated that "the unity of the nation and the *Reich* is the primary consideration, the division into *Länder* is the secondary consideration, not only in the forefront of the Weimar constitution, but running all through it as the dominant ideas."

The division of the *Reich* was a matter of great difficulty because of the conflict between history and reason. The existing state boundaries were in many cases geographically and ethnologically wrong and administratively quite unsuitable; the huge difference between Prussia and the small states was incompatible with sound administrative organisation and the fundamental

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 44.
[2] Ibid., p. 46. [3] Ibid., p. 47.

equality of states vis-à-vis the *Reich*. But nevertheless the circumstances of 1919 had been such that the National Assembly could not undertake a territorial reorganisation. But it had prepared the way for it by two actions.

The very important Article 18[1] provided the constitutional method for a future rearrangement with the co-operation of the *Reich*; and a resolution of the National Assembly imposed on the government of the *Reich* the duty of preparing for such a rearrangement by establishing a special central office for the purpose. That article had been secured only with great difficulty and as the result of compromise; but the constitution had given to the *Reich* competence of such a kind as must inevitably make territorial boundaries within the *Reich* of decreasing importance, and bring about an appropriate territorial redistribution.[2]

The *Reich* must in Preuss's judgment succeed to the hegemony which Prussia had exercised. As examples of necessary changes he pointed to the abolition of the military "contingent" system and the unification of the military forces of the *Reich*; the concentration of all foreign affairs in the hands of the *Reich*, and the abandonment of the old system whereby some of the states retained rights of diplomatic representation; the unification of the railway system; and the unification of finance essential because of Germany's vast burdens. And the fundamental principle was laid down that the law of the *Reich* overrides the law of the *Länder*, whilst the principle of the "legal state" was maintained by the reference of disputes between the *Reich* and the *Länder* to the decision of independent tribunals.

The constitutional division of powers left the position of the *Länder* strongest in respect of internal administration not only in their own sphere of competence but also in that of the *Reich*.

The entrusting of the administration of the *Reich* to the officials of the *Länder*, whilst at the same time the *Reich's* right of supervision over the governments of the *Länder* was strengthened, provided an elaborate decentralisation of German internal administration which harmonised with a dominant trait of German national character.[3]

The unity attained by the great states under the dynastic and family policies was not the result of national self-consciousness or of a people's self-consciousness, but was mainly the work of an alien bureaucracy. That was possibly the only method

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 49; *Artikel 18 der Reichsverfassung*, 1922, p. 48.

[2] Ibid., p. 50.

[3] Ibid., 1923, p. 53.

at the time, at any rate it was an effective method of constructive policy; but it became not only ineffective, but positively harmful in a time of awakened national consciousness. Preuss remarked that "it is noteworthy how that means of coalescing peoples which had been successful in the old Prussian territories had already failed to get hold in the new Prussian provinces." The liberationist movements in those regions, after the overthrow of the monarchy, derived their strongest support from the popular hostility to administration from Berlin by non-local officials.[1] The system having thus failed in the new Prussian territories the attempt to extend it to the *Reich* would certainly be disastrous. Bitter experience in the case of Alsace showed that clearly. The new constitution might extend greatly the competence of the *Reich*, it might strengthen its organisation, it could set aside the reserved rights; all that met with opposition, but the opposition was overcome. It would have become insuperable if the constitution had attempted to transfer all internal affairs to the *Reich*.[2]

Even the unitary state, should it be attainable, must equip its provinces—formed on a more rational territorial basis—with adequate powers of self-government in matters of internal administration. This natural development, in finance and taxation and many other matters, would result in the development of direct *Reich* administration by local intermediate and subordinate officials. The legal basis of such a system was already in the constitution. But nevertheless a large internal administration must be left to the autonomy of the territories and communes, and Preuss believed that "such decentralisation, by means of a system of highly developed self-government, within the framework of the national organisation of the *Reich*, would make it unnecessary to have mechanical safeguards against the introduction of non-local officials.

On this assumption he argued that "the distinction between autonomous *Länder* and autonomous provinces" would be reduced more and more until it entirely disappeared.[3] Therefore to him the question whether the large *Land* self-governing bodies still had a "state" character was of no practical importance. And the adoption of the term *Land* in the constitution was entirely appropriate. Above these territorial self-governing bodies there should and could be only one central legislation and one central administration—that of the *Reich*. The question whether

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 54.
[2] Ibid., pp. 54-55.
[3] Ibid., p. 55.

one should regard such a result as the realisation of the decentralised unitary state or of the true "federal state" might be a good subject for a doctoral thesis, but it was nothing more.[1]

Federalism, according to Preuss, was not a particular state form, but a fundamental political characteristic of the structure of the body politic. His ideal of a democratic republic based on the social structure of equality, of liberty and of freedom was the decentralised unitary state of a federal kind.

§ 4

Preuss's international ideas were also derived from his democratic idea of equality. An advocate of the *Genossenschaft* theory, he naturally accepted the sociological principle of contrariety as the cement of association and association as the substratum of contrariety.[2]

Contrariety and association are not antithetical but correlative. "Their inter-action governs the whole social, legal, economic, political, material and moral development of the relationship of individuals with one another and with their unions, as well as those of the unions of mankind from the narrowest to the widest and from the loosest to the most compact."[3]

Thus the correlation of the contrariety and association of material interests is only the most obvious manifestation of this basic principle; it shows itself also in the moral interests, views and feelings. The reciprocal action is a twofold one. The contrariety to other associations serves to bind associations closer together; and the contrariety of complementary interests and opinions has in it the germ of a new and wider association. It has long been recognised that even hostile and warlike relations between hordes, tribes and nations mean a degree of association which has often developed into the closest union. Slave raids and piracy were often the origin of peaceful commercial intercourse, as war was often the source of joint state-making. Even within the labour force of a highly developed industrialism the rivalry between the seekers for work gave way to the solidarity of the members of the unions. And on the other side (i.e. that of the employers), only more slowly and less

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 56.
[2] Ibid.: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 4.
[3] Ibid., p. 5.

solidly—because of the smaller pressure—a similar solidarity developed. Therefore as Gierke had pointed to the balance of plurality and unity as of the highest significance to the community, so Preuss stated that the question of whether and to what extent this tension between complementary contrarieties might "find its balance in a wider association, was one of decisive importance for the social and political future."[1]

"Man is the enemy of man": the *homo homini lupus* of Hobbes' doctrine had led to the absolutist state organisation equipped with the Leviathan of the supreme authority. Yet man is bound to man by *appetitus societatis*, according to the doctrines of Grotius which led to the peace of international law, because where there is an association, there is a right (*ubi societas, ibi jus*).[2]

The rising series of growing social and political unions developed state by state, and the collectivity of every union strengthened itself regularly by sharp opposition to those outside its ranks, to other unions.

This antagonism towards others, this exclusiveness, appears always as the strongest means of securing the combination of individuals. The town marked itself off from the country and estate from estate. And when these contrarieties had found a balance in some way within a large collectivity this in its turn entered into even sharper rivalry with other collectivities of the like kind; district with district, territory with territory, state with state. And even within the consolidated collectivities the contrariety of interests, opinions and sentiments of the most diverse kinds persisted, but their struggles were no longer with arms and violence, but by the procedure of an established legal system.[3]

But the working out of such a system is possible only in constant reciprocal relation to the growing organisation of the collectivities. In so far as the organisation strengthens the closer collectivity, it naturally stresses the difference of that collectivity from others, and seeks to keep its members exclusively to itself. As, with the growth of intercourse, it becomes increasingly difficult to control the relations of the members with outsiders, the organisation seeks to conduct such relations itself, and as it is not permanently possible to maintain this by force alone, so the organisation strives by all possible means to inculcate its members with the idea of antagonism to outsiders—with the belief that the conflict of interests is greater than their com-

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 6.
[2] Ibid., p. 7. [3] Ibid.

munity. That is the result of the natural tendency of every organisation, and of those directing it, towards self-preservation. But, as Preuss pointed out, it is noteworthy that this sense of antagonism is commonly much less strong between the directors (rulers) of the organisations than between the members of them, indeed between the rulers there is often a sense of community of interests.[1]

Preuss asserted that "all this was most clearly manifest in the absolute sovereign state, which had in the end overcome the rivalries of the narrower collectivities, of estates, of country and town, and had finally broken the moral ties of the Holy Roman Empire and the church as comprehensive collectivities. In order to unite those deep-rooted, multiform contrarieties into a collectivity which was at first not felt in any way to be natural, the state had to develop to the utmost this one bond of union—antagonism towards the world outside itself."[2]

So it became a purely authoritarian organisation as an end in itself; it came to depend solely upon two instruments—bureaucracy and standing army. Subordination to this authority was to the absolute sovereign state the one essential *principium individuationis*.

Whether the subject of that authority, the people, formed or did not form a natural unity, a national collectivity, was at first unimportant. But as regards further development it did matter, for obviously a state based on national unity had an advantage over one based merely on more or less accidental subordination to a particular dynasty.

The absolute state as a mere *Herrschaft* organisation feels a constant urge towards the extension of its authority by all possible means; politically and economically unceasing antagonism towards all outside its boundaries is its very life's blood. Therefore the natural economic policy of the absolute sovereign state is mercantilism. Warfare, military and economic, is the normal condition under this system.[3] But even war creates a sense of association, of collective interests, and there have not been lacking attempts to give effect to that idea. The "great design" of Henry IV of France and the Congress after the Thirty Years War were examples; so was the work of Hugo Grotius; and in the eighteenth century the Abbé de S. Pierre's scheme of a perpetual peace was strikingly like the idea of the League of Nations of our own time.

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 8.
[2] Ibid. [3] Ibid., p. 9.

The great events which marked the breaking up of the old state system, such as the declaration of American Independence and the French Revolution, were the theoretical and practical assertion of the people's right of self-determination. But this raised a new question: What is "the people," which is to have the control of its own destiny? What is the new *principium individuationis* which binds a host of individuals into a collectivity? The idea of *natural* unity as the basis of *national* association did not exist at that time, but yet arose from it. The theory of the Revolution—that men select their state—derived from the theory of the social contract. According to the ideas of this "natural right" rationalism a number of individuals intelligently conscious of their purpose bind themselves voluntarily into an arbitrarily formed state collectivity. The French did this in their revolutionary constitution; logically they must allow others to do the same, provided those others were free to act in accordance with the principles of the social contract. Unfree authoritarian organisations threatened the new-won freedom of the French. In the revolutionary wars the French were the champions of freedom, they were opposed not to foreign nations but to all tyrants at home and abroad. But in accordance with what seems to be a natural law of development the actual opposition to foreign states and peoples led to the illegitimate dominance of Napoleon.

It was in these circumstances that Kant published the essay on Eternal Peace (*Zum ewigen Friede*) and indicated various essential conditions for the maintenance of peace. Preuss pointed out that the first preliminary condition postulated by Kant, namely, the "republican constitution of every state," was intended by him to draw a distinction not between the republican and the monarchical forms of the state but between the popular state (*Volksstaat*) and the authoritarian state (*Obrigkeitsstaat*).[1] Kant's second condition anticipated the creation of a League of Nations, and his third a universal world citizenship—for community was developed so far amongst the nations of the world that violation of the law in any one place affects them all.[2]

Preuss pointed out further that Kant accepted the "natural law" idea of the abstract individual and so was out of accord with the modern conception of the nation. That idea was replaced by the recognition of the natural-historical conditions

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 12.
[2] Ibid., p. 13.

of mankind, and particularly of national determination. National sentiment was a potent force against Napoleonic dominance. Repressed for a time by restored "Legitimacy," the principle of nationality became one of the strongest factors making for the political antagonism and the political association of states and nations. In its complete development the principle of nationality means the identification of the state organisation with nationality.[1]

The place of subordination to one and the same "legitimate" authority is taken by the natural-historical unity of the nationality as the *principium individuationis* of the state. But what is a "nation"? What is the *principium individuationis* of the nation? It is not identity of race or speech, as many instances show. Preuss agreed with Renan that the deciding factor is a psychological one, and quoted the saying of the French writer that: "What makes a nation is not identity of speech or membership of one and the same ethnological group, but the fact that people have done great things together in the past and have the will to do them together in the future. The nation is a moral principle, the outcome of long historical relationship."[2]

But if the psychological factor is the decisive one, its application must be the result of individual and collective will, so the idea of the social contract—that the individual choses his state—still stands. But the individual is no longer abstract, but historically conditioned. His choice is determined by the principle of nationality; he chooses, generally perforce, the nation into which he is born. The feeling of community may as a result of historical and political development have so developed as to overcome racial friction, and bring national contrarieties into harmony in a state community. Where, on the other hand, the community feeling is weak, racial antagonisms may break up the collective state established in the period of authoritarian rule. Switzerland is an example of the first, Austria of the second.

Where is the source of that strong political community of sentiment? Kant would answer: "republicanism." At present, at any rate, the authoritarian state is everywhere weaker than the national separatist spirit, whilst the national state can at least be stronger. Preuss held that no people in Europe had so much to gain as the German by the application of the principle of nationality; and yet its authoritarian form had been

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 13.
[2] Ibid., p. 15.

more repellent than national kinship had been attractive, as had been shown by the case of Alsace.

As the self-consciousness of the individual developed in sharp antagonism against other individuals, so self-consciousness of the nation developed in antagonism to other nations.[1] This had been particularly marked in the nineteenth and early twentieth centuries, fostered as it was particularly by the authoritarian governments, yet underneath all this antagonism was a growing community of interests, which found expression in all kinds of international arrangements and organisations. Yet the limitations of this internationalism were shown by the world war. Similarly, the differences between the members of the modern family of nations are comparatively small, they are like the differences between members of the same family; but the violence of national antagonisms strove to distort them into vital and fundamental differences.[2]

Preuss (speaking in October 1918) held that "it is in accordance with the law of development that the most terrible outbreak in political history should lead to a lightening of the political atmosphere, to a higher compromise between national antagonisms."[3]

He pointed out that the old conception of an international community of a League of Nations, in whose legal system national differences would by no means disappear but would no longer express themselves in primitive conflicts, had now become a problem of practical politics. Undoubtedly an application, as complete as possible, of the principle of nationality in the formation of states would get rid of much that was likely to give rise to conflicts; but it was also true that the conflicting forces which he had previously discussed might, in their antagonism to that principle, provide new matters of conflict.

If the nations identified themselves with the governmental organisation of their states they would readily take over the mediatising tendency of sovereignty which is inherent in authoritarian organisation. Preuss held that the idea of sovereignty is in complete antagonism to any real organisation of the international community. It is of course true that between nationalism and internationalism there is just as little contradiction as there is between the individual and the commonwealth of which he is part, for contrariety and association are not

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 16.
[2] Ibid., p. 19. [3] Ibid.

opposites. But the sovereignty principle of the authoritarian system is by its very nature opposed to incorporation in a larger collectivity.

So Preuss reached the conclusion that the national community, the free living force, can only flourish, as a peaceful vital force, on the basis of legal freedom and equality of rights for all its members; and only such free national commonwealths can in fact, in harmony with their own internal nature, be voluntary members of a firmly built international community.

This community must be based on the complete freedom and equality of all its national members. This principle is easy to accept; its practical realisation would be very difficult because it runs counter to the very nature of the authoritarian state system.[1] Yet failure would throw the world back into the worst passions of national antagonisms. For the individual shares the servitude and lack of legal rights of his nation. As lack of freedom and inequality of rights alienate the individuals from the state and make them regard themselves as members of an oppressed class rather than as members of the state, so every member of a coerced nation will feel his antagonism to other nations much more intensely than his relation to the international community. But the possibility of this community sentiment taking root peacefully in the soul of the individual, side by side with the national sentiment, is the prerequisite of its fuller development. Any inclination towards a brotherhood of nations is inconceivable unless there is internal and external freedom and equality.[2]

Preuss's conception of the international community is therefore that of one in which there should be equality of nations, as one stage of the development of human association, just as individuals should be equal and free in every stage of human association. Therefore his argument as to Article 4 of the new German constitution, regarding international relations, is naturally an acceptance of the universally acknowledged rules of international law as having obligatory force by being a part of the German law of the *Reich*. Thus he explained that "we want to organise a united free state, but not on lines of nationalist exclusiveness." And he added that "as in years gone by the newly formed United States of North America became a member of the older world of state communities by acknowledging the binding force of international law, so to-day the new German

[1] Hugo Preuss: *Nationaler Gegensatz und Internationale Gemeinschaft*, 1918, p. 20.
[2] Ibid., pp. 20–21.

republic in the same way recognises the validity of international law."[1]

The rule laid down by Article 4 of the *Reich* constitution contained, however, "a positive norm for the relationship of national and international law." But in his explanation of this article he did not go beyond the prevailing principle of international law which, as Kelsen pointed out, by its retention of the conception of the sovereignty attributed to the individual state the quality of absolutism.

Lastly, as to the new institution of the *Reichsrat*, which was the subject of the main criticism made on the federalistic tendency of the new constitution by the unitarist constitutional jurists, Preuss held that "the decentralised unitary state must allow to its great self-governing bodies, and the federal state to its member state, a definite position within the organisation of the collective state, in order to secure the necessary organic interrelation between the collectivity and the members."[2]

The whole historical development of Germany was entirely against the exclusion of the *Länder* from any part in the organisation of the *Reich*, and practically that could not be seriously considered.

The position of the Federal Council (*Bundesrath*) in the constitution of the empire did in fact serve that purpose, but in addition it served the purposes of the League of Princes and the hegemony of Prussia, and with their disappearance the position of the Federal Council must disappear also. The first task before the framers of the new constitution was to give representation to the *Länder* in a "chamber of states" as a second house of parliament side by side with the popular house. That followed the example of other federal states, such as the American Senate and the Swiss *Ständerat*—the only difference being that the great disparity between the sizes of the German states made equality of representation impossible.

The plan also followed the precedent of the Frankfurt imperial constitution of 1849, and the Prussian constitution of 1848 and 1850 had originally contemplated the representation of the great self-governing bodies in the upper chamber. Similar arrangements were to be found in the cases of the French and Italian senates. The general opposition to Preuss's draft as to the proposed chamber of states was due to a number of causes—including doctrinaire opposition to the two-chamber system on the one

[1] Hugo Preuss: *Reich und Länder*, ed. by Anschütz, p. 82.

[2] Ibid.: *Deutschlands republikanische Reichsverfassung*, 1923, p. 57.

hand and on the other the extreme particularist desire to give more influence to the *Länder* in the organisation of the *Reich*.

The form of the new *Reichsrat* was based on that of the earlier Federal Council, but with the necessary restrictions and modification. In the nature of its membership this new *Reichsrat* had remained substantially like the old Federal Council. The distribution of votes was in principle according to the populations of the *Länder*; but the complete application of this principle was made dependent on the carrying out of territorial redistribution. Accordingly, the small states inevitably had much greater voting power, and Prussia a smaller power than they would have on a population basis.[1]

The mode of representation of the *Länder* in the *Reichsrat* was externally not very different from that of the *Bundesrat*, but there was a change in its internal nature. The *Länder* were to be represented by members of their governments, but as these were dependent upon the democraticallyelected territorial parliaments, it wa· actually the public opinion of a territory that would be represented in the *Reichsrat*, and not the will of an authority independent of that public opinion. Preuss pointed out that the sittings of the *Reichsrat* were to be public, and remarked that "whether a large or small number of the public sit in the galleries does not matter in the least so far as concerns publicity; the decisive fact is the possibility of a control of the proceedings by means of the press and public opinion, from which in a democratic state the proceedings of any organ of government cannot escape."[2]

And also he argued that by reason of the independence of the *Reichsrat* from Prussian hegemony, the government of the *Reich* was more independent of it, and the *Reichstag* also had a stronger position.

In the new constitution the government of the *Reich* was to be dependent upon the political support of the *Reichstag*, but not upon that of the *Reichsrat*, however desirable amicable relations between them would naturally be. The administration of the *Reich* was to be carried out wholly by the responsible government of the *Reich*; it was entitled to issue the necessary administrative regulations, the *Reichsrat* co-operating only to the extent prescribed by the constitution. Control over the carrying out of the constitutional and legislative duties of the *Länder* was no longer dependent upon preliminary decisions of the *Reichsrat*. The government of the *Reich* must have the concurrence of the

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 59.
[2] Ibid., p. 60.

Reichsrat for the introduction of legislation and *vice versa*, but if there should be a difference of opinion between the two bodies the decision would rest with the *Reichstag*.

Accordingly, Preuss concluded that the "*Reichsrat* has all the powers which it needs in order to maintain the proper organic relation between the *Reich* and the *Länder*, to inform the *Reich* of the particular needs of the *Länder* and the *Länder* of the necessities of the *Reich*."[1] But it was no longer, like the previous Federal Council, an insuperable obstacle to the development of the parliamentary system and of a unitary and independently responsible government of the *Reich*.

Fundamentally Preuss did not want any kind of *Reichsrat* like the Swiss Federal Council or the Senate in America. His compromise was due solely to the recognition of the necessity of some legislative and administrative organ with the right to give expression to the will of the corporate bodies within the body politic.

Referring back to his pamphlet *Was uns fehlt*, written in 1888, in which he set out the urgent needs of his country at that time, Preuss had said that these needs could be satisfied only by a nation fully conscious of "the great conception of state existence." He added that "such knowledge must awaken in the heart of people pride in the state, and cause them to recognise the state as that which the free state is in truth—the highest good of mankind. If this can be done, then and only then will our empire flourish."[2]

He had arrived, at any rate, within measurable distance of his ideal by his great contribution towards the making of the new German constitution.

§ 5

Gerhard Anschütz, an outstanding figure among contemporary jurists, discussed in 1923 the nature of the federal tendencies of the new Weimar constitution in his little pamphlet *Drei Leitgedanken der Weimarer Reichsverfassung*.

Great as were the misfortunes which had fallen upon Germany, externally and internally, in consequence of the loss of the Great War, he did not feel at all pessimistic about the future of the German *Reich*. Out of this upheaval there had emerged one gain,

[1] Hugo Preuss: *Deutschlands republikanische Reichsverfassung*, 1923, p. 61.
[2] Ibid.: *Was uns Fehlt*, 1888, p. 36.

and that the highest for a people suffering, as the Germans had been, from internal divisions and antagonisms—namely, the "organisation as a state of our natural unity, our *Reich*." The *Reich*, he said, "yet remains to us, and will remain to us as long as we are united."[1]

He pointed out as to the political nature, i.e. the constitutional form, of the *Reich*, that there are three leading ideas expressed in the Weimar constitution of August 1919. Twice in the last seventy years the German people had roused themselves to take their destiny into their own hands contrary to their ingrained tendency to be guided from above by the historical "legitimate" authorities, and to reconstruct their state system from its foundation by a freely elected constituent body—that is, by a National Assembly. The first attempt failed to achieve what the national will aimed at; the Frankfurt constitution of 1849 remained simply a document—a worthy legal memorial—and never became a law.

At the second attempt, that made at the Weimar National Assembly in 1919, the will was made effective. On that occasion, despite all the obstacles, the task was not so difficult as seventy years earlier, for the national state had been created in the years 1866-1871, and the task of the Assembly at Weimar was only that of giving to the existing Reich a new constitution in place of the old one destroyed by the revolution.

Between the statesmen of the *Paulskirche* at Frankfurt and those of the theatre at Weimar there stood Bismarck, the founder of the *Reich* and author of the Imperial constitution of 1871. His work was more akin to that of Frankfurt than to that of Weimar, but was fundamentally different from both. Between it and the Weimar constitution there were, according to Anschütz, three outstanding differences.

Firstly, much more clearly and strongly than the former constitution, the Weimar constitution showed the statehood of the *Reich*, its quality as an independent national state formation—that is, something more than and different from the sum or union of the member states.

Secondly, the relation of the *Reich* to the member states, the *Länder*, was not conceived of as predominantly federalist, as had formerly been the case. The standard test is now not federalism but its opposite, unitarism.

Thirdly—and this was the greatest difference—in place of the old monarchical Germany there was a new republican

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 3.

Germany, organised democratically both in the *Reich* and in the *Länder*.[1]

These three leading ideas of the Weimar constitution—the statehood of the *Reich*, unitarism and democracy—were the dominant characteristics of the new German constitution.

First as to the statehood of the *Reich*, Anschütz asserted that the phrase, "the German *Reich* is a state," meant that it was something more and other than merely a union of particularist powers which in the course of centuries had taken possession of German soil as antagonists of national unity. The *Reich* is not so much a unity of these particularist authorities, it is the German people united without regard to territorial boundaries under a supreme authority. Even if one regards the *Länder* as state organisations, as states of a lower order, and the *Reich* as a whole as being consequently a collective state formed by the individual states, yet the *Reich* is still a state entity, like the other great national states, such as England, the United States, France and Italy. The *Reich* does not offer to the Germans a substitute for a state, but is itself the German state. That is not merely a political desire, but it is a constitutional actuality, the clearly expressed intent of the new constitution. To realise the significance of this it was necessary, according to Anschütz, to look back at the history of the preceding century. Throughout that period the goal of the German people had been the creation of a national state, a *Reich*. That was so at the time of the War of Liberation, but the German princes were incapable of making the smallest sacrifice of their sovereign rights, and the Germanic confederation of 1815 was no more than an alliance for the mutual protection of dynastic interests. The German people endured this until 1848, when, as the result of the revolutions of that year, the Frankfurt Assembly framed a constitution which had all the marks of statehood—there was to be not a treaty relationship between individual states but a state organisation of the German people, in the form of a constitutional democratic empire; that is to say, a state, no matter whether federal or unitary. But the attempt failed: unity was achieved, half a generation later, not by a national movement but by the German policy of Prussia and Bismarck. But what was the real nature of the North-German Confederation of 1867 and its enlargement, the German Empire of 1871? Was it a state or something else—a mere league of separate states, a confederation, that in some respects acted as a state?

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 5.

Anschütz pointed out that the constitution of 1871 gave no clear answer to this problem. There was much in the text that seemed to favour the idea of confederation, particularly the introductory phrase describing the *Reich* as "the permanent union of German Princes and Free cities," the provisions as to the so-called "reserved rights," and the alliance with Bavaria dependent upon the constitution. Bismarck himself had expressed an opinion as to the fundamental basis of his work—as to whether the *Reich* was a state or a *Bund*, only once, and then in obviously ambiguous terms.

In his draft of the constitution of the North German *Bund* in 1866 he indicated that in form one should keep rather to confederation, but should give it in practice the character of a federal state. That is to say, the structure of German unity should look as much as possible like a confederation, because otherwise the dynastic and other particularism would take fright.[1] So Bismarck made the work of unity acceptable to the German princes by covering the statehood of the *Reich* with the veil of confederation. In these circumstances Anschütz did not think it surprising that the conception of the *Reich* as more or less confederate became conspicuous in political science. This tendency was carried on by Max v. Seydel, the most thoroughgoing federalist among the German constitutional legists of the Bismarckian period, and he was followed by some others—not all of whom were influenced by political predilections—like Jagemann and Otto Mayer, and in the present day the Austrian Leo Wittmayer.

But the great majority of German constitutional legists rejected this interpretation. Haenel had argued strenuously for the statehood of the *Reich*, and another master of the science, Laband, had propounded the theory of the federal state which was to become predominant—the theory in which the statehood left to the *Länder* made no breach in the statehood of the *Reich*, for the *Reich* was the sovereign collective state formed of non-sovereign individual states—that is, a federal state.[2]

Anschütz had no doubt that Laband and Haenel were in the right against Seydel, and consequently against Bismarck, but he admitted that in consequence of the lack of clarity in the constitution it was not easy to counter the arguments on the other side. The old constitution was full of inconsistencies, and to put it shortly, the proposition that the Empire of 1871 was, though

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 8.
[2] Ibid., p. 9.

a "union" (*Bund*), primarily a state and not a mere "union," was by no means altogether indisputable and proven.[1]

But he asserted that the Weimar constitution had given clarity to the new political basic principles established by the Revolution. The new state edifice had not been erected on agreements between *Länder* or on the foundation of treaties, but on an act of the national will by the decisions of a constituent National Assembly, armed with complete sovereignty even over the *Länder*.[2]

In the preamble to the Weimar constitution the phrase, "The German people, one in its race and animated by the will to re-create and secure its *Reich* in freedom and justice . . . has set up this constitution," contrasted with the older preamble as to the "permanent union." And there was no longer any reference to the separate states, the *Länder*, which in the meantime had become republics.

Therefore Anschütz declared that "the *Reich* is no longer the union of its member states but the collectivity of the whole German people, which now properly calls the *Reich* its *Reich*." The new *Reich* is "the German people united under the authority derived from themselves," and by the new constitution the German people had unquestionably attained to that to which they, "as a great nation, have an inalienable right—unity in a state."[3]

Consequently, Anschütz contended that Seydel's argument that the secession of a *Land* from the *Reich* was not "high treason," but only a "breach of contract," and Jagemann's argument as to the right of the German territorial governments to dissolve the Empire and substitute another with a different constitution were now wholly untenable.[4]

Secondly, Anschütz remarked as to legal and political controversies that the Germans like to wrangle over the theoretical bases of their state entity. Just as discussion used to rage over the statehood of the *Reich*, so now it raged over the statehood of the members of the *Reich*—the *Länder*. But the question as to whether the *Länder* were, under the Weimar constitution, real state entities, or only provinces (self-governing corporations) of the *Reich*, was not unimportant; if they were the former, then the *Reich* was a consolidated state; if they were the latter, it was a unitary state. Anschütz's own opinion was that the *Reich* remained

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 10.
[2] Ibid. [3] Ibid., p. 11.
[4] Anschütz pointed out that the French had been right in saying that France had politically lost the war, since the resultant revolution had done what Bismarck had failed to do—consolidated the German people into a single state.

what it was before—a consolidated state, a collective state divided into a number of separate states. It remained questionable whether it did or did not correspond to the idea of a federal state. But it was certain that the relation of the *Reich* to the *Länder* was far more unitary than in the Empire created by Bismarck. This unitarism was the second dominant idea in the Weimar constitution.[1]

Anschütz, like Triepel, asserted that unitarism and its opposite, federalism, related to the types of organisation of the consolidated state, and especially of the federal state.[2] If the relations between the central and the individual state authorities were such as to incline to the unitary state, the whole system is called "unitarist"; if the inclination is in the other way, the system is called "federalist." But Anschütz pointed out that "unitarism" and "federalism" are not mutually exclusive qualities, present or not present in a federal state, but are qualities which can both be present in varying degrees in such a state. The German constitution was an illustration of the fact that the constitution of a federal state could bear marks of both systems. His attitude towards federalism has therefore been the same as that of Triepel ten years earlier. From this conception of the federal state, which I may call the new positivist theory of federalism, he analysed the relations between the *Reich* and the *Länder* under the new constitution.

The basic motive of the revolution was unitary; as regards the overwhelming majority of the members, the constituent National Assembly was similarly inclined; consequently, it was certain that unitarism would prevail in the work of that body. The number of matters as to which the *Reich* can legislate has been greatly increased. Important branches of administration have been taken from the *Länder* and transferred to the *Reich*, such as foreign policy, the army, railways, canals, post and telegraphs.

In particular the financial authority of the *Länder* has been greatly reduced in that all the really important sources of taxation revenue have been claimed by the *Reich* and are to be exploited by it on its own behalf by its own laws and its own officials.

The organisation of the *Reich* has the same characteristic in that two of its three main organs, the *Reichstag* and the Presidency of the *Reich*, are to be filled directly by the vote of the whole people of the *Reich*, without any participation of the particularist sections,

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 11.
[2] Ibid., p. 13.

only the appointment of the members of the third and less important organ, the *Reichsrat*, being left to the governments of the *Länder*. The provision of the new constitution which gave to the *Reich* the sovereign right of disposition as to the areas and boundaries of the *Länder* was essentially unitary.[1] The division of the *Reich* into *Länder*—that is, the whole internal *Land* organisation of Germany—was put completely into the hands of the *Reich*. These internal boundaries can be altered by a constitutional law if the governments of the *Länder* concerned agree or if, should they not agree, the alteration is approved by a popular vote, and if there is an overwhelming reason of state a change can be made by a simple enactment of the *Reich*. Therefore, Anschütz asserted that "an inalienable right of the *Länder* to the integrity of their areas and the unchangeability of their boundaries—even a right of the continued existence of the individual *Länder*—is not recognised over against this territorial supremacy of the *Reich*." And he added that in this respect, more than in any other, there is an unrestricted assertion of the subordination of particular interests to national interests.[2]

Against this predominant principle of unitarism in the Weimar constitution, Anschütz pointed out that there were institutions which in fact, if not in form, approximated to federalism, in that they went a considerable way towards serving the interest of the *Länder* on the one hand in the maintenance of a not too closely restricted autonomy, and on the other hand in a similar participation in the formation of the ruling will of the *Reich*.[3]

The chief of these institutions was the *Reichsrat*, the successor of the old Federal Council, with its manifold rights in respect of the legislation and administration of the *Reich*; rights which were much less than the corresponding rights of the Federal Council but yet strong enough to enable the *Länder* to assert their particular interests.

Secondly, there was the principle of the constitution of the *Reich* that, as was formerly the case, the execution of the law of the *Reich* was in all *Länder* a territorial matter—that is to say, the task of the officials of the *Länder*—and that only in exceptional cases (as for example in respect of taxation) should the execution of the law be entrusted to the *Reich's* own officials, by express legislation of the *Reich*. This principle enabled the governments of the *Länder* to apply the law in the manner best suited to their particular conditions.

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 14.
[2] Ibid., pp. 14–15. [3] Ibid., p. 15.

Thirdly, there was an important application of the federal idea in the provisions of the constitution that the officials of the *Reich* in the various *Länder* should as a rule be subjects (*Angehörige*) of the respective *Länder*, and that in regard to the organisation of the *Reichswehr* regard should be had to the special circumstances of each *Land*.[1]

Some people held that these arrangements were not sufficient, that they did not adequately give effect to the true federal idea, and in Bavaria, where this was most strongly felt, there was a demand for a complete revision of the constitution. This meant that the *Reich* should revert to what it was not, and was not intended to be, under the Weimar constitution—that is, a league of German individual states—possibly not a mere international alliance, but simply a constitutional federal relationship of that loose kind which Seydel and others had predicated of the Empire as created by Bismarck, that federal relationship being formed not for its own sake, and not so much at the will of the German nation, but primarily for the members of the league and at the will of the individual states for their own use and benefit.

But the new *Reich* is not the result of a league and has not been created as a league of individual states; it is a state collectivity of the German people created by themselves, i.e. a state in which the unity of the people, and not the plurality of the individual states, appears as the holder of the highest authority.[2]

Not only the origin, but also the content of the constitution, presented the idea of democracy in its purest form. The very first article declared that "the state authority is derived from the people." That authority of the *Reich* has its seat and origin not outside of or above the people, but in them alone; it is identical with the general will of the whole people. Two of the main organs of the *Reich* which have to form, to declare and to exercise the common will, the *Reichstag* and the President of the *Reich*, are created by the popular vote, and are therefore direct mandatories of the national will. Only the third main organ, the less powerful *Reichsrat*, is not formed by popular election, but consists of members nominated by the governments of the *Länder*; this was not the result of an anti-democratic concession, but was set up as a federalist counterweight to the strong unitary principle on which the two former organs are based. Above all these three organs there is an extra-supreme organ of the *Reich*—the whole electorate—which can be called on in certain cases to decide

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 16.
[2] Ibid.

by means of the referendum. Moreover, the constitution prescribed that all the *Länder* must have a democratic republican state system. This not only prevented the restoration of the monarchy, but also the introduction of undemocratic forms of government, such as the dictatorship of the working classes or of the proletariat. So the idea of democracy had been applied with energy and consistency in the Weimar constitution.

Then Anschütz pointed out why he opposed the recognition of the federative government of the *Reich*. He was convinced that "in the case of any conflict the *Reich* is everything, the individual state nothing." In his belief the German state was embodied first and foremost in the *Reich*, not in the *Länder*. The *Reich*, therefore, was to him not "a union of the German *Länder*," but "the manifestation in state form of the national unity." The *Reich* was to Germany a vital necessity, its continuance a matter of life and death, which admitted of no discussion; but whether it should or should not be divided into *Länder* was a mere matter of expediency.[1]

Anschütz thought that there was no particular reason to change the existing relationship between the *Reich* and the *Länder*, because this was of such a nature that both the *Reich* and the *Länder* could live under it. He pointed to the arrangements made by the Weimar constitution in favour of the *Länder*—the *Reichsrat*, and the execution of the laws of the *Reich* by the governments of the *Länder*—and held that the latter had "no ground of complaint" providing they fully understood their position to be that not of sovereign members of a confederation but of serving (*dienende*) members of a federal state.[2]

He rejected any federalistic revision of the constitution for another reason. He asserted that "the Weimar constitution was so elastic and loose-meshed as to allow free play to the development of the relationship between *Reich* and *Länder*, according to time and circumstances, even without any formal change."[3] It was no obstacle to the further development which he himself hoped to see realised in the national interest—the development of Germany into a unitary state.

Anschütz, however, realised that the process could only be gradual whilst a very large part of the German people, in Prussia and the other *Länder* of North and Middle Germany, were ready for the unitary state, but in the South, and above all in Bavaria, the name, even more than the thing itself, was thoroughly

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 17.
[2] Ibid., p. 18. [3] Ibid.

unpopular. The advocates of the great ideal of the national unitary state must have patience. Time was on their side, and the unitary state would be created not by a command of the legislator, but by a change in the minds of men.[1]

The line of progress towards the unitary state which Anschütz looked for was what Jellinek had called the "transformation of the constitution"—"a change in men's opinion followed by a change of political dynamics"—rather than the "changing of the constitution, that is, the modification of the constitutional law, by a decision of the legislator." This transformation would not mean the disappearance of the *Länder*. The answer to those opponents of the unitary state who asserted it would destroy the colourful diversity of German life and replace it by a dull uniformity was simply: "the unitary state does not mean the same thing as centralisation." The unitary state can be so skilfully decentralised that the peculiar qualities of the various races and districts can all be given their proper scope.[2]

The possessors of this decentralisation would be the *Länder*, retaining under the unitary state rights and liberties practically no less than those they possessed at present; they would be in the position of greater, stronger and freer self-governing bodies which, renouncing an individual statehood which had already become little more than formal, would desire to be nothing else than members serving voluntarily the whole, the *Reich*, of which they were parts. He quoted as the ideal the formula of von Treitschke—"the national unitary state with a strong self-government of autonomous provinces."[3]

Thirdly, Anschütz asserted that after the long monarchical history of Germany the idea of democracy had at last been victorious in the November Revolution. The subsequent Weimar constitution was a democratic constitution alike in its origin and in its content. The German people created the new constitution, acting through a parliament freely elected and empowered by it. The new Germany could be formed in no other way than by self-organisation of the people, and by the will of a constituent representation of the people. The constitution was adopted by a more than three-fourths majority of the Weimar Assembly.[4]

An attempt at the revision of the constitution in a monarchical sense was to Anschütz even more undesirable than one in a federative direction. For a democratic Empire there was no room in Germany, and even its advocates must admit that there was no

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 19.
[2] Ibid., p. 20. [3] Ibid., pp. 20–21. [4] Ibid., pp. 22, 23.

time for constitutional debates about it. Anschütz believed that the work of Weimar was as difficult, but the compromise reached at Weimar by a commanding majority between two great forces in the building of the state, between the middle class and the workmen, must be honoured for the sake of the national unity which must be safeguarded at home and abroad. The state form which Germany wanted and the only one she could want was the one having the support of the wills of the greatest possible majority of the people, and that was the democracy in the form of the republic.[1] Therefore he pointed out that in a conflict on the question of republic or monarchy the real issue would be not "republic or monarchy" but "republic or anarchy."[2]

Anschütz, therefore, as the unitarist, declared that the principle of democracy must be maintained.

Some people asserted that democracy meant a weak state power, monarchy a strong one. Anschütz answered this by pointing out that the Great War was lost by monarchies and won by democracies, and contended that the weakness of the new democratic government of Germany was due to the loss of the war by the monarchy.

He also attacked the theory that democracy is anti-national, and pointed to the identification of democracy with nationalism in the times of American Independence and the French Revolution. With the progressive democratisation of the world the strengthening and deepening of the state conception based on the principle of nationality—that is, nationalism has advanced hand in hand, so that it has become difficult to say whether the democratisation has worked on nationalist lines or the national consciousness on democratic lines.

The democratic state need not always be a republic; monarchical institutions are not incompatible with it, but only as long as the wearer of the crown does not seek to be more than the servant of the national genius and the executor of the national will.

Anschütz affirmed his belief that the national and democratic ideas "are not antagonistic, but are akin; they are children of the same spirit," "the right of self-determination of the peoples arising from their self-consciousness."[3]

Finally, he described the core of the democratic state principle as being the idea of oneness of state and people. He asserted that "the state is not an institution apart from ourselves, but we ourselves, the association of the whole people, are the state."[4]

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 26.
[2] Ibid., p. 27. [3] Ibid., p. 30. [4] Ibid., p. 31.

The monarchy is not necessarily an obstacle to this oneness of state and people, though it had often been so. Anschütz declared that the German monarchy had to the last been heavily cumbered with the remnants of absolutism and patrimonialism, and of a divine grace which was no longer true, and this had given to the German state system "the stamp of an institution transcending the people." This was a state constitution and state conception which inevitably had the harmful result that the people regarded the state as an alien institution, not something that was their own, and it lost respect and moral justification as the people attained to manhood and claimed the state for themselves.

But as the state is ourselves, "we people are no longer the object of a state authority which derives its power from something above, but we ourselves have become the subject of the state authority." In other words, "the state authority is the will of the people" and "authority" means the collectivity of the persons called on to exercise the state power; that is to say, it is the serving member, the organ of the popular will, an organ whose power is, and can only be, rooted in that will.

"This state," he said, "is not a power transcendent over us, but a power immanent in us to which we are all subordinate, but in which also we all participate, which is the concern of us all, and for which we must all feel a civic responsibility."[1]

This bringing together of all the powers of people into the state, the obligatory conscious participation of all in the state, is "of the essential nature and value of the democracy, the ethics of democracy."

Anschütz's statement as to the democratic state, on the basis of the *Genossenschaft* of the wills of the people, and his subjective interpretation of the state authority are by no means in conflict with Preuss's ideal of democracy. And his ideal of the German national state, with the highly decentralised autonomy of self-governing territories, stands on the same basis as Preuss's dictum as to the decentralised unitary state.

But the question remains how far Anschütz would go in the analysis and criticism of the state organism on the *Genossenschaft* conception, and how far his idea of federalism would go beyond the orthodox conception in order to explain the new German democratic federal republic from the standpoint of his new doctrine that the people is the subject of the state authority.

In his work, *Der deutsche Föderalismus in Vergangenheit, Gegenwart und Zukunft*, in 1924, Anschütz, like Triepel, held that the two

[1] G. Anschütz: *Drei Leitgedanken der Weimarer Reichsverfassung*, 1923, p. 31.

conceptions of federalism and unitarism both assume the supreme conception of the federal state and that federalism and unitarism are possible forms of organisation or types of the federal state.[1]

The federal state, both as a legal conception and as an historico-political phenomenon, stands midway between the confederation and the unitary state. It is an elastic term. It can approximate to either of the two terms—confederation and unitary state, without ceasing to be itself. When the federal state approximates to the confederation we speak of federalism; when it approximates to the unitary state we speak of unitarism.

The inclination in one direction or the other is manifested first in the division of competence—in Germany between *Reich* and *Länder*—and secondly in the organisation of the central authority; or, in other words, in the extent of the right of self-determination allowed to the *Länder* and in the extent to which the *Länder* are allowed to share in the formation and exercise of the will of the *Reich*. Anschütz, like all other jurists, assumed that federalism can be carried so far that the federal state differs from the confederation only theoretically, in that there is recognition of the statehood of the union collectivity and of its superiority over the individual states, but in other respects the collectivity appears only as a union of individual states, in which the people have no share and between which and them there is the intermediary of the authorities of the individual states. It is only a step further to the denial of the state character and sovereignty of the union, and to the affirmation of the sovereignty of the members of the union, and then we have the confederation.

The relation of the union to the individual states is not that of a whole to its parts, but that of a society to its members.[2]

Anschütz's idea of federalism was entirely orthodox, and in his discussion of the question as to how federalism came to be so strongly marked in the Empire created by Bismarck, although it was in many respects organised on unitarist lines, he was largely in agreement with Triepel and Bilfinger. That Empire was, according to the constitution, essentially federal in its nature; actually unitarism was strong, originally because of the hegemony of Prussia. That hegemony was neither federalist nor particularist; it was unitarist. But there was no indication of that in the written

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 11.

[2] Ibid., p. 12.

In the Empire the only really federal feature was the division of competence between the *Reich* and the individual states, which gave very great scope to the self-determination of the latter. In many matters the individual states made use of their legislative power; they were hardly hampered in the carrying out of imperial laws by the very wide supervision of the Empire; there was little distinct imperial administration, and so much the more reserved rights. Everything was arranged to the advantage of the *Länder*. The other side of federalism—the right of participation in the formation of the will of the empire—was more formal than real.

From this standpoint he analysed the new Weimar constitution, which was not socialistic enough for the socialists, but too much so for their opponents, too democratic for the anti-democrats, not federal enough for the federalists and also too unitarist. Many members of the National Assembly wanted much more than a mere federal state unitarism, they wanted at once the unitary state. But they realised that this goal was not attainable under the existing conditions and consequently allied themselves with those who wished to keep the traditional and familiar type of the federal state, but were ready by strengthening the attributes of the *Reich*, and by restricting the rights of the individual states,

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, pp. 14–15.

to bring the *Reich* much nearer to the unitary state than it was before the Revolution.[1]

The Weimar constitution based the *Reich* no longer on the individual state but on the German people. Laband's conception of *Reich* as a corporation with so many members as there were *Länder* is untenable with respect to the present law. The *Länder* might have a share in the formation of the will of the authority of the *Reich*, but they were no longer participators in or holders of the authority of the *Reich*. Moreover, the *Länder's* rights of self-determination and of participation were much more restricted than formerly; many matters were no longer to be determined by them—as, for example, the nature of their constitutions in the most important respects. Of the two supreme organs, the *Reichstag* was to be elected and the office of President filled by direct popular vote—that is, in a definitely unitarist way, and the particularist authorities had a share only in the appointment of the *Reichsrat* with its much diminished powers. The increase and strengthening of the authority of the *Reich* in scope and character, though the administration was entrusted mainly to the officials of the *Länder* and the limitation of the financial powers of the *Länder* meant a great advance in the authority of the *Reich* and the sovereign right to determine the areas and boundaries of the *Länder*, was a decisive manifestation of the unitarism of the new *Reich*.[2]

A direct effect of that provision could be to assist the dissolution of Prussia into independent *Länder*. But such dissolution, by making any hegemony of Prussia impossible and increasing that species of individual state which was most dangerous to national unity—namely the middle state—would not serve any unitarist purpose, but the very contrary. It was, therefore, not surprising that the most extreme programme of the federalists, the Bamberger Programme of the Bavarian People's Party, whole-heartedly supported the provision.

Anschütz next pointed out that though the power of the new *Reichsrat* was theoretically less than that of the old Federal Council, yet actually in some respects the provisions of the constitution and subsequent legislation were distinctly more favourable to it.

Broadly speaking, the old Federal Council was federal in appearance, but in fact very unitarist, because of the overwhelming dominance of the Prussian-German government of the Empire

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 17. [2] Ibid.

and the dead weight of the Prussian hegemony. So the power of the Federal Council was helpful to the unity of the Empire. But now the hegemony had disappeared and federalism had much greater opportunities in the *Reichsrat* because "the voting strength of Prussia is enormously reduced by the fact that half of its votes in the *Reichsrat* have been taken from it and given to its provinces to use as they think fit."[1]

Though the division of competence was to the increased advantage of the *Reich*, yet there were some counter-balancing federalist factors, such as the obligation upon the administration of the *Reich* to have regard to the special interests of the territories and the influence of the latter in respect of the local personnel of the offices of the *Reich*. These provisions were victories for federalism, which Anschütz himself regretted. They were, he thought, not so much federalist as particularist and petty.

As regards the future of federalism in Germany he ventured the forecast that in the immediate future it would probably meet with a certain measure of success. At Weimar federalism was not strongly represented, except by some Bavarian members and government representatives, and the sense of the great majority of the National Assembly was unitary even among the extreme right, in the German national party, and also to a remarkable extent in the Central Party. But then came a change. Anschütz pointed out that, as with every Revolution, so after the German revolution of 1918 there was a reaction. In the same way as there was an attack on the work of Weimar, so there developed a growing attack upon unitarism—that is, "the tide of federalism began to rise."[2] Its strength was derived partly from the policy of excessive centralisation adopted by the supreme authorities of the *Reich* —which was, however, exaggerated for the purposes of the agitation, and was represented as "Berlinism." It was not possible to say at the time (1924) to what extent this federalist tendency would be checked by the latest German political phenomenon—the popular movement, the nationalism of which must be in spirit unitarist.[3]

Bavarian federalism was based on the principle of confederation —no subordinate relations of Bavaria to the *Reich* and freedom from the *Reich* rather than freedom in the *Reich*. This Bavarian federalism, which was at least fifty per cent. particularism, would

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 20.

[2] Ibid., p. 22.

[3] Ibid.

not serve the common interests of all or some of the *Länder*, but only the special interests, or what were short-sightedly supposed to be the special interests, of Bavaria. The question of the federalisation of the constitution of the German *Reich* had become essentially the problem of the relations between the *Reich* and its second greatest *Land*—that is, it had become a Bavarian problem.[1]

Therefore Anschütz opposed in principle the Bavarian demand for special concession as set out in the Bamberger Programme of the Bavarian People's Party in 1920 as to the federalistic formation of the *Reich* and the official note on the revision of the Weimar constitution of the *Reich* by the Bavarian government, and also in the essay on "federalism" by Konrad Beyerle of Munich, a member of the *Reichstag*, and the memorandum on *Das Reich und die Länder*, by Baumgartner, President of the Baden Parliament, which, despite its author's position, had no official authority.

To Anschütz the whole federalist movement was regrettable. Every federalist demand must be very closely examined to see if it would tend to a loosening and weakening of the *Reich*. What Germany needed was close concentration and the strongest possible combination of all national resources, and this was attainable only by unitarism, whether democratic or under a hegemony, and not by federalism.[2] The Weimar constitution had, Anschütz believed, created a system under which not only the *Reich* but also the *Länder* (including Bavaria) could continue to exist. Mistakes had no doubt been made; they could be remedied, but a general revision of the constitution was not necessary and should be avoided for the time being.

He suggested that there were two ways in which the federalist claims could be met. As regards the right of self-determination, it was possible to meet the Bavarian wishes to a considerable extent by the renunciation of the right of the *Reich* to legislate on certain matters, such renunciation being either tacit, by non-use, or express by deletion of some subjects from various articles of the constitution. As regards means of communication, the control must remain with the *Reich*, but Bavaria might possibly be given a greater influence in respect of their administration.[3]

To the second demand, that for the restoration of complete freedom as to the form of the constitutions of the territories, Anschütz was uncompromisingly opposed. The question of the

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 23.

[2] Ibid., p. 25.

[3] Ibid., pp. 25, 26.

form of the state must be settled by the *Reich* alone, both for itself and for the *Länder*. There must be homogeneity, and that must be secured by the law of the *Reich*. So long as the *Reich* remained a democratic republic, it could not allow the *Länder* to have a fundamentally different state form, whether monarchy or Bolshevism.

Thirdly, Anschütz entirely rejected any claim to the extension of the right of self-determination to military matters and foreign affairs. Both these matters must be solely in the hands of the *Reich*, in respect of both legislation and administration, in the interest of national unity.

As regards the proposals for an extension of the right of the *Länder* to participate in the formation of the will of the *Reich*, Anschütz pointed out that these proposals were all directed towards raising the status of the *Reichsrat*. The proposal to subject the legislative initiative of the government of the *Reich* to the veto of the *Reichsrat* would be to subject the intercourse between government and parliament to a control incompatible with the spirit of parliamentary institutions. And the proposal that the concurrence of the *Reichsrat* should be necessary for all legislation is in complete conflict with modern democracy, in which the first chamber is superior to the second, and no democratic state can secure democracy without maintaining this fundamental principle. The *Reichsrat* could properly be a check on the *Reichstag*, "but not in any circumstances by the power of an absolute veto."

Such a right of veto could not be conceded—unless the bases of the present constitution be overthrown—for reasons both of democracy and unitarism. The supreme decision, the final word, as to whether a law should be enacted or retained must rest with the German people, the nation and its representative, the *Reichstag*, and in the last resort with the universal suffrage, but not with the governments or assemblies of the *Länder*.[1]

Finally, Anschütz viewed with some apprehension the weakening of the position of Prussia in the *Reichsrat*, by the reduction of the total number of votes allotted to Prussia, and the attribution of half the nominations to the provincial authorities. There was a real danger that in the absence of a Prussian hegemony, telling for unity, particularism would get control. So he concluded that "from the standpoint of national interests, of the interests of the *Reich*, we need the full, and not the partial, voting power of

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 30.

Prussia, as a compensation for the absence of the government vote in the *Reichsrat*, and we need this voting power, this necessarily anti-particularist force, the more as the constitution, status and power of the *Reichsrat* is increased."[1]

§ 6

In the same year as Anschütz wrote on "German Federalism in the past, present, and future," Heinrich Triepel also published an article on federalism,[2] in which historically or from the strictly technical standpoint he enquired whether and to what extent the Weimar constitution was in the true line of German state development, and then proceeded to examine that constitution as a piece of technical organisation.[3]

No matter what adjective one put before federalism—whether "true" or "improved" or "enlightened" or well-considered," the contrast was always between "a federalism of fact" and a conception of decentralisation. The Bavarian government had asserted that the Bismarckian Imperial constitution was in the true sense of the word "federative," since it had given to the *Reich* what was necessary to it and had spared the individuality and independent life of the states as much as possible. According to this a constitution would be federative if it created a proper balance between the interests of the collectivity and those of the particular powers, which, of course, left open the question as to what should be considered a proper balance. The Bavarian statement presented federation as an idea or moral tendency taking effect in the establishment of a constitution, and as something definitely antagonistic to unitarism. There is some truth in this, for the conception of federalism in relation to the federal state institutions only attains definiteness by being contrasted with unitarism. The federal state is an intermediate between unitary state and confederation, i.e. a compromise between two conflicting tendencies of which the one would force a nation consisting of a number of races and other bodies into the form of a unitary state, whereas the other would organise them as a league

[1] Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi: *Der deutsche Föderalismus. Die Diktatur des Reichspräsidenten*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Heft I, 1924, p. 32.

[2] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924.

[3] Ibid., p. 196.

of independent states.[1] The effect of the compromise is that in each federal state unitarist and federalist elements exist side by side; but it is possible for any federal state to stress either element more than the other. A federal state is unitarist if it regards itself as a unitary state, disregarding the existence of the individual states as special bodies; it is federalist if it ignores the statehood of the federal state. Under the new German constitution the *Reichstag* is constructed on unitarist lines, the *Reichsrat* on federalist lines. A tendency to strengthen and develop the old "league" elements of the constitution against the unitary elements is federalism, the antithesis of unitarism. "True" federalism would differ from any other only in the strengthening of its tendency and the scope of its demands, but not in essence.[2]

Triepel considered the unitary elements in the Weimar constitution to be far greater than those of the Bismarckian constitution. He declared that "taking everything together, and realising that of the 'treaty bases' of the Bismarckian constitution no trace is left, and that everything is now based on the unifying principle of the popular sovereignty of the collective German people, it is clear that the unitarist elements of the constitution have thrust the federalist elements so much into the background that the step towards a completely unitary state is so short that many theorists think it has already been taken."[3]

There would, Triepel thought, be nothing unnatural in a widening of the unitary basis of the German constitution. It would, in fact, be in the line of historical development.

The fifty years' history of the imperial constitution was one of the uninterrupted progress of unitarism in the German *Reich*, despite various federative institutions, such as the reserved rights and the final authority of the Federal Council. The war and the concentralisation of state forces which it necessitated had hastened that movement. Triepel thought that even if the war had brought to Germany victory abroad and there had been no domestic revolution, unitarism would certainly have made further progress. Just before the revolution the constitutional amendment of October 28th, 1918, had made a decisive advance in the unitary direction.[4]

If this view were correct there were two criticisms to be made of the recent federalist efforts. It would be both impossible and a complete reversal of the course of history to go back,

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 197.
[2] Ibid., p. 198. [3] Ibid., p. 199. [4] Ibid., pp. 200–201.

in respect of the relations between the *Reich* and the *Länder*, to the state of affairs existent before the Bismarckian constitution, i.e. to the federalism of the Frankfurt Assembly.

The Bavarian manifesto was an appeal to revise the Weimar constitution in the federative sense in her own special interest in a way that would go back to the state of things that existed not before 1919 but before 1867.

It was impossible, and unnatural, to attempt to undo the unification which the Weimar constitution had brought about in matters in which such a condition had long been regarded as desirable. Examples of this were the unification of the conduct of foreign relations and the administration of military affairs and the railways (the last-named had been the chief weakness in the Bismarckian scheme), the abandonment of the system of reserved rights, the giving of the right of final decision in disputes between the *Reich* and the *Länder* to the court of the *Reich*, and especially the right of supervision accorded to the *Reich*.

The National Assembly of Weimar set up a new relationship between the *Reich* and the *Länder*; the powers and activities of the *Reich* were increased and the traditional influence of the *Länder* on the formation of the will of the *Reich* was not merely lessened, but was actually taken away from them by the constitution.

To Triepel the main question was whether the striking acceleration of the unitary development was due to a right or wrong estimate of the existing political forces in Germany.[1]

The responsible makers of the Weimar constitution had believed that the Revolution had destroyed both the will to live and the power to live of the German states, and that the putting aside of the dynasties without a struggle showed that they were not deep-rooted in their lands. But this had soon proved to be a two-fold mistake. The states had given up their dynasties—and many had done so very reluctantly—but they were not ready to renounce their own statehood. The desire for the maintenance of the separate states, and the agitation for the continuation of the separate state governmental centres was not due merely to romanticism bred of recollections of the past or to selfish and petty interests, but was due to much wider considerations.[2]

The populations of the *Länder* as such, quite apart from racial connections, which played only a secondary part, had been raised to statehood by the efforts of the princes, had derived their

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 205.
[2] Ibid., p. 207.

sense of citizenship from the territorial state, valued a direct connection with the governments of the *Länder*, and wished to be governed by officials of the *Länder*. Consequently, antagonism to unification and centralisation was found not only in the bureaucracies, but also in the popular representative bodies of the *Länder*.

Triepel thought that constitutionalism had done very much to promote solidarity in the *Länder*, and the parliamentary system imposed by the Weimar constitution—not in terms but in spirit—upon the constitutions of the *Länder* had not brought about the expected homogeneity of the *Reichstag* and the parliaments of the *Länder*, or a schism among the particularist forces; it had rather proved to be a support to federalist or even particularist efforts.

He thought that the Weimar constitution had been too hasty in the emphasis which it laid upon unitarism. The makers of that constitution thought that the federal state had outlived its usefulness and the time of the unitary state had come. They sought their models in Western Europe, but entirely failed to notice how in England federal tendencies, and in France regional movements, were seeking to loosen the unitary state. So "the federal state period of the modern great state is not yet ended. Neither in the United States nor in the British dominions is there any idea of giving up the federal system; in the latter it is even being developed."

The federalist reaction in Germany seemed, therefore, to Triepel to have a good deal of justification. But there was a second reason for it. Under the Bismarckian constitution the federal state problem was closely involved with the constitutional problem. Every increase of the authority of the Empire increased the power of the *Reichstag;* so did any enhancement of the position of the Emperor, as the Chancellor was responsible to the *Reichstag*. But the Conservative parties, and the great Chancellor himself, were opposed to parliamentary government. Bismarck's cautious attitude towards unitarism was due, therefore, not so much to hostility to it in itself as to it as the precursor of parliamentary government.

The Weimar constitution was a decisive victory of unitarism, and with it of democratic parliamentarism; it had established a parliamentary absolutism in its purest form. But as Triepel pointed out, historical experience has taught us that against every absolutism, whether monarchical or parliamentary, some opposing forces will come into being. It may be that the courts appear as the guardians of freedom; or it may be that local

self-government may prove to be the way of keeping absolutism in check.[1] The history of England is the guarding of freedom against the omnipotence of parliament. And federalism is to a large extent simply the stressing of the idea of local self-government in a particular form. And it was therefore quite natural that federalism should come forward again when unitarism had joined hands with that absolutism which is the enemy of freedom.

Triepel thought that, regarded from this standpoint, the latest federalist movement could not be condemned outright as a reaction. Anything which serves the sound principle of self-government cannot itself be entirely unsound. And this led to another consideration.

The organic principle which is commonly called self-government manifests itself in two ways.

Self-government is the independent activity of public authorities in a prescribed and limited area; but it also means the putting at the service of the whole, social forces which have a life of their own apart from the whole. Accordingly the commune has self-government in so far as the state hands over a certain body of business to its charge, but it also exercises self-government when it is entrusted by the state with the discharge of certain state duties in such a way that its organism is intermingled with the state organism, and its organs become state organs—that is, organs acting in the name of the state.[2] It is in this second sense that the great moral importance of self-government, as a means of developing the sense of community, is most marked.

Triepel declared it to be an "old maxim of state-craft" that rival forces could be most surely utilised for the state by giving them work to do for it.[3] He pointed out that the Brandenburg and Prussian Electors and Kings had been well advised when they forced the feudal lords into the service of the state, and that one of the most serious mistakes of the era of Wilhelm II was that the movement of the working class represented by social democracy had been artificially kept out of serving the state.

Looked at from this side, federalism took on a new aspect. The claim that the separate states should be given a larger field of activity independent of the *Reich* was only one-half of the federalist programme. The other half was the desire of the *Länder* to have a greater share than hitherto in the formation of the will of the *Reich* in matters of legislation and administration.

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, pp. 208–209.
[2] Ibid., p. 209. [3] Ibid.

That desire could be represented as directed towards satisfying selfish interests and strengthening individualist statehood; but it was also possible that it was the expression of the desire to serve the collectivity of the *Reich*, as Bilfinger put it, "to place all the available powers of the states so far as possible together in the service of the *Reich*."

Federalism of this kind would not be inimical to unity, but helpful to it; it would not favour particularism but counteract it; it would be a cement and not an explosive. It would be federalism for the sake of both freedom and unity; and that, according to Triepel, was the essence of federalism as understood and represented by Bismarck.[1]

The co-operation of the German princes in the work of the *Reich* secured by Bismarck's creation of the federal Council had not endangered, but on the contrary had promoted, the unity of the *Reich*. It was a misunderstanding of German history to regard statehood of the *Länder* simply as a cause of disintegration. Whilst it is true that the territorial powers had caused the failure of the old Empire, it is also true that for centuries the *Reich* was held together by them in federative form, though threatened by an essentially non-German imperial power. And at the present time it is impossible to maintain that the *Reich* is so strong that it can dispense with the help of the states in maintaining unity. It must be recognised that alongside the unreasonable claims of federalism there were reasonable ones, and to Triepel the problem was how to satisfy these. In answering this question the formal and material aspects must be kept distinct.[2]

It was unfortunate that substantial concessions to federalism could not now be made except by a formal amendment of the constitution, and therefore with much parliamentary conflict.

The Weimar constitution lacked flexibility. In Triepel's opinion this was right, for a democratic parliamentary constitution, which entrusts legislation to quickly changing majorities, must be "rigid" rather than "flexible" if the constitutional position is to be safeguarded against constant change. Consequently, formal agreements had been made between the *Reich* and the *Länder* on a number of matters. In respect of posts, railways and canals that seemed to have been contemplated by the constitution. Unfortunately, it appeared that the concessions thus made by the *Reich* were either too small to satisfy the states concerned or

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 210.
[2] Ibid., p. 211.

so large as to satisfy them and thereby cause some anxiety as to their harmony with the intent of the constitution. An alternative method adopted had been that of declarations by the *Reich* of non-intention of exercising particular powers.[1]

Such agreements or declarations, so far as legally binding at all, only bound present and not future governments, and there was doubt as to their political expediency, since non-participants could well object to them and there was the risk that *Reich* legislation could only be obtained at the price of such concessions. And most of all, such agreements were not compatible with the constitution. For the constitutional rights of the *Reich* could not properly be touched except by amendments of the constitution.

In order to meet the reasonable wishes of federalism, a revision of the constitution was necessary; what line should that revision take?

Some people thought that a careful system of decentralisation would serve the purpose. But of this Triepel was doubtful; it would only satisfy half the demand for "improved" federalism. Decentralisation can have different meanings. The transference of work from a central department to district offices—say the *Länder* finance offices or *Reich* offices—would not affect the relations between the *Reich* and the *Länder*, or might affect them unfavourably. It might in some cases offend those federalist sympathies which the *Reich* officials disliked, and on the other hand the setting up of local delegations of the *Reich* ministries might encourage particularism.

It would be different if a system of decentralisation were carried out by transferring tasks of the *Reich* to the *Länder* and communes. That could be done in two ways. The authorities and officials of the *Länder* could be entrusted with the management of the affairs of the *Reich*, but subject to the guidance and supervision of some *Reich* authority.[2] That, however, would be of small service to the individual state. For a system which did not give to the *Länder* an administration carried on in their own name and on their own responsibility, but made their officials indirect officials of the *Reich*, a system which involved a direct control of the middle and subordinate officials of the *Länder* instead of a mere supreme supervision over their central governments, and withdrew from the *Länder* a good part of their official patronage, would have more a unitary than federative working. Decen-

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 213.

[2] Ibid., p. 215.

tralisation, to be a real attempt to meet the federalist claims, must be such as to transfer powers of the *Reich* to the *Länder* as state entities.[1]

This would in effect carry out one-half of the federalist programme, but it would leave unsatisfied the desire to give the *Länder* a larger share in the affairs of the *Reich*; in fact, it would work the opposite way, for it would reduce the number of *Reich* matters in which the states could share.

Therefore the modification of the powers of the *Reich* by a revision of the constitution might not prove the best course to the desired goal. But it must be taken, and Triepel thought there were a number of matters in which such modification could be made without harm to the collective interests.

The central issue of the whole constitutional problem was one of organisation, and turned on whether and to what extent the federalist efforts could be satisfied by the strengthening of the *Reichsrat*, the place in which the influence of the states upon the *Reich*, and their co-operation with it, were strongest and most manifest. The most radical course, proposed only in the Bamberger programme of the Bavarian People's Party, to give the *Reichsrat* the same rôle as the old Federal Council, was impracticable. It would mean a break-away from the whole course of development. The *Reichsrat* could not be entrusted with the exercise of the *Reich's* powers of supervision; it could not be given the chief authority to issue decrees. The Bavarian demand that the *Reichsrat* should be given full co-ordinate rights in respect of legislation would have put the *Reichsrat* on the footing of a ruling Chamber (*Kollegium*) side by side with the parliament of the *Reich*.[2]

Triepel, as a unitarist, was a defender of the system of hegemony in the functioning of the federal state. He thought that if the German individual states again obtained a dominant position in the *Reich*, by an increase in the powers of the *Reichsrat*, it was obvious that they must all share equally in this gain.[3]

In the body which would be made into a supreme governmental organ no one of them could suffer any restrictions which would prevent it exercising the authority to which its historical and present importance entitled it. That was particularly true of Prussia. Prussia had lost, by the Weimar constitution, its old dominant position in the *Reich*; it had so far made no attempt to recover it; but if the constitution were revised in a federal sense,

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 215.
[2] Ibid., p. 221. [3] Ibid., p. 222.

if the states acquired a substantially increased influence on the government of the *Reich*, Prussia would be forced to abandon this attitude and demand that place in the *Reich* to which its area, population and political and economic importance entitled it.

Triepel himself had no fear of the "spectre" of Prussian hegemony; rather he regarded that hegemony as a necessity of nature. It was not inseparable from a monarchical state form; it had need only of Prussia's military powers and her communications system. It had in the past not been based only on bayonets; in a federal state, made up of a number of large and small states, the leadership must inevitably be taken by the largest, especially when it has to its credit great achievements and services.

Triepel thought that in the Germany of to-day hegemony is not conceivable in the form of the rule of the large states over the small, or of the exercise of supremacy within territories other than those of the state having the hegemony.

For hegemony is not necessarily domination over others; it is "guidance." So Triepel defined hegemony as "the content of all legal principles and institutions by means of which the leading power of a consolidated state entity is able to give to the life of the collectivity the desired direction and to impress it with the stamp of its own personality."[1] And he asserted that it was historically evident that the authority of Prussian jurisprudence and successful administration would have sufficed, without any form of compulsion, to make Prussian law and Prussian administrative institutions of all kinds into the common possession of Germany.

Leadership and voluntary allegiance spring from and are in harmony with the German sense of law; their ethical value is at least equal to that sense of confederation which prevails in those federal republics which are based on the equality of the member states, and is greater than that of the "bugbear" of the majority principle. If the Prussian state were given in the council any precedence over the other states, it would be in a position to fulfil in the future its historical mission, which is not yet ended.

But hegemony gives its possessor in a federal state a strong position over against the central government. So in considering the federal problem in Germany one had to ask whether the pre-eminent position of a consolidated Prussia in a strengthened *Reichsrat* would be to the advantage of the *Reich* as a collectivity. From the technical standpoint this was the same as asking if the

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, p. 225.

increase of Prussian influence on the conduct of the *Reich* might not involve the risk of dual government. The practical difficulty was due to the relationship between the authority of the *Reich* and the state authority of Prussia.

Recently it had been suggested that the offices of President of the *Reich* and of the suggested President of Prussia should be held by one and the same person. Triepel did not see any fundamental objection to this, if it meant that the elected President of the *Reich* should be *ipso facto* President of Prussia. Prussia could quite well be satisfied with this, as Prussia has four-sevenths of the presidential electors, and it has been estimated that "even in the most unfavourable and unlikely case a President of the *Reich* must have received at least a third, and usually a much larger proportion, of the Prussian votes. The scheme would be of insignificance, however, if the president alike in the *Reich* and in Prussia could be freed from undue dependence on parliament, if, for example, he need not have the concurrence of ministers for the dissolution of the legislature."[1]

If this union of the two presidential offices were held to be impracticable, Triepel thought that an attempt at a union of ministerial offices might be made and various proposals of the kind had been put forward. Triepel did not discuss them in detail, but thought them worthy of consideration, though he pointed out that they all involved a sacrifice by parliament—the taking of important ministerial offices "out of politics."

Triepel ended his survey of the Prusso-German problem by declining to forecast the ultimate solution, contenting himself by repeating the remark of Montesquieu that "the coach will run somehow, because it must."[2] Prussia and the *Reich* will continue to go together, because they *must* do so.

§ 7

The great advocate of a new German federalism was Beyerle, a member of the National Assembly of Weimar, who clearly expounded the Bavarian attitude which was still largely influenced by the theory of confederation of Max Seydel.

Himself a follower of Seydel, he naturally defended the system of "reserved rights" for his own state and the federative basis of

[1] Heinrich Triepel: *Der Föderalismus und die Revision der Weimarer Reichsverfassung*, in *Zeitschrift für Politik*, Band XIV, 1924, pp. 228–229. [2] Ibid.

the new constitution, not only because of his political prejudices but also on theoretical grounds. In the constitutional committee of the National Assembly at Weimar in May, 1919, he stated that as to the general question of reserved rights, Bavaria must insist on continuity. Bavaria and other states could give up some of their reserved rights, but not all those rights could be treated in the same way. The movement towards unitarism was admittedly strong, but he did not think that the reserved rights played in the controversy between unitarism and federalism the rôle commonly attributed to them. It was quite possible to think of unification with the maintenance of some reserved rights which were felt to be of special importance. To Bavaria's military rights her people attached great value—they had not been disadvantageous to the *Reich* in the past and there were strong political reasons for maintaining them.[1]

As regards the constitutional limitation of the *Länder* to the republican form of state Beyerle remarked that "I have some doubts as to so far-reaching an interference with the member states' right of self-determination. Practically the restoration of monarchy is not a matter for discussion. If the present proposal be adopted such restoration could only be by revolution and not by any legal procedure."[2]

Beyerle criticised vigorously the nature of the *Reichsrat*, which presented one of the central problems, involved as it was with the division of powers between the *Reich* and the states and the retention or abandonment of the reserved rights. In view of the limitation of the scope of the law of the *Länder*, of the probable diminution of the reserved rights, and the renunciation by Prussia of her presidential position and therefore also of her constitutional hegemony, the treatment of the question of the *Reichsrat* was of supreme political importance. Under the draft constitution "the *Reichsrat* would no longer be the representative of the holder of state authority in Germany, but an organ for the representation of the member states, associated with the central organs of the *Reich*."[3] Therefore, as the representation of the states, the *Reichsrat* should be not only a factor in legislation, but should also have an appropriate share in the administration of the *Reich*.[4]

Comparing the position of the *Reichsrat* with that of the former federal council Beyerle pointed out that the latter was the representative of the holder of the state power of the Empire, which

[1] *Bericht und Protokolle des Achten Ausschusses über den Entwurf einer Verfassung des Deutschen Reichs*, 1920, p. 43.
[2] Ibid., p. 110, second col.
[3] Ibid., p. 116, first col.
[4] Ibid., p. 116, second col.

was a union of princes and free cities. Now the whole people had become the holder of the state power, but the *Reichsrat* envisaged in the draft was only one of the organs of the *Reich*, side by side with or under the government of the *Reich* as representative of the free states which are members of the *Reich*. Over against it the chief organ of the collective state was to be the president of the *Reich*.

As regards the share of the *Reichsrat* in legislation, its position was to be quite different from that of the Federal Council.[1] Hitherto the concurrence of that body had been necessary for the introduction of any legislative proposals and also for the postponement of a law. Under the new constitution a law could originate with the government or with the *Reichstag*, and moreover the *Reichsrat* could take part in the initiation of legislation, not by itself submitting proposals to the *Reichstag* as the Federal Council could do, but by requiring the government to introduce proposals for legislation which the *Reichsrat* had originated. Even if the government disagreed with the proposals it must introduce them. The *Reich* could widen the scope of its legislative powers by a simple *Reich* enactment, and the *Reichsrat* could not make any effective protest against this. A very substantial change was also to be made in respect of the power to make regulations, under which this power was vested mainly in the *Reichsrat*, without the co-operation of the *Reichstag*. The draft constitution proposed to transfer this power to the government of the *Reich*, as alone responsible to parliament.

Next, there was the problem of the participation in the administration of the *Reich*, which was bound up with that of ministerial responsibility. The former Chancellor and secretaries of state were subject to the Federal Council or the presidential authority (the Emperor); the government of the new *Reich* was to be quite independent of the *Reichsrat* and was responsible to the *Reichstag* as the representative of the people.

The *Reichsrat* was an entire reconstruction of the Chamber of States proposed in Preuss's first draft. In that scheme the complete representation of the states was not contemplated; the chamber of states was to be simple representation of self-government. The individual states were self-governing bodies; they were to have the right to send to the chamber of states representatives freely chosen from their assemblies, those representatives having the right to vote as they chose. The only business of the chamber

[1] *Bericht und Protokolle des Achten Ausschusses über den Entwurf einer Verfassung des Deutschen Reichs*, 1920, p. 116, second col.

was to be the participation in legislation; it was to have nothing to do with the administration of the *Reich*. Beyerle stated that from the standpoint of "radical unitarism" this was logical, but the states and public opinion generally were hostile to it, on the ground that the chamber thus contemplated would be representative not of the states but of political parties, and in consequence would be nothing more than a dubious reproduction of the *Reichstag* on a smaller scale, and would completely undermine the position of the individual states in the *Reich*. The *Reichsrat* would, on the contrary, be the one part of the *Reich* organism in which adequate effect could be given to the will of the member states.[1]

The proposal for a chamber of states had a certain attractiveness because it was taken, though with important changes, from the Frankfurt constitution of 1848. It had encountered the opposition of the *Bundestag*, the representative of the loose and purely international law union of the states of the old German confederation, and this was the decisive cause of the failure of the 1848 attempt at a constitution. The political position of the individual states, as free states, was now entirely different; it was possible to break down the influence of princes and the individual state governments by means of a strong and so far as possible freely constituted chamber of states.

Therefore Beyerle asserted that "we as a constituent National Assembly have no longer to meet the power of princes, but as a free state collective association (*Genossenschaft*) we have to deal with free state member associations."[2] For this reason he hoped that the prejudice against a stronger development of the *Reichsrat*, which would approximate it more closely to the federal council of the former imperial constitution, would be allayed. The suggested *Reichsrat* offered the proper middle course between the old Federal Council and the chamber of states. A *Reichsrat* which could share in the administration of the *Reich* was the more necessary because without it "the individual states were in danger of becoming merely objects of the supervision of the *Reich* authority instead of being sharers in that authority."

The main point for discussion seemed to Beyerle to be that of the real representation of the states side by side with the *Reichstag* that represented the people as a whole. He argued that what was needed was a genuine representation of the states as necessary members of the organisation of the new *Reich*, and with a participation in the affairs of the *Reich*, without thereby adversely affecting

[1] *Bericht und Protokolle des Achten Ausschusses über den Entwurf einer Verfassung des Deutschen Reichs*, 1920, p. 117, second col. [2] Ibid., p. 118, first col.

the unity of the *Reich*. Therefore the *Reichsrat* should not be only a legislative organ. And it must be a constant element in contrast to the fluctuating membership of the Parliament."[1]

From the political point of view the *Reichsrat* must be one of the means of promoting the idea of the *Reich* in the new free state. It must be the bond of union of the *Reich*, counterbalancing the particularism of the assemblies of the *Länder*. That particularism was regarded by the unitarists as highly dangerous, but as it was quite impossible to sweep those assembles suddenly away, it must be countered by giving the states a share in the conduct of the *Reich*, so that thereby *Reich* interests and state interests could be harmonised.

At the same time he opposed the original proposal to base the *Reichsrat* on the state parliaments alone, because that would only put "party particularism" in the place of regional particularism.[2] On these assumptions Beyerle favoured a *Reichsrat* representative of the states on purely federative lines.

Apart from Beyerle, Hans Nawiasky was the chief exponent of contemporary Bavarian federalism. In his work entitled *Der Bundesstaat als Rechtsbegriff*, published in 1920, he started with the definition of the state as "the holder of an individual legal right of dominion," or, as dominion is equivalent to the will expressed in any system of law, as "the holder of a will manifested in a particular system of law." This definition implies the personality of the state. The relationship between the state and individuals, being one of law, is a relationship of rights and duties; but this can exist only between subjects of law (*Rechts-subjekte*), i.e. persons in the legal sense. Therefore the state must be a person. Nawiasky therefore defined the state more fully as that legal subject whose will is manifested in some definite system of law, or that person whose will is expressed in some particular system of law."[3]

Nawiasky, as a *Herrschaft* theorist, considered it necessary in an enquiry into the federal state to consider points relating to the idea of the state and state authority, the chief of these—of great importance for the proper appreciation of the federal state—being the exclusiveness of the state authority.[4]

The nature of the state authority is, Nawiasky argued, elucidated by the conception of the system of law. That system can be

[1] *Bericht und Protokolle des Achten Ausschusses über den Entwurf einer Verfassung des Deutschen Reichs*, 1920, p. 118, first col. [2] Ibid., second col.
[3] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 17.
[4] Ibid., p. 18.

described as the unconditionally binding regulation of man's outward conduct. If there were on our planet only one "world state" it would follow that the conduct of all subjects of law would be regulated by the system of law of that state. As, however, the course of history has brought the existence of a plurality of states, a demarcation of their respective spheres of authority is necessary. That demarcation must relate to the subjects of law and the nature of their conduct; it is necessary also to determine the body (*Kreis*) of persons and the precise sphere of their activity which each state influences by the establishment of rules. The first is possible by the definition of subjective factors—personal supremacy; or there can be determination of a definite area (*Raum*) in which the rule applies to all the subjects of law—territorial supremacy; or a combination of both is possible. Both together can be described as the external sphere of authority of the state.[1]

Consequently "the determination of the sphere of activity covered by the rules of law is in so far of importance as affording the basis for the definition of the activity of state according to the material point of view, for the establishing of the competence of the state."

Then Nawiasky considered by whom this delimitation is to be undertaken. If the state authority is law by reason of its own inherent power, the state alone is entitled to do this by its own system of law. If the states are in fact isolated, no difficulties arise. But if they are not, it is possible that each will decide the scope of its authority without regard to the others, and the spheres may partially or wholly overlap. In that case which rules are to be binding upon individuals and what state authority are they to obey? Rules belonging to two different systems of law cannot in practice claim equal validity side by side. The states must harmonise their rival wills. For this purpose they must have recourse to a delimitation of their spheres. This is in practice achieved only on a territorial basis. A delimitation in terms of state competence is conceivable; it is possible to imagine two state powers operating in the same territory, one dealing with customs and matters of trade and commerce, the other with civil law and procedure; but the establishment of two such state powers, each acting without regard to the other, is in practice impossible. For every state can of its own inherent right extend its competence, and consequently the possibility of conflict remains. So in this case also there is need to secure harmony.[2]

The simultaneous claims of two separate state powers to exercise

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 19. [2] Ibid., p. 20.

authority in the same sphere can only be prevented by mutual agreement, and is necessary to save the individual subjects from coming into conflict with one or other power, and to prevent conflict between the two powers. For these practical reasons international rules have developed and are recognised by the states as regulating their action.[1] If the federal state is to be a state composed of states, the definition of the state must be applied to the central power and to the members. The whole and the parts must be understood as possessors of individualised legal authority. There must be a system of law of the union, and so many other systems of law as there are members. And each system must be "original" and not "derived." Consequently no one system can be subordinate to another. From this it follows that the authority of the union and the members must be co-ordinate—the members must not be superior to the whole or the whole to the members.[2]

At the same time Nawiasky admitted that the union and members must together form a higher unity and their systems of law must harmonise. And from that standpoint there must be a demarcation between these systems; for each embodies a particular will, and the delimitation cannot relate to will as such. The only possible line of demarcation is by the subject-matters of the will, that is, by the spheres to which the will applies. Such a division between the union and its members is one of competence, and as it is not feasible to formulate any general and certain principle of division, by means of some general clause one finds everywhere adopted the system of enumeration, which assigns competence in specified matters to one or other of the parts. The list so formed is in some ways always associated with the principle that anything not specifically assigned to one part falls within the sphere of the other. The division of powers—by the enumeration method thus defined—may formally appear in the constitution of only one of the parts; it becomes actually an integral part of the constitutions of both.[3]

The interrelation of the two constitutions to one another is determined by reference from one to the other. The system of union refers matters not coming within its own competence to the systems of the members, and *vice-versa*. From the standpoint of the member state the federal law, in so far as the law of the member state referred to it, would be part of its own law, and the authority of the union would be authority of the member state; so that the

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, pp. 20–21.
[2] Ibid., p. 21. [3] Ibid., p. 23.

union would be "not a state but a society of states having equal rights, that is, a confederation." And from the standpoint of the union, the law of the member state to which the union law refers would be a part of that law; consequently the union and not the members would rule; so that the members would not be states, and the union would be a unitary state.[1]

These two conclusions lead, Nawiasky pointed out, to the definition of the federal state as "that legal phenomenon which is from the standpoint of its own legal system a unitary state, and from the standpoint of the legal systems of the constituent states is a confederation."[2]

The mere adoption of this reference idea is therefore insufficient. Reference presupposes the subordination of the one to whom the reference is made to the one who makes it. In the case of the federal state and its members there is no such one-sided subordination, but co-ordination. Reference is reciprocal.[3]

Therefore Nawiasky sought a complete analogy to the construction of the federal state in the conception of international law as "external" constitutional law. International law is normally, in contradistinction to the law binding individuals, the law binding individual states. Consequently international law is outside the systems of state law. If "outside" is interpreted as "superior" and the law of the individual state is regarded as subordinate to international law, then there is a denial of the original and underived nature of state law, which is deprived of its independent character. The validity of the state law is derived simply from international law and becomes a dependent part of the latter, the state *Herrschaft* as the operation of an independent will ceases, and the state is no longer a *Herrschaft* state but a legally subordinate person—at most a public law corporation or self-governing body. If, however, "external" be taken to mean unconnected and unco-ordinated, then the legal quality of state law remains and the *Herrschaft* of the state is undisturbed; but there is no interrelation of the two systems of law, and they are entirely aloof from one another.

From this there arises the question of formulating such a theory of international law as will leave state law undisturbed and yet establish a relation between them. Nawiasky thought this could be done by regarding international law as a part of state law instead of *vice-versa*. The state declares, by means of its own system of law, that in its relations with other states it

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 24.
[2] Ibid., p. 25.

regards itself as bound by prescribed rules, subject, of course, to the adoption of the same rules by the other states also. In this way international law is "a common portion of the systems of law of the participating states," operating in each state by virtue of that state's own system of law and by its will, at once on an equality with the other part of that system—domestic state law, by reason of its incorporation into the law of the other states, and also on an equality with the law of the other states.[1]

By these formula the "law between states" will not only be brought into proper relation to the domestic state law, but will also serve as a bridge between the systems of law of the various states.

An obvious criticism of the theory thus formulated is that there are many points in which international law and domestic state law may conflict—for example, an international treaty may clearly contemplate the issue of a penal code for certain offences, which will, in fact, not be made a part of the domestic law. If international law be regarded as "external state law," based on the will of the state, the result in such a case would be that the state at the same time "wills" and does not "will" the action in question.[2] Nawiasky thought, however, that even in such a case there was no real contradiction. For the principle of the "law between states" is quite different in content from that of the "law within states." In the former the state undertakes to create a definite legal rule. But it is backward in doing so—that is all.

To understand the federal state it is necessary to bear in mind that it "must consist of at least three states," that is, of the union and two members. It is conceivable that two state personalities could divide full state power (*Kompetenz*) between them, each state exercising a part of it. But Nawiasky did not think it necessary to enquire whether such an arrangement had historically ever existed—whether, for example, Jellinek's *Staatenstaat* (a term under which he included the oriental tributary state) was an instance of it. In any event the federal state comprises at least two members besides itself. The relation of the union to its members is that out of the ordinary spheres of the systems of law of the member states identical subject-matters are withdrawn to constitute the sphere to which the system of law of the union is applicable. That is to say, "the sphere of federal state law is a common portion of the spheres of the laws of the constituent states."

So Nawiasky arrived at the following definition: "the federal state is the possessor of a will consisting of a common portion of a plurality of systems of law which are united by that portion,

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 27. [2] Ibid.

or the holder of a legal power of dominion which forms the common portion of a number of legal powers of dominion bound together thereby." In contrast thereto the member states of the federal state are "the subjects of different wills manifested in their systems of law, united by the fact that a definite portion of their systems of laws constitutes a special common system, or the holders of legal powers of dominion of which a particular portion constitutes a special common power of dominion."[1]

Alternatively, if stress is to be laid on "competence," the definition can be: "the federal state is a state whose competence is made up of a common part of the competences of a number of states associated in it. Member states of a federal state are states which are united by the fact that a definite and identical portion of their competences is assigned to one other particular state."[2]

It follows from this that a federal state does not mean a state unity in which a number of states participate in such a manner that they are absorbed by the unity. It is rather only a form of the division of competence; it is a central state authority, enlarged by a number of complementary state authorities. It is not correct to describe these individual states as members.[3]

From his *Herrschaft* state conception, and assuming the absolute equality between central and individual states, Nawiasky held that there is not only analogy but also affinity between international law and the federal state law.

The former is concerned with a part of the systems of law of all the states which are members of the community of nations; the second is concerned with a portion of the systems of law of the states participating in the federal state community. The question is therefore whether the difference is due solely to the extent of the collectivity or to other factors also.[4]

If the first of these two alternatives applied, the difference is one not of kind but simply of degree, depending on the number of members of the collectivity. But this is clearly not a satisfactory explanation of the difference, and it is necessary to find other distinguishing features. They cannot be found in the internal structure of the two sets of rules. Both are concerned with the determination of rights and duties, based on the common portion of the system of law concerned. The real difference is that the rules of international law embody only the rights and duties of a state vis-à-vis other states—that is, they are rules of law operative

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 28.
[2] Ibid., p. 29. [3] Ibid. [4] Ibid., p. 32.

between states. There is no room for "dominion," which is not possible as between one "state" and another. The federal state is, however, a "state," and as such has dominion over individuals. The decisive distinction between international law and federal state law, which is state law, is that the individual is a subject of rights and duties in state law but not in international law. Federal state law differs from state law only in respect of scope. Consequently the rights and duties of the individual result partly from federal and partly from member state systems of law. But within its own sphere each part operates as a unitary state.

Nawiasky pointed out that some jurists did not accept this antithesis, and quoted the dictum of Anglo-American law that "International law is a part of the law of the land" and the provision in the new German constitution that "the generally recognised rules of international law are binding parts of the law of the German *Reich*."

The original draft had been: "The relations of the German *Reich* to foreign states are governed by state treaties, by the generally recognised rules of international law, and by the decisions of the League of Nations, should the *Reich* become a member thereof." It was in Nawiasky's judgment a mistake to suggest that the first-quoted formula meant that the principles of international law would apply directly to individuals, whilst the second formula would have the contrary effect. For even if the rules of international law became part of the law of the *Reich*, their application would still be limited to the *Reich* as a state. As they are not directed to individuals they cannot of themselves be binding upon individuals.

This determination of the decisive difference between international law and state law cleared the way to determining the distinction between the conceptions of "federal state" and "confederation."

Like previous political thinkers and jurists, Nawiasky held that the federal state is a manifestation of state law, and the confederation is a manifestation of international law. That is to say, the difference lies in the fact that in the former rights and duties are imposed upon the individual, in the latter upon the state.

The assumption in the case of the confederation is the absence of any legal relationship between the union and the citizens, and the fact that the union is not endowed with legal authority to rule directly over individuals.

The assumption in the case of the federal state is, on the con-

trary, that the union can establish a system of law creating rights and duties of individuals.

Further, as in the confederation there is no authority over individuals there is no state authority (*Staatsgewalt*) at all, because the states cannot be subject to any such authority. And consequently the confederation itself does not acquire a ruler personality; it does not become a subject of law possessed of the right of dominion; it is a union, and not a state.

That does not mean, however, that the confederation has not personality, is not a subject of law. To Nawiasky with his orthodox principle a subject of law was "nothing other than a subject of legal rights and duties, as being the holder of a legally valid will."[1]

He held, therefore, that the doctrine that a confederation is not a subject of law—a juristic person—but a legal relationship, is inadequate. The only satisfactory distinction is that the federal state, because its system of law prescribes the rights and duties of individuals, has dominion, which is lacking to the confederation because its system of law has no such content. The federal state has the quality of a holder of dominion; the confederation has not. Only he asserted that the possession of dominion must not be taken to imply authority over the member states.[2] If the confederation, as the conceptional holder of the collective wills of a member of associated states, is a legal subject, but not possessed of *Herrschaft*, the same must be true of the holder of the collective will of the collectivity of international law which includes in theory all states. Side by side with the confederation there appears the League of Nations as the conceptional holder of the will which is manifested in the common portion of the systems of law, but is applied only to their mutual relations. As the authority of the state must be original, and not subordinated to any power, the League of Nations, like the confederation, is according to this interpretation not a subject of rights and duties standing over the states, but one standing by the side of them.[3]

It follows, therefore, according to Nawiasky, that unitary state, federal state, its member states, confederation and League of Nations are all on the same level; not one of them is superior to another. But the first three are subjects of law possessed of dominion (*Herrschergewalt*); the confederation and the League of Nations lack this second quality.

There remained only the question of how to determine the

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 35.
[2] Ibid., p. 36.
[3] Ibid., pp. 36–37.

part of the systems of law of the member states which is to constitute the system of the federal state, that is to say, how shall the division of competence between union and members be made?[1]

Nawiasky answered this question by pointing to two main possibilities. The division can be made once for all, in the constitution of the federal state or in the constitution of its members, or in both. Or the division can be a variable one, but this involves determining in whom the power of variation shall vest. In practice it must be either the union, or the members, or both.

The right to determine competence is technically called "*Kompetenz-Kompetenz*." Its true importance is indicated by the fact that it can lead in a federal state in one extreme to consolidation into a unified state, and in the other extreme to the practical dissolution of the federal state. That is to say, it means the legal power to determine if the state shall or shall not exist. But this has the consequence that the *Kompetenz-Kompetenz* is an original inherent power, not derived from any other power, that is it implies statehood. And, further, a combination of a number of states is a state only if it has this uncontrolled competence. If this competence vests in the member states, their combination is not a state, but at most a confederation. If on the other hand it vests in the union, then the members are not states, and the union is not a *Staatenstaat*, but a unitary state.[2]

Discussing this *Kompetenz-Kompetenz*, Nawiasky held that its ascription is nothing more than a case of division of competence, and that this is most clearly shown by the fact that it can be divided and the parts allocated to the two sides. It is easily possible to entrust it to the member states, but to except certain rights of the federal state and leave them to it. Conversely the revision of competence can be entrusted only to the federal state, but with provision at the same time to secure some rights for the member states. An instance of this last was the special rights according to certain states under the German imperial constitution—rights which could be taken away only with the consent of the state concerned.

Unlimited competence had, Nawiasky pointed out, frequently been called sovereignty, the highest power in law. Some writers had regarded sovereignty as identical with state power, that is, had regarded sovereignty as an essential of statehood. Others had distinguished between sovereign and non-sovereign states, and Jellinek had made the possibility of the federal states dependent on this distinction. A third group had distinguished

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 37. [2] Ibid., p. 40.

between sovereign and semi-sovereign states. Nawiasky held that if sovereignty be deemed to be a quality of the state, then a division of it is logically impossible, and distinction between sovereign and semi-sovereign states is ruled out. Similarly, he rejected the idea of the non-sovereign state as incompatible with the conception of statehood. Further, the theory which distinguished between sovereignty as an external matter only, and "dominion" (*Herrschaft*) as internal, and held that the ascription of the latter quality did not involve that of the former, was equally inacceptable to him. And so he asserted that both the member states and the federal state itself are sovereign.

But, he asserted, this does not mean that in the federal state the sovereignty is divided; he held, like Waitz, that it is the state authority which is divided between the union and the members, and each part of this divided authority is endowed equally with an identical quality, i.e. sovereignty.

On this assumption Nawiasky asserted that every state authority is sovereign, but does not necessarily possess supremacy of competence. So *Kompetenz-Kompetenz* is not identical with sovereignty. It is only a special kind of competence.

He thought that one of the causes of the ascription of sovereignty to the federal state and the withholding of it from the members was the meaning given to the term in international law. There it is customary to regard sovereignty as equivalent to the capacity to enter into international legal relationships. But experience shows that some states are capable of entering into such relationships and some are not.

In the federal state, and frequently even in the confederation, this capacity to enter into international legal relations is concentrated in the union, and from that standpoint sovereignty is ascribed to the union and denied to the members. It is juristically entirely possible to allow to the state person, as to every subject of law, a complete or limited legal capacity, and in this sense to speak of "sovereign" and "non-sovereign" states. But it is necessary to appreciate clearly the fact that this meaning of "sovereignty" is not the same as that which it has in state law.[1]

Thus Nawiasky's attitude to federalism was entirely a legalist attempt to concentrate on the division of state authority between the union and the members, the state legal relationships within and without the federal constitution, and lastly the legal relationship of the people of the *Länder* to the state.

Examining Laband's theory of the federal state and the idea

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 48.

of the member states as self-governing bodies, he reached the conclusion that the "federal state is a union of collectivities (in the sense of juristic persons) which outside the sphere of the competence of the union are states. Member states are collectivities which are states in so far as an (in essentials) agreed part of their competence has not been transferred to the state (the federal state) formed of them."[1]

As regards internal relations his differentiation between federal state and confederation did not advance much beyond that of Waitz, and with regard to the rights of the collectivity vis-à-vis the members and *vice-versa* he held that there is no fundamental difference in this respect between the federal state and the confederation.[2]

He had already written in this sense of a collectivity of states when considering the totality of the phenomena of federal state systems of law. It was entirely in accord with that to take as the distinguishing characteristics of the two kinds of state unions the fact that the federal state is in direct legal relations with the individuals, and the confederation is not. This distinction left aside the legal relations between the states, but it is obvious that these have an international law character. They could have a state law character if they were based on the law of a state—and that would exclude the state personality of the other part.

On this assumption he asserted that the equality of the federal state and confederation in respect of the legal relations between union and members and between the members is a logical consequence of the co-ordinate position of the two parts. Admittedly there is a political side of the matter, and with that he did not purport to deal.

With legal logic Nawiasky asserted that as the state power is the highest power, independent of every other, and as the state will is also the highest and is dependent on no other will, its obligations depend solely on its own will, its own system of law. This applies both to the states' domestic obligations in respect of individual subjects of law and its external obligations to foreign states. And consequently the fact that these obligations combine with other obligations towards precisely defined state legal subjects in a closer legal relationship, into a legal collectivity, as in the federal state or confederation, or alternatively are co-ordinated in the general community of international law, cannot be the basis of a distinction.[3]

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 66.
[2] Ibid., p. 106.
[3] Ibid., p. 107.

Federal, confederate and international legal relations being thus closely alike in kind, it was for consideration whether the principle of *rebus sic stantibus*, which is generally accepted in international law, does not apply equally to confederation and the federal state. The result would, however, be that the legal relationships in a union of states would be as precarious as those of international law. The principle to him was justified only by its own merits and practical considerations; from the theoretical standpoint it had no claims for consideration—it exists only because of the nature of the relations with which international law deals, and the manner in which it deals with them.[1]

Finally, he asserted that the conception of contract grew up out of domestic (*innerstaatlich*) law. But it is not sufficient to take the agreement of the wills of the parties to the contract as the basis of its legal validity. Rather the determining consideration for the obligatoriness of the contract is the rule of law, which regards the union of wills as one of the postulates, the evidence of fact, with which the development of definite legal obligations is bound up. The transference of the idea of contract to the sphere of international law brings about a complete change of meaning, assuming, that is, that one does not accept the idea of a system of international law imposed upon the states by an independent authority. Then the will of the parties to the contract is the source of its binding power, for the reason that it is a matter of the state will which can be bound only by itself or by the system of law in which it manifests itself.[2]

Nawiasky's whole book was a defence of the theory of the treaty-based union of international law as the principle of federalism.

The federalist demands of Bavaria have been the outstanding feature in federalist discussion in the present-day Germany. Konrad Beyerle's definition of federalism was that it is the "basic political check which seeks to preserve the state structure of a federal state, the parts of which themselves possess state characteristics, and to protect the member states from being merged into a unitary state."[3] He pointed out that as the actual German constitution had a federal nature, the result of historical development, federalism was a very great problem of German constitutional politics.

"Union" and "unitary state" were contrasted conceptions, but the reality is always one of flux and its significance is histori-

[1] Hans Nawiasky: *Der Bundesstaat als Rechtsbegriff*, 1920, p. 107.
[2] Ibid., p. 108.
[3] Konrad Beyerle: *Föderalistische Reichspolitik*, 1924, p. 11; *Föderalismus*, 1923.

cally conditioned and relative. Beyerle held that there is no such thing as an everlasting state system, and like his opponents Triepel and Anschütz he asserted that the federal state was "a thing intermediate between the tendencies of federalism and of unitarism." As to the Bavarian attitude towards the unitary tendency, he said that "in Bavaria any prophet of the decentralised unitary state speaks to deaf ears." Seydel's influence is still strong in our time, as Beyerle declared that "in the final instance federalism requires a clear acknowledgment of the idea of the statehood and sovereignty of the *Länder*."[1] His federalism and that of his school was the result partly of the Bavarian traditional doctrine and partly of the desire to protect Bavarian rights against the predominance of Berlin.

Against Seydel's particularist theory as maintained by Beyerle and Waitz's divided sovereignty theory renewed by Nawiasky, Carl Schmitt, an outstanding jurist with a great reputation in present-day Germany, fought against the "entirely empty phrase 'highe t authority' " as "a fiction of absolute normativeness," and sought to prove the definition of sovereignty of Bodin and Pufendorf which made it "the power to determine exceptional conditions."[2]

According to him, this right to determine "exceptional conditions" is sovereignty. In the federal state the central authority has the decision as to what are to be regarded as "exceptional conditions" since the individual state, according to Article 48 of the new German constitution, has no independent authority to declare them, and the *Reichstag* and the presidency can at any time attempt the abolition of it.

Therefore Carl Schmitt's assertion is that the union is sovereign. The question whether the individual states shall be designated states or not is the same question that has been the subject of controversy for the last hundred years, and the most difficult problem in connection with the relation of sovereignty to federalism.

The political contest in the early period of the new German *Reich* was almost entirely between two parties, the Federalists and the Unitarists. The Bavarian People's Party formed the support of Bavarian rights and the German National People's Party, seeking the preservation of Prussian supremacy in accordance with the Bismarckian traditions stood in favour of federalism. The centralists inclined to pure federalism quite independent of

[1] Konrad Beyerle: *Föderalistische Reichspolitik*, 1924, p. 19.

[2] Carl Schmitt: *Soziologie des Souveränitätsbegriffs und politische Theorie*, 1923, p. 6; *Verfassungslehre*, 1928, p. 108.

Bavarian or Prussian particularism. The Social Democratic and Democratic Parties have continued to march from 1918 towards the unitary state.[1]

Numerous jurists and politicians have propounded and defended legal and political arguments in support of the two parties, and the result has been an extensive pamphlet literature.

J. D. Bredt pointed out that the idea of a new federal republic was due not so much to the "text" as to the "spirit" of the Weimar constitution.[2] He thought that the general trend of the new German *Reich* was towards Preuss's decentralised unitary state.[3]

The general political movement in the period from the November Revolution of 1918 to the formation of the Weimar constitution was away from Bavarian Particularism on the one hand and from the Bolshevik council system on the other; that is, it was directed towards saving the new Germany from Seydel's ideal of federalism and from the Spartakus' dictatorship.

Whilst the federalists and centralists have been engaged in this academic and political controversy the Austrian school, represented by Kelsen and Wittmayer, found a solution of the problem of the federal state by a route different from that taken by the Germans.

Wittmayer pointed out that "Kelsen, who follows critically in Jellinek's footsteps, made his position clearer when he designated the federal state of the old school as the only particular instance of the organised technical type of the decentralised state."[3]

He asked if the early Bismarckian empire was really nothing more than a decentralised state, and answered that there was "no alternative between this and a confederation."

In this respect he declared that "the German federal state" is only "an expression to which we are reduced in order to avoid this dilemma, an obscure jumbled form which at its best reflects actuality, but only vaguely, and neglects a valid basic principle."[4]

Kelsen also pointed out that the constitution of the federal state was considered as the constitutional authority by which the part orders—the collective and member states—were in equal co-ordination, but not in subordinate relation.[5]

Therefore, since the division of competence between union and member states must of necessity contain "a minimum content,"

[1] *Handbuch der Politik*, 1921, Vol. III, "Die Neuen Parteien," pp. 80–122.
[2] J. D. Bredt: *Der Geist der deutschen Reichsverfassung*, 1924, p. 77.
[3] Ibid., p. 136.
[4] Wittmayer: *Die Weimarer Reichsverfassung*, 1922, pp. 119–120.
[5] Hans Kelsen: *Die Bundesexekution*, 1927, pp. 130, 131, 134.

Further, the collective constitution could from the outset contain not only the whole constitution of the union and the main outlines (in more or less detail) of the constitutions of the member states, but also some provisions as to the content of the positive law rules to be issued by union and member states within their respective competences. Thus it may set out a list of fundamental rights. So that neither the union nor the member state can enact legislation destructive of the liberty of the subject, without infringing the *collective* constitution. In this case the autonomy of the constitution and the legislative authority of both the union and the member state are restricted.

Differing from the Austrian opinion that the federal state of the German *Reich* was only a "perplexed expression" for the decentralised unitary state, the German theory of the federal state still clung to the traditional conception of federalism. Not only Seydel's Bavarian followers, but also other jurists, such as Freytagh-Loringhoven, E. Jacobi and Poetzsch, although they admitted the general tendency of the German federal state towards the unitary state, attempted to justify the maintenance of the statehood of the *Länder*.[1]

[1] Freytagh-Loringhoven: *Die Weimarer Verfassung in Lehre und Wirklichkeit*, 1924, pp. 41, 66. Jur. E. Jacobi: *Einheitsstaat oder Bundesstaat*, 1919, pp. 38,

As Walther Rauschenberger in 1920 pointed out, characteristics of the conception of the federal state are the following:—

"(1) Sovereignty of the federal state (comprehensiveness) and self-determination of its competence (*Kompetenz-Kompetenz*). The federal state is *actu* limited but, like every state, *potentia* unlimited.

"(2) The state unity of the federal state and the individual states. The individual state is subordinated to the federal state and derives its *Herrschaft* authority from the *suprema potestas*.

"(3) Participation of individual states in the formation of the will of the federal state.

"(4) Freedom of constitution of the individual states, and self-determination of their competence with due regard to the attributes of the federal state. The individual state is limited *actu* as well as *potentia*, but in the latter respect only negatively. The right to determine the content of its supreme rights and the form of its constitution is not to be confused with an inherent original *Herrschaft* authority.

"(5) Personal union between the individual state and the constitution-making organ of the federal state (formal). Materially; possibility for the individual state to maintain its existence and rights under (4) above."[1]

W. Vogel's defence of the federal state structure of the new German constitution, and Rudolf Cohn's suggestion of the ultimate control of the *Länder* by the system of *Reich* supervision were other contributions to the discussion.[2]

In modern Germany attempts had been made, e.g. by Constantin Frantz, to argue that the individual states had a racial basis, and to use that fact as an argument for federalism. Mommsen pointed out that the claim was unwarranted[3]; for the German states were the outcome of dynastic polities, ambitions of rulers and historical events, with the result that their racial basis had

39.—Jacobi argued that if the future government of the Reich succeeded in reconciling the interests of North and South Germany, not merely temporarily but permanently, and in ruling the Reich in harmony with the *Länder*, "then it will be time to change over from the federal state to the unitary state, which will be ruled no longer in a particularist spirit, but so that each territory will be assured of its own in accordance with the dictates of justice.

[1] Walther Rauschenberger: *Das Bundesstaatsproblem*, 1920, pp. 25, 26.

[2] W. Vogel: *Deutschlands Bundesstaatliche Neugestaltung*, 1919. Jur. Rudolf Cohn: *Die Reichsaufsicht über die Länder*, 1921, p. 62.

[3] Constantin Frantz: *Deutschland und der Föderalismus*, 1917. W. Mommsen: *Unitarismus und Föderalismus in Deutschland*, in *Zeitschrift für Politik*, 1925,

been to a large extent lost. The only real basis for their federalist claims was their historical rôle as states.

Becker agreed with this view, and pointed out that federalism in Germany was based also on the economic interests of groups and parties which could play an important, and indeed the chief part, in one particular state, but not in the collective state. But writing in 1928 he was not sure as to whether "racial federalism" or "state federalism" would prevail in Germany. Bavarian opinion favoured the former, for it would mean the division of Prussia and the consequent ending of its hegemony; but the forces on the other side were strong.[1]

Bilfinger laid down the propositions that "German federalism envisages the purpose of the federal state organisation and function of the *Reich* to be the putting of the existing powers of the individual state into the service of the *Reich* in as unitary a form as possible," and that the difficulty of this federal idea lies not so much in an antagonism to so-called unitarism as in the need of finding in the actual conditions of the time some means of securing a strong *Reich* authority in face of particularist tendencies.[2]

The generally accepted theory of the federal state was that of a state organisation intermediary between confederation and the unitary state, i.e. between federalism and unitarism. Therefore academic and political criticisms on the federal state of Germany are largely survivals of federal theory, and in fact I am afraid that all defenders of federalism were unable to go beyond the traditional hypothesis and consequently failed to find new lines for its defence.

Anschütz's and Bilfinger's proposals for reform of the *Reichsrat*, either by the administrative personal union of officials of the *Reich* government and the Prussian presidency or by alterations of its membership, met with fierce opposition on the part of the federalists.

The controversy between the unitarists and federalists found expression not only in political discussions but also in financial discussions between the popular representatives and the governments. The conference of financial ministers in October, 1927, was concerned with the financial needs of the *Länder*, and also with the federative problem. The difficulties arising between the *Reich* and the member states in various federal relations finally

[1] Walter Becker: *Föderalistische Tendenzen im deutschen Staatsleben seit dem Umsturze der Bismarckschen Verfassung*, 1928, pp. 9, 47.

[2] Karl Bilfinger: *Der deutsche Föderalismus*, 1924, p. 58.

brought about a conference of the *Reich* and the *Länder* in 1928, which consisted of the cabinet of the *Reich* and the Presidents or other ministers of the *Länder*. The problems before it were the modification of the relationship between *Reich* and the *Länder*, financial economy and administrative reform.

The discussion showed the old cleavage of opinion. The representatives of Hamburg and Prussia insisted on the organic decentralised state, whereas Held, the minister-President of Bavaria, emphasised the particularist federalism of the southern states.[1]

The following were, among others, the conclusions of this Conference:—

"The *Reich* government and the governments of the *Länder* are of opinion that the Weimar settlement of the relations between the *Reich* and the *Länder* is unsatisfactory and needs thorough revision. Whilst it has not been possible to reach agreement as to whether the reform shall strengthen the unitary or federal factors, or whether the combination of these factors in some new system is possible, there is complete unanimity as to the need for a strong *Reich*."

"Agreement has been reached on the following points:—

"1. Any partial solution is open to doubt. In particular the general solution should not be hampered by weak *Länder* being taken over by the *Reich* as '*Reich* territories.' Financial difficulties of the *Länder*, arising from a change of circumstances, shall be dealt with by other appropriate methods, which, however, shall not include subsidies.

"2. The *Reich* shall not exceed its sphere of authority by financial pressure or similar measures harmful to the *Länder*.

"3. If smaller *Länder* desire to be incorporated into neighbouring *Länder*, that incorporation shall be facilitated as much as possible. The elimination by voluntary agreement of the numerous small enclaves and detached portions of *Länder* appears desirable.

"4. The *Länder* will make between themselves, more frequently and rapidly than hitherto, agreements for the uniformity and consolidation of law and administration: in the making of such agreements the *Reich* will co-operate.

"5. The solution of the general problem shall be investigated by a commission nominated in equal numbers by the government of the *Reich* and the governments of the *Länder*. The Chancellor of the *Reich* shall be Chairman."[2]

Provision was made for a commission of finance ministers of the

[1] *Die Länderkonferenz*, January, 1928, published by the Reichsministerium des Innern, pp. 12, 13, 37, 38, 39, 47, 48.

[2] Ibid., p. 83.

Länder, under the chairmanship of the *Reich* minister of finance, to review the whole administration of *Reich* and *Länder* with a view to far-reaching economies.

Although the general trend of this conference was in the direction of "unitarism," yet the immediate result appears to have been to strengthen the position of the *Länder*, especially against the financial control of the *Reich*.[1]

During and after this conference there were numerous theoretical discussions on federalism.

Richard Thoma in 1928 urged the need for the unitary state, but combined with effective self-government. He declared that the extension of the power and action of the *Reich*, since the Weimar constitution, had an exaggerated unitarism, which yet lacked strength; that the constitution had marked federalist features which, nevertheless, result in injustice and the waste of money and effort; and that the state had in principle decentralised administration and, in part, legislation also, but that decentralisation is in actual practice the merest farce. It is a farce, he said, because "the *Reich*, whenever it transfers a state duty to the member states—whether entirely or for the carrying out of *Reich* laws—entrusts this duty to eighteen states, of which ten at least are too small—and some, moreover, are geographically scattered—to be equal to these duties and carry them out in an economical and administratively reasonable manner, and one of which, on the other hand, with 37 million inhabitants, is much too large for the transfer to it to be called decentralisation."[2]

He favoured the unitary state without Prussian dominance, and therefore advocated the division of Prussia and the organisation of Germany into eight to twelve *Länder*, in which Bavaria and Saxony would remain almost unaltered. This unitary state, necessary politically and economically, must, however, leave a large measure of federalism in the constitution, for only so could the future adherence of Austria be looked for.[3]

Erich Koch-Weser's proposal for the decentralised unitary state was the "abandonment of the sovereignty claims of the *Länder*, which lead to an extravagant and over-elaborate structure of governments and parliaments for the discharge of what are merely the tasks of self-government."[4]

Lohmeyer demanded decentralisation and self-administration

[1] *Die Länderkonferenz*, January, 1928, published by the Reichsministerium des Innern, p. 83. [2] Richard Thoma: *Die Forderung des Einheitsstaates*, 1928, p. 7. [3] Ibid., pp. 19–20.
[4] Erich Koch-Weser: *Einheitsstaat und Selbstverwaltung*, pp. 54–55.

as the only way of saving Germany from a highly centralised bureaucracy directed by a *Reich* government chosen by the *Reichstag.*[1]

Otto Braun and J. Haller asserted that the Germany of the future must be a Germanic Germany, not the Prussian Germany of the old Bismarckian constitution.[2]

Otto Frielinghaus declared that the "unitary state will come." He thought that the solution of the problem of the unitary but decentralised *Reich* was not impossible, if one began with the territories, made in them the fundamental unity and decentralisation clear, and built up thereon the highest institution of the *Reich.* He remarked that only then can one proceed to that reconstruction of the town and country circles which alone can bring about any real economy.[3]

Finally, Apelt proposed the regional state as the intermediary stage of development towards the unitary state. He asserted that the regional state is not a federal state in the usual acceptance of the term, but a stage beyond it in the direction of unitary state; it is by no means either an already decentralised unitary state or a collective state, but occupies an intermediary position between the federal state and the unitary state, tending towards development into the latter. Apelt thought it offered a basis of compromise between unitarists and federalists.

The regional state, regarded by Apelt as the next stage of Germany's political development, would, he thought, unite the German races more closely, but it must pay due regard to historical facts and to urgent state requirements, and by forming an intermediate stage to the unitary state it should be well adapted to serve the Germany of the future until community feeling has become so certain and strong among all Germans as to cause a unanimous demand for the unitary state.[4]

In all these circumstances Walter Becker's study of federalism concluded that "the future will give the answer that it is right to set up to-day the federative powers in the service of the *Reich,*" and adopted Max Fleischmann's expression, "Through federalism to beyond federalism."[5]

Max Weber, whose approach to the problem is more sociological

[1] H. C. Lohmeyer: *Zentralismus oder Selbstverwaltung*, 1928, pp. 76–77.

[2] Otto Braun: *Deutscher Einheitsstaat oder Föderativsystem?* 1927, pp. 34–35. Johannes Haller: *Bundesstaat oder Einheitsstaat?* 1928, p. 36.

[3] Otto Frielinghaus: *Der dezentralisierte Einheitsstaat*, 1928, pp. 19, 51.

[4] Apelt: *Von Bundesstaat zum Regionalstaat*, 1927, p. 63.

[5] Walter Becker: *Föderalistische Tendenzen im deutschen Staatsleben seit dem Umsturze der Bismarckschen Verfassung*, p. 187.

than that of other thinkers, made in his numerous essays a valuable suggestion as to German political organisation. He suggested that the solution of the problem whether the new German republic should be a unitary state or a federal state must depend on the nature of its economic system. He believed that the system aimed at by socialism is one of "municipalisation" and "state collectivism," and therefore requires an elaborate bureaucracy, with compulsory syndication under state supervision and state control of raw materials and of marketing, whilst private enterprise presupposes the autonomy of industries and trade, and freedom of the relations of the various parts of the economic organisation. That means that the socialist system favours the unitary state and the system of private enterprise the federal state.[1]

Weber was undoubtedly right in thinking that the form of political organisation of the state must be largely determined by its economic system. But his argument as to the incompatibility of socialism with the federal state system is, I think, untenable, because, having an entirely *a priori* conception of socialism, he misunderstood the real nature of the socialistic economic and political system. Socialism aims at the collective ownership of wealth, but should not aim at the collectivity of the organs and functions of the economic and political system; otherwise no socialist state can be satisfactorily developed—any more than the dictatorship of the proletariat—and no socialist economic organisation become effective. Therefore the idea of federalism does not conflict with, but is an important, and indeed essential, part of the conception of the organisation and functions of the socialist commonwealth. In this respect Walther Rathenau's ideal of the decentralised functional state—though erroneous in some points, as, for instance, with respect to proportional representation—was undoubtedly a socialist project for the future German socialist republic.[2]

The contemporary German federalism which we have thus briefly surveyed manifests the bankruptcy of the traditional doctrines. The ideal of the decentralised unitary state was the common goal not only of Preuss, in the doctrines based on the *Genossenschaft* theory, but also of Triepel and Anschütz in the dominant school of German jurisprudence, of the jurists of other schools, and also of the Austrian school. Federalism in Germany, as a matter of fact, has developed into the unitary state much more rapidly than the American federal state.

[1] Max Weber: *Gesammelte politische Schriften*, 1921, pp. 350–354.
[2] W. Rathenau: *Der neue Staat*, 1919, pp. 38–43.

CHAPTER VIII

THE LEGAL FEDERALISM OF HANS KELSEN

In this chapter I shall give an account of the federal ideas of Kelsen, one of the greatest European jurists of our time. His attitude towards sovereignty, differing from that of other contemporary jurists, is indicated by his statement in the Preface to the work entitled *Das Problem der Souveränität und die Theorie des Völkerrechts*, published in 1920, that although "the sovereignty of the state is one of the focal points of juristic discussion," he had in earlier works left it aside because "the solution of this problem is impossible without a fundamental exposition of the theory of international law."[1] The question of the relationship of that law to state law is involved with the problem of the nature of sovereignty and particularly of its essentiality for the state, conceived of as a system and indeed as a legal system. The work named above had for its main purpose the investigation of the relations between these two sets of legal rules (international and state), and as its most important result the perception of their necessary unity.

This unity is, however, only an enunciation of the unity of juristic science as a whole, which can have as its subject-matter only general legal rules, and fulfils its task, as a science, by developing a unitary set of legal principles (*Rechtsätze*).

"If, as Paul Natorp has pointed out, the problem of the ultimate unity of science as a whole is a philosophical problem, but there is also in the individual sciences an urge towards an ultimate unity for each of them, then the task of a philosophy of law may be defined as the determination and exposition of the final unity of juristic science in all spheres of law; but then the urge to that unity must manifest itself in all branches of law, and the philosophy of law must pervade the whole science of law."[2]

Kelsen thought that this unity had become obscured by a mass of unrealities and legal fictions, and asserted his purpose to be that of clearing these away from the minds of jurists and getting back to clear and simple legal principles.

Kelsen replied in the Preface from which the above quotations are taken to two criticisms made upon his theories. The first was

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. iii.

[2] Ibid., 1920, p. iv.

that in his discussion of legal principles and their functional interrelations he had failed to take into account social actualities—or as it is sometimes called "practicality (*Praxis*)." But he claimed this as a merit. As he regarded law as an independent system, quite distinct from nature—as do all other jurists, though they may not all realise it—and accepted the science of law as expounded by its best representatives, both past and present, as being entirely independent both in subject and method, and in particular quite different from natural science, so he regarded the appeal to "actuality" and "practicality" as an appeal to an altogether different body of knowledge, to a theory other than and essentially alien to the basic theory of jurisprudence—that is, "as recourse to an authority not having the necessary competence."

For the progress of all true science the first essential is that it confines itself strictly to its own special subject-matter and method. In the case of jurisprudence the observance of this limitation might seriously weaken its position among the sciences. And this would, of course, be regretted by those who thought that as "jurists" it was their business to understand everything and were accustomed to solve by juristic theorising problems of psychology and sociology, and to respond to the demands of politics. Unfortunately, one could not ignore the fact that as the result of going in this way outside its own sphere, jurisprudence had ceased to be regarded as a true science, and the jurist had come to be thought of simply as a sharp practitioner.[1]

The second criticism was that his teaching presented positive law as something derived merely from preconceived ideas, as something to be considered simply in the abstract. To that Kelsen's answer was that whilst he related the particular principle adopted in any judgment or administrative decision to the general principle of the law, the law to the more general principle of the constitution, and the principle of the constitution to a general supreme principle, the logical origin of all, established by the constituent authority as a juristic assumption, he fully realised that the constitution derived its validity from the postulated original principle, but its content from the empirical act of will of the constituent authority, just as the law derived its validity from the constitution, but its content from the facts of legislative decisions and a judgment derived its validity from the law and its content from the fact of a juristic act of will.[2] The logical development (*Erzeugung*) of the law from the original principle

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. v.

[2] Ibid.

proceeds step by step in a constant relation to a parallel fact, which, however, like psychological facts in relation to the logical values, is the *conditio sine qua non*, and not the *conditio per quam* of the law at its different stages and in validity to jurists.

But this logical deduction from an original principle must not be confused with the deductions of natural law. The real criticism which could be made on him was not that he was too little but that he was too much a positivist. But he saw more clearly than he had previously done the limits to which positivism can be carried in legal science. Only an uncritical dogmatism can deny that a system of positive law is wholly possible. The only point is to bear in mind the relatively *a priori* basis of such a system. Kelsen's own attempt he asserted to be based on the transcendental philosophy of Kant; the bringing of that philosophy and legal science together had been the great service rendered by Rudolf Stammler.[1] Kelsen himself undertook this task *as* a jurist, not as a professional philosopher, and *for* jurists, who are not conversant with the terminology of pure science and are influenced by materialistic prejudices, and therefore he had to utilise prevalent conceptions and an unscientific and pre-scientific terminology.[2]

§ 2

Before I give an account of his main juristic conception of the *Normsatz* and his famous *Stufentheorie*, I will describe his method of criticism of previous legal ideas by his Kantian process of argument.

I select his criticism of the organic theory of state because of its close connection with the problem of federalism. Kelsen discussed in the final chapter of his work entitled *Hauptprobleme der Staatsrechtslehre* (2nd ed., 1923) the question as to whether the organs of the state are legally a deputy or proxy (*Stellvertretung*) for the state, or whether the state and its organs are two essentially different legal institutions. He pointed out that in the more recent literature there was nearly general agreement as to the difference in kind between "organ" (*Organschaft*) and "deputy" or "proxy" (*Stellvertretung*). In this there was agreement between the supporters of the inorganic and organic theories of the state. Thus Laband had written that in the case of plenipotentiary

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. vi.

[2] Ibid.

representation (*Vertretung in Vollmacht*), i.e. by proxy, there is a legal relation between two subjects of law, i.e. the state and its proxy; but in the case of representation by organs (*Vertretung in Organschaft*) the juristic person itself (i.e. the state) acts directly and its executive (*Vorstand*) does not appear vis-à-vis third parties as a legal subject distinct from itself. And Preuss (an exponent of the organic theory) appeared to agree when he wrote of the *Organschaft*: "the law has in this case not to regulate the relations between two mutually distinct individuals (as in the case of the *Stellvertretung*), but to organise the common will of a collective person."[1]

He pointed out that only the inorganic theory could maintain this distinction, because it alone denied that the organ has a personality alongside of the state personality, whilst the organic theory—with its doctrine of the personality of the organ—assumes two legal subjects, and consequently cannot maintain that the *Organschaft* is not *Stellvertretung*, because there is only one person. According to Kelsen the distinction between *Organschaft* and *Stellvertretung* emanated from Gierke, that is, it had grown up in the soil of the organic theory of the state and had been taken over by the inorganic theory. But in his own opinion the distinction could be maintained only from the standpoint of the organic theory. For the complete non-personality of the organ, postulated by the inorganic theory, is an untenable doctrine if regard is to be had to the legal relations between state and organ, and especially the legally binding ones. If *Organschaft* is to be distinct from *Stellvertretung*, the stress must be laid not on the number of persons related but on the precise nature of their union. In the organic theory, the unique and, in particular, "organic" connection between organ and organism—in which the former is at the same time independent and yet a part of the latter—is of the utmost importance in its assertion of the distinction between *Organschaft* and *Stellvertretung*. But the inorganic theory lacked this factor.[1]

Kelsen, however, pointed out that the central pillar of the organic theory of the state is the acceptance of a unitary real-physical collective will of the state in relation to which the physical wills of the organs are operative only as parts of that will.[2]

Kelsen rejected the idea that the state-person is based on a real-physical collective will. He claimed to have shown that a collective will in the social-physical sense, as a unitary sub-

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 695.
[2] Ibid., p. 696. [3] Ibid.

stratum of the state person, does not exist because (as Preuss held) there is no clear proof of the existence of a common will, but also because it can be positively demonstrated that the requisites for the existence of such a collective will of the state are lacking and must be so, because by the term "state will" we must understand something quite different. But he, like Hobhouse, assumed that if there exists for the state what social psychology designates a "common will" it is not an independent will, in the sense of social psychology, but is only an expression of the fact that a plurality of individual wills have a common content.[1]

But he argued that if, as the organic theorists maintained, the psychical will is the "substance of personality," there are only individual personalities, but not a collective personality, because the term "collective personality" designates something essentially different from "person," namely, simply a relation between persons, and can only express the fact that the wills of a plurality of individual persons are in accord. The individual person and the collective person are the same in name but not in nature, and therefore the postulate of the unity of the idea of personality, which is accepted by the representatives of the organic theory, must be abandoned.

Kelsen thought that the illusion resulting from the use of the term "collective will"—which created the assumption that something is a will which is only a relation between wills—explained the mistake which regarded the will of the organ (*Organwille*) as part of a larger will of like nature to itself and the organ-person as part of a collective person. But as the will of the organ cannot be a part of a state will, but at most is one of a number of individual wills which are in accord, so the action of the organ cannot be the action of the state for the reason that the organ-person is a part of the state-person.

From this point of view of material psychology, not formal jurisprudence, a collective or common will exists only so far as it is possible to point to an agreement of individual wills.

But if the action of the organ is to be explained legally as being the action of the state, this conclusion is not based on that relation between the wills of the separate individual organs which rank as a collective will in the sense indicated—because such relation does not, in fact, exist, but on the system of law which embodies in its principles those rules of attribution, by virtue of which certain human acts are attributed not to those who actually do

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 698. Hobhouse: *The Metaphysical Theory of the State*, 1921.

them, but to some common force conceived as operating through them.[1]

If the system of law is designated "organisation," then the action of the organ should not count as the action of the state (as it did with Preuss) because the will of the organ is part of the organised common will, but because the existence of a unitary organisation makes it necessary to assume a unitary common state will—in the sense not, indeed, of social psychology, but as meaning a general point of attribution. What is commonly called "state will" is only a term for the unitary nature of that system of law which is called "organisation."

Kelsen, therefore, asserted frankly that it is simply a vicious circle to speak with Gierke and Preuss of a collective will which is first organised by the system of law, if the existence of a collective will can be deduced only from the fact of organisation, that is, the existence of a system of law.

But Kelsen argued further that apart from this false conception on which the organic theory of state is built up, the particular juristic doctrine deduced from that theory as to the legal position of the state organ in relation to the state person and the directly consequential distinction between *Organschaft* and *Stellvertretung* is untenable, because it is self-contradictory. Kelsen argued that it was not possible to reconcile Preuss's dicta that the "collective person is not a third person separable from its parts," that the organ person is an organising part of the collective person, and its rights and obligations cannot be in any way separated from those of the collective person, with his separation of the organs from the whole as independent persons and the recognition of the existence of legal obligations and subjective rights of the organs vis-à-vis the organism, and his agreement with Schlossman's argument, against the pseudo-organic terminology of Laband, Jellinek and others, that the recognition of the independent personality of the organ in relation to the organism is necessary because of the existence of reciprocal duties and subjective rights on both sides.[2]

To the riddle thus presented the organic theory of the state answered only that this relation between the organism and the organ is an "organic" one; or, in Preuss' words, "unity in plurality is the characteristic of the conception 'organism.'" But Kelsen held that there are not such logical obstacles to the idea of physical organisms as there are to that of social organisms

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 699.

[2] Ibid., p. 700.

which, according to Preuss, are not simply analogous to the form, but are actually a second species of the same genus. For in the case of the physical organism no one would class the organ not only as a part of the organism but also as a separate unity distinct from it. To be the organ of a whole means simply and solely to be bound up with that whole, to be a means to an end and not an end in itself. In the sense of the natural law conception of the organ, resulting from the organic theory of the state—to which the physical and social organisms are only two species of the same genus—the state organ cannot be at the same time organ, as it is necessary to regard it as a legal purpose in itself, that is, as the subject of rights and obligations which are not rights and obligations of the organism, because they are against the organism and between the organ and the state.[1]

Kelsen sought to indicate the solution of the problem of regarding the organ as subject of rights and obligations possessed of personality and also as not so possessed, by avoiding the mistake of trying to ascribe to the organ the possession of both these attributes in that relation in which they must be mutually exclusive. The organ can be an end, and a means, but only in the two quite separate relations in which the organ stands to two entirely distinct groups of legal principles.

The organic theory had been forced to recognise that the relation between the two subjects differs in the two cases of *Organschaft* and *Stellvertretung*. To quote Preuss: "To the organic theory the legal relation between the collective person and the organ-person forming part of it is a relation of two unequal wills, the organ will is subordinate to the collective will," i.e. the relationship is that of authority. The individualistic legal relation between the representative or proxy (*Stellvertreter*) and the person whom he represents is that of two equal wills, i.e. the will of the representative is co-ordinate with that of the person represented.

Kelsen pointed out that by setting up in this way a legal subordination side by side with the legal co-ordination of the subjects the organic theory deprived its general scheme of a unitary character.[2]

For whilst in accordance with the postulate of the conception of the unitary person all persons must appear as co-ordinate with one another because it is from the same relation to legal order that they derive their character of persons, yet according to the organic theory the postulate of unity seemed to be abandoned and the organ person is subordinated to the state-person. As

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 701. [2] Ibid., p. 702.

according to the ordinary theory of the public law—accepted even by the organic theory—the relation of the state to the other subjects of law is that of legal domination, but is different from its relation to the organ persons, there is for the whole legal scheme a third plane. Kelsen pointed out that a juristic method of this kind concerned itself with three legally entirely different categories of persons—the mutually co-ordinate subordinate persons, the state person dominant over them, and finally the organ person which is subordinate to the latter but in a different place from the first category.[1]

In criticising this result Kelsen remarked that "against the possibility or admissibility of the theory of legal subordinate and dominant relations and for the axiom here presented that the state as a person must be legally co-ordinate with all other persons, the only contention that can possibly be adduced is that the purely formalist body of doctrine of the jurists is incapable of giving expression to political and economic forces—which are in both cases psychological factors; that the relations of subordination and dominance, which are actually present and cannot be ignored, and are the real determinants of power, find no place in the legal concepts, and are left out of consideration as being merely 'factural' and not legal factors." It can further be pointed out that force and power can exist as physical factors only in the relation between human beings, and not between the artificial creations of law, i.e. between juristic persons, and that in particular the state is simply a central point of attribution and not the embodiment of psychical function, a power factor. That is of course true only from the purely legal standpoint; it is only to the law that the term "state" has that connotation.

If one can give to the term "state" as to that of "society" from the sociological standpoint only one meaning, then to this "state" of sociology it is possible to ascribe all those qualities which the public law of to-day asserts the state to possess—power and force—rule and dominance. The practical sociological consideration—which is a socio-psychological one—takes account of all those elements which exist as facts of power and force in the psychical and material reality of being. But from the juristic standpoint there is no "above" and "below"; everything is on the same plane.

Kelsen held that the rejection of a condition of legal dominance and subordination side by side with one of legal co-ordination was in the interest of the greatest possible simplicity of general doctrine. The prevalent teaching had never been able to explain

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 702.

how the relationships described as being those of dominance differed legally from other relationships. For they cannot arise from anything except the legal obligations and subjective rights of persons. A differentiation between these conceptions is, however, not admissible, because their absolute unity is a fundamental postulate of all jurisprudence.

Now, Kelsen pointed out this view was often criticised as being based solely on private law. But this did not matter if only there was recognition of the need for some unitary basic conceptions applicable to the whole range of law. A distinction between private and public law is quite inadmissible if it means that to form the conceptions of private law some other method is necessary than that used for public law and that the conceptions of the latter must include elements absent from the former.[1]

He explained that if the juristic interpretation of industrial relations had to ignore economic supremacy and the conditions of superiority and subordination which prevail between employers and employed, and if these actual economic factors were not expressed in the relevant legal conceptions, this is not because their relations are a matter of private law, but because legal doctrine by its very nature is not able to take these elements into account. And this juristic interpretation cannot and may not change its nature when dealing with "public law" relationships (so-called because the state person is concerned). When the theory of public law was stimulated to find legal expression for state power relationships it entered into the field of politics and sociology. The present-day distinction between the methods of private law and public law is so much one of principle that the general bringing of both under a unitary conception of law is no longer warranted.

The assumed legal relationships of dominance and subordination, or of *Herrschaft*, which distinguish public from private law entirely disappear when there is recognition of the fundamental principle of all systems of state law, namely, that to conceive rightly of the state means to put it in the same relation to the system of law as all other subjects of law, and to put it on an equality with all those other subjects of law.[2]

This meant that all legal qualification depends exclusively and solely on the specific relationship to the system of law.

Therefore differing from the organic theory which based the distinction between *Organschaft* and *Stellvertretung* on a difference

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 704.

[2] Ibid., pp. 704–705.

in the relations between the subjects of law—and treats legal relationship as being between subjects—Kelsen held that a legal relation is not one between two subjects but a relation to the system of law. "Legal relationship is either subjective right or subjective obligation and as such a relation of the subject to legal principle."[1]

To Kelsen law, whether in the objective or in the subjective sense, is only "form and not content"; it is protection, but not something protected; it is "order," but not "that which is ordered." Therefore he deduced from this idea of law that the legal relationship is not a natural and purely material relationship between human beings which is independent of the system of law and possible without it, but that formal relationship which is created by the system of law; it is the relationship of the law, that is, of the system of law, to the subject.[2]

To his legal mind the only relevant consideration as to the *Organschaft* and *Stellvertretung* is the formal relation of each to the system of law, and the material connection between the subjects, i.e. between state and organ in one case, and between representative and represented in the other is to be ignored.

He claimed to have shown that in the relation of the state organ to the system of law two kinds of legal principles are involved—those which bind the state to a particular line of action, which it is the task of the organ to carry out, and those which bind the organ (and exceptionally, in the case of monarchies, entitle it) to give effect to principles of the former kind.

It is, Kelsen asserted, therefore recognised that "the organ in relation to the legal rules of the second kind, as a final point of legal attribution, as subject of duties or rights, is a person, but that on the contrary in relation to the legal rules of the first kind it is only an intermediate point of attribution and so without legal personality."[3] In this respect the representation (*Stellvertretung*) in relation to the legal rules is only an intermediate point of attribution and without personality in the same way as the organ is to the rules of law imposing state obligations, which it has to fulfil. Just as legal personality is not any essential quality inborn and immanent in human beings, but arises from a specific relation to a system of law, i.e. to individual legal rules, so man is not as such and in all circumstances and in every respect "person," but he is so in regard only to quite definite rules of law, "in respect of which there is created for him a definite possibility of legal

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 705.
[2] Ibid., pp. 706–707. [3] Ibid.

subjectivity, and in consequence of which these rules of law appear as his obligation or right."[1]

Kelsen's final conclusion was that Preuss and the followers of his school of thought could not claim for their legal exposition the psychological link of causality, but simply and solely the "legal normative bond of attribution."[2]

§ 3

Kelsen pointed out that the conception of "sovereignty" had undergone many changes since that term was used in political science, mainly because the meanings given to it had been influenced by political predilections, so that they varied not merely from time to time, but even at the same time. But, nevertheless, it had been more than a varying political postulate; it represented a continued effort to find a term expressive of a recognised phenomenon. The modern conception was nearer the truth than its predecessors; it would be a vital mistake to eliminate it from political science and jurisprudence, even though that one of its many meanings which had come to be regarded as the only right one—that of absolute and unlimited state power—is incompatible with the modern idea of the legal state.[3]

The problem of sovereignty had been under discussion ever since Bartolus distinguished between *universitates quae superiorem non recognoscunt* and *universitates superiorem recognoscentes*. The subject to which sovereignty was attributed had varied (state, prince, people); sovereignty had been regarded as attribute or subject, according as it was identified with the state or with its authority; its content had varied, as had also the presuppositions on which it was based and the conclusions deduced from it. Modern thought had tended to give some stability to the conception, in that the state had come to be regarded generally as the subject of which sovereignty could be predicated. Ultimately there had been a general acceptance of the proposition expressed by Bartolus negatively as *civitates qua superiorem non recognoscunt* and Bodin positively as *summa potestas*; the essential was held to be that the state can or must be deemed to be something highest or supreme.[4]

[1] Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*, 1923, p. 707.
[2] Ibid., p. 709.
[3] Ibid.: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 2–3.
[4] Ibid. p. 5.

As to this Kelsen pointed out that when used of human relations the terms "over" and "under," "higher" and "lower" can have two meanings. They can indicate a special case of the relation "cause" and "effect." If the will of one party motivates that of another, it is customary to represent the former as being "over" the latter; the ruler—as possessor of the causative will—is "above"; the ruled is "below." And there is a disposition to regard the state as such a relation of rule (*Herrschaftsverhältniss*). But it is quite wrong to identify the state—which embraces both ruler and ruled—with the ruler in such a way as to assert that it is "above" or "over" the ruled. And it is impossible, in any consideration of actual social phenomena, and with due regard to the law of causation, to ascribe to any subject of rule a "highest" existence (*Sein*) instead of a "higher" one, i.e. to substitute a superlative for a comparative. The superlative applied to such a subject involves its acceptance as a *prima causa*, i.e. a will that is the *prima causa* of another's will, but, being "highest," not itself ruled, that is, caused by another will.[1]

Natural science had led political science to treat the problem of sovereignty so far as possible inductively, by the investigation of social facts. But anything like sovereignty cannot be derived from social reality. In the natural sphere sovereignty must mean the independence of a power (*Macht*) or authority (*Herrschaft*) from any other. But as power or authority is simply, in the social sphere, causation, the assumption of such a power or authority—that is, of a primary cause—which is not itself the result of a cause, and is, therefore, "free" or "independent," is incompatible with the idea of causality. So the state (or, better, the motive forces which collectively can be called "state") cannot be sovereign; each state, even the most powerful politically, is externally determined on all sides of its economic, legal and cultural life, is dependent and unfree.[2]

In a quite different sense "over" and "under" are used to express that relation of obligation in which one subject has to follow the will of another. He whose will is binding upon that of another is "over" that other, and if no other will is binding upon his own is "highest," i.e. "sovereign." This assumption of a "highest" will, of sovereignty in this sense, is not self-contradictory, like that of a *prima causa*, and is a practicable one in respect of the state, since it does not misrepresent the true facts by treating the state as a reality and yet taking it out of the chain of cause and

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 6.

[2] Ibid., p. 7.

effect. A closer examination of the "normative" relation of rule—of superiority and subordination—shows that this does not exist between man and man as such. One is "subject"—in the sense of "bound"—only to the "norm," and to the will of a man only so far as the norm prescribes, that is to say imposes, a general course of conduct the precise determination of which is entrusted to a man, i.e. the authority created by the norm. Consequently the norm is the ruler (*Herrscher*), and as such is "sovereign" only in so far as the norm is assumed to be "highest" (supreme).[1]

The assumption that a norm or system of norms is "highest" means that it is regarded or assumed as "underivable," as logically original. The image of superiority and inferiority, of "higher" and "lower" pictures the logical relation of the general to the particular, and in the conception of sovereignty to the category of the most comprehensive (*das Allgemeinste*), to the *summum genus in logicis*. "The subject subordinated to the 'ruling' system, the—physical or juristic—'person' of the law appears finally as the personification of a particular norm and system which in relation to the 'higher,' because more general and comprehensive, system has the nature of a derived 'part system.' "[2]

Kelsen held that, adopting in political science the theory of causality, and regarding the state as a social fact, as something in the chain of cause and effect, it is not possible logically to argue that a quality, conceivable only from the normative standpoint, is a quality contributory to the general nature of the state. If, on the other hand, one regards the state as the norm or system, and as such identical with the law of that system of law called the "state" which coincides with the state system that is called "law," then the sovereign state is a "highest" system, i.e. one not thought of as derived from any higher one. So he laid down the proposition that "the state, so far as it is the subject-matter of legal perception, and so far as there is a doctrine of state law, must itself be of the nature of law, that is, must itself be either a system of law or a part thereof, because 'legally' one can conceive only of law, and the state considered from the legal standpoint (which is what the theory of state law means) can mean only the *state as law*."[3] And the state, regarded as a system, can only represent a complete system of law, and not a part of a system; the ideas that a part of the law can be outside the state or a part of the state outside the law are to-day equally untenable. The state, in the only sense of the term in which sovereignty can be

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 8. [2] Ibid., p. 9. [3] Ibid., pp. 11–12.

ascribed to the state—the sovereign system—must be identical with the system of law as a whole. That is so, not only because the state which imposes obligations (and particularly, according to modern doctrine, imposes them upon itself) must be that from which alone a legal obligation—the system of law as such—emanates, but also because the state system, if it were only a part system, would stand to the complete system as the "lower" to the "higher," and therefore could not rank as "highest."[1] And Kelsen held that only if sovereignty is recognised as a quality of the state defined as a system of law is there any meaning in the attempt made on the juristic side of political science to make sovereignty a conception of law. He thought that it was necessary to adopt a standpoint fundamentally different from that generally taken. "Sovereignty must be regarded not as a quality of an actual physical or psychical natural object, and therefore as something empirically and inductively observable in the realm of external phenomena, but as an attitude, an assumption in the mind of the observer of state and law. To maintain that some kind of sovereignty is an essential quality of the state means simply that a system (having the force of compulsion) is valid as a system of law or state only so far as I, the observer, assume that system to be the highest, and not derivable; such a system alone can be called sovereign."[2]

Kelsen further pointed out that the claim that sovereignty is a quality of the state is valid only in so far as there is recognition of the state as system and of the identity of that system with the system of law. If any other meaning is given to the conception of the state, sovereignty becomes merely a quality of the system of law and not of the state. The general recognition by modern theory of the sovereign quality of the state, and the rejection of any other subject of sovereignty, seemed to him to be obviously related to the juristic conception of the state which had become dominant, and an indication of what he regarded as the proper tendency, namely, the approximation and ultimate consolidation of the conception of the state and the conception of law.[3] But this tendency was not yet strongly marked; and in the prevailing school of thought the state with its sovereignty appeared not as a system of law or even as a subject of law, but as something concrete, as force or power. To Kelsen force or power and law are mutually exclusive. He argued, therefore, that whilst, as he claimed to have shown, it is impossible to speak in any intelligible

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 12–13. [2] Ibid., p. 14. [3] Ibid., p. 16.

sense of the sovereignty of the state, regarded as part of a causally determined social actuality, it is also not possible to attribute sovereignty to every juristic manifestation of the state. For the state as a subject of rights and duties, which therefore must be thought of as subordinate to the system of law, for that very reason cannot—strictly—be regarded as sovereign. But there is no serious fallacy. For the state which is subordinated to the legal system is materially identical with the legal system, also described as "state."[1]

Kelsen next pointed out that the state as a person is only the same thing as every other juristic person, and indeed every other physical person, but on a larger scale—namely, the personification of rules of law (*Rechtsnormen*). But there is the difference that the state is the personification of the whole system of law, whilst other juristic persons and the so-called physical persons are personifications only of parts of the system of law—e.g. the communes are personifications of the communal law and the so-called physical persons personify the rules governing human conduct. Vis-à-vis all these persons—juristic and physical—the system of law stands in the relation of the general to the particular, and so one can maintain that these persons derive from it and owe their personalities to it. But the state person is itself the whole system of law.[2]

At the outset of his work (1925) on *Allgemeine Staatslehre* Kelsen stressed the distinction between the sociological and juristic conceptions of the state. He pointed out that the question of the nature of the state is inseparable from that of the conceptional relationship between state and society on the one hand and state and law on the other. The dominant school of thought regarded state and law as two different entities: the state as a union of men coming within the category of society (*Gesellschaft*) and therefore society being thought of like nature or a part of nature, as a causal relationship, a psychical or even physical reality, and law as a body of norms—of commands (*Sollsätze*) and therefore having an idealistic, though as positive law only a relatively idealistic, character.[3]

If the state and law be regarded as presenting an antithesis between "being" (*Sein*) and "command" (*Sollen*), there follows logically a difference in principle between a sociological causative theory of the state and a juristic normative theory. But as it is

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 20.

[2] Ibid., p. 21.

[3] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 6.

methodologically impossible to let one and the same thing form the subject-matter of two sciences whose cognitive processes are *ex hypothesi* entirely different, people had adopted the idea that the state is a thing with two sides, one the "nature" side and the other the "law" side—an idea which Kelsen described as superficial, and as having the result that that state being which is part of nature's chain of causality is identified mainly with the state as force (*Machtfaktor*) and the antithesis of nature and law takes on the importance of an antithesis between force and law. Kelsen held that the subject-matter of a theory of law can be only law, and consequently that the state must be law and only law if it is to be the subject-matter of a theory of law. It does not matter whether the state is the system of law as a whole, or only a part system. One cannot speak of an antithesis between state and law—the prevalent doctrine as to this is quite wrong, even though expressed in the modified form that the theory of state is concerned only with those principles (*Normen*) of law which deal with the content of the state and regulate the formation of the state and its conduct, just as the theory of private law is concerned with the principles governing the conduct of individuals without thereby raising the question of the position of man as a biological or psychological being. Apart from the fact that an extension of the theory of state law by the inclusion of a sociology of the state would be as unreasonable as an attempt to combine the theory of private law with the biology and psychology of "man" into a unitary science, it must not be forgotten that it is not the biological and psychological "man" whose functions form the content of propositions of law. The traditional jurisprudence has long realised that it is concerned not with the "man" (*Mensch*) but with the "person"; and this clearly means that the biological-psychological "man" and the juristic "person" are two entirely distinct entities. The conduct (*Verhalten*) of the state can be the subject-matter of the principles of law only as being that of a juristic person, and as the juristic person is simply the embodiment of a complex of principles of law, it is clear that the state as a subject-matter of science must be either a complete system of law or a part thereof.[1]

The idea that the conduct of the state can be as much subject-matter of principles of law as that of man tacitly assumes that the state is a kind of man, i.e. has the same "real" nature as the object of biology and psychology. The argument for this assumption is that the union of forces (*Elemente*) presented by the state

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 7.

is an instance of interaction, and particularly of psychical interaction. A plurality of men is a unity, if they morally react upon each other. But the human beings forming and belonging to one and the same state are not necessarily and always in the closest relation of mutual interaction, that is, in closer moral relations than with individuals not belonging to the state. Membership of a race, a religion, a social class—not coincident with a state community—may mean a closer moral relationship without endangering the unity of the state. Looked at from this standpoint of actual moral interaction the people of a state seem to be divided into numerous groups and united with the people of other states in the most diverse elements. If, nevertheless, one assumes that there is such a thing as a state-entity, it is because of the application of a quite different criterion—a juristic one. Kelsen consequently rejected the idea of the state as a social reality.[1]

And similarly he rejected the idea of the state as an organism. The whole theory, derived from natural science and therefore valueless, of the state, as a biological organism seemed to him to be only a cloak for certain ethical-political judgments of values (*Werturteile*), and to be based on a very defective analogy. For in the physical organism the cells, i.e. the men who form the state, can move freely. The biological theory of the state admits that the "tie" (*Verbindung*) by which these cells are held together in an "organism" is only of a spiritual and moral kind, but fails to realise that this tie is something altogether different from the causative bond of the biological organism.[2] And so Kelsen concluded that the organic theory, so far as it enunciates ethico-political principles as laws of nature, must be rejected as an attempt to make absolutely certain only relatively justifiable values by making them into laws of causation and assuming for them at the same time a higher degree of validity. "Nature," whose laws are contrasted with the actuality of social life, plays the part of a supreme authority and thereby that of a divinity whose commands have absolute validity.[3]

Discussing next the state as an "ideal" system, Kelsen remarked that the cause of the misconception was that all the facts, acts and processes which collectively one calls "state" have their seat, like all social facts, in the soul of man. But just as the thought expressed in the laws of mathematics or logic is a psychical act, but the substance of mathematics or logic is nothing psychical,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 8.

[2] Ibid., pp. 11–12.

[3] Ibid., p. 13.

no mathematical or logical "soul," but a specific intellectual content; so the state is a specific spiritual (*geistiger*) content, but not the fact of the thinking and willing of that content. It is an "ideal" system, a definite body of norms, but not the thinking and willing of those norms. The actual form of this spiritual content called the "state" is that of a system of norms, and the normative nature of the state finds expression—unconsciously and without their volition—even with those writers who believe themselves to present the state as a causally determined reality. The qualities which they ascribe, and must ascribe, to the state, if they want their presentation of the state to correspond to that of state-law, are only possible as qualities of a system of norms. The constantly repeated contention that the state has an objective existence independent of the subject arbitrary will of those who make up the state would be quite impossible if the state—the state will, the state "soul"—were presented as merely the sum of subjective acts of will. This objective existence of the state appear as the objective validity of those norms which form the state system, a validity which is objective in that it is independent of the subject wishes and wills of those over whom it claims validity. "The state as an obligatory authority—and its nature cannot be otherwise expressed—is a value or a norm or system of norms, and as such essentially different from the specific fact—into which no question of value enters—of the presentment or willing of a norm."[1]

The normative nature of the state as a unity above individuals is manifested most clearly by the antithesis which all those writers who treat the state as a social reality make between state and society in general and state and individual in particular. This latter antithesis was, in Kelsen's opinion, only possible so far as the state is assumed to be a norm whose command (*Sollen*) conflicts with the being (*Sein*) of the individual will and action. "In so far as the antithesis means simply that on the one hand the individual is only a part of a whole, of the state, and on the other hand is himself a whole, the antithesis ceases to be a logical contradiction if we realise that the individuals, or, better, the individual wills and actions, are only, as contents of norms which form the state system, that is, of commands, integral parts of a whole system, whilst the deed of the individual will and action which conflicts with the whole of the state takes place in the plane of being."[2]

What applies to the social edifice of the state—that its specific unity cannot be explained by the law of causation, that its

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 14–15. [2] Ibid., p. 15.

existence arises not in the realm of nature but in that of ethical values—can be easily shown to be true of those other social structures—collectivities and unions—which are comprised under the general term "society" (*Gesellschaft*). The various social organisations—religious, national and other—can be understood only as particular systems of value (*Wertsysteme*). At best there are only various social creations, societies, and not one society as a universal system of value embracing all collectivities as part systems. The idea of a universal society is the problem of a universal conception of value or of the universe as a synthesis of all systems of norms.[1] Kelsen's own conclusion was that "the completely normative nature of the conception of society is most clearly shown when society is presented as in direct antithesis to the state. The antagonism between the state and society which constantly appears in ethico-political and particularly in sociological literature proves, on closer examination, to be merely the contrast between two different systems of value or of norms, whether "society" appears as the "system of value" of liberalism or the "ideal" of socialism in contrast with the positive system of the actual historical state.[2]

The recognition of the fact that the state is essentially a system of norms or the expression of the unity of such a system implies that the state as a system can be only the system of law or the expression of its unity. It is generally agreed that the state is in very close relation to a system of law; the assumption that this relation is not one of identity is simply due to non-recognition of the state as being itself a system. Kelsen held that if the state is a system of norms, it can be only the positive legal system, because the validity of any other order concurrent with it must be excluded. If the state were something else than the system of positive legal norms, it would be no more possible to maintain that state and law exist side by side or together than it is for the jurist to maintain the validity of morality, or the moralist the validity of the positive law.[3]

Passing to the discussion of the so-called "origin" (*Entstehung*) of the state, Kelsen agreed that if one's attention is directed to the particular content of a legal or state system, there is reason for considering the question of the natural economic and other historical conditions under which norms having a particular content arise and become operative. The extraordinary complexity of the problem, the difficulties of solving it, and the scantiness of

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 15.
[2] Ibid., p. 16.
[3] Ibid., p. 17.

the results hitherto obtained are not sufficient reasons for putting it aside. It is entirely a scientific and, if one likes to use the term, sociological problem. The conditions within the sphere of causality which bring about the establishment of particular norms may be described as the concrete foundations (*Unterbau*) on which the norms and systems of norms as specific ethical content rise as a superstructure (*Oberbau*). Adopting the terminology of the materialist conception of history, this is merely a picture (*Bild*) of that relation of the system of nature to that of spirit and therein of "reality" to "value," of which the relation of nature and society is a special case. Whilst one must admit the truth of the oft-repeated commonplace that it is the natural, economic and other facts of historical development which determine the content of legal system, it is, nevertheless, certain that the independence and self-determination (*Eigengesetzlichkeit*) of the system of norms as such is not affected by the relation contended for between its content and the content of the causally determined development of actual fact, and that the understanding of the state as a system of law depends upon the acceptance of this self-determination of the normative system instead of the causality of historical development.[1] Kelsen put aside the various theories of the origin of the state as sociological theories, though admitting their interest mainly as throwing light upon the past.[2]

As a jurist, he held that politics as a science must be distinguished from the general theory of the state. The latter inquires into the nature and form of the state; politics is concerned with the question whether the state should exist at all, and, if so, what is the best form for it to take given the various possibilities. Therefore politics is a part of ethics, as indicating the objective goals of human conduct. In so far, however, as politics seeks the best means of attaining these goals—that is to say, establishing those norms which are shown by experience to have effects most in accord with the assumed objects, politics is not ethics but *technique*, or, if one chooses to use the term, "social technique," and as such directive towards the causative relation of means and end. The normative problem, whether and why a particular thing should be, must be clearly distinguished from the teleological problem of what are the means of attaining a desired purpose (*Zweck*) in harmony with the content of what should be.[3]

Kelsen rejected the identification of politics with ethics, or its inclusion therein, on the ground that in that case in setting up

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 21.

[2] Ibid., pp. 22–26.

[3] Ibid., p. 27.

objective goals (*Ziele*) it must in forming its judgments adopt increasingly generalised and finally ultimate judgments of value or norms the validity of which is not further demonstrable and can only be assumed if an ethico-political system is possible at all. On the other hand, in so far as politics presents itself as social technique, by searching out the appropriate means to certain ends (*Zwecke*) in the sphere of natural reality (the ends which politics, as ethics, has determined should be), it pronounces judgments on the appropriateness of the means. The degree of truth contained in those judgments must be measured by the possibility of testing exactly the effectiveness of those means—this possibility is, however, relatively very slight, owing to impossibility of experiment.[1]

The primary difference of principle between political theories turned on the denial or acceptance of the state as a system of compulsion (*Zwangsordnung*). The doctrine of anarchism in its extreme form denied to the state all compulsory power. As soon, however, as the state is allowed any means of compulsion, however slight, there is not a negation of the state but its limitation for the sake of a free society; that is the attitude of so-called liberalism, which regards the state as a necessary evil, to be restricted as closely as possible in its activities. If state compulsion in the form of legal obligation is unavoidable, freedom can exist only in self-obligation, self-determination of what is to be legally determined; the state system of law must be created by those who are to be subject to it; and hence liberalism's demand for the democratic form of state.[2] The theory of conservatism starts from the opposite standpoint; it assigns the highest value not to the individual and his freedom, but to the collectivity (*Kollectivum*); the individual is to it a dependent part of a whole, that whole being the state, upon whose action vis-à-vis the individual no limit can be placed. Society is absorbed in the state. And Kelsen therefore pointed out that there is theoretically an approximation between conservatism and socialism—both regard the individual as less important than the community, and that in particular what has been called "state socialism" is, like conservatism, in sharp antagonism to liberalism and to socialistic anarchism. And he pointed out also that in recent times socialism, as the political ideology of the mass movement of the proletariat, has moved from anarchism to statism (*Estatismus*).[3]

Discussing the various arguments as to the justification (*Recht-*

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 27.
[2] Ibid., p. 31.
[3] Ibid., p. 33.

fertigung) of the state, Kelsen argued that the theory of contract and the metaphysical theory were both in different ways based on an inacceptable dualism of obligation (*Sollen*) and being (*Sein*). In particular he held that the tendency inherent in all metaphysical speculation to make actuality and value absolute must not be substituted for the necessary tendency of all scientific knowledge towards objectivity. Objective validity is fully compatible with a relative estimate of actuality and value, of the natural law and the norm. Consequently in Kelsen's view a scientific and not metaphysical justification of the state can be only relative and not absolute.[1]

In the consideration of the state as self-purpose (*Selbstzweck*) he held that every state is a legal state (*Rechtsstaat*) in the sense that all its acts are legal acts because, and in so far as, they embody a system which is to have the character of a system of law, just as every state—in respect of the purpose to be attained by the system of law—is a power state and cultural state (*Machtstaat und Kultur-Staat*). He pointed out, further, that the uncertainty of the whole theory of the purpose of the state is shown by the fact that together with law, power and culture, it is claimed for the state that its purpose is "freedom," which is also claimed as a ground for the denial of the state. Some hold that the state destroys freedom; others expect from it the realisation of freedom. If it be accepted that freedom means only the accordance of value or spirit with the law, as distinct from and in known antagonism to the causality of nature, then it can be said that the state not only has freedom as its purpose, but is itself freedom, because it is the legal expression of law.[1]

Kelsen held that the postulate of parity of method can only be given effect by the clearly marked separation of the theory of the state on the one side from politics as ethics and social technique, and on the other side from natural science and the sociology which tries to proceed on the lines of natural science. It might be said that politics, as the theory of the "should be" (*Sollen*) of the state is the contradiction of the theory of the state which is the theory of the "is" (*Sein*) of the state. But this is not true. The being (*Sein*) of the state is not necessarily that of nature; it is possible to conceive a being of the state as an existence, reality, actuality quite different from that of nature; the antithesis of "should be" and "is" is not absolute but relative; the state or system of law can in its self-accordance with law be put in the same antithesis to causally-determined nature as "should be" is

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 33–38. [2] Ibid., p. 44.

to "is," and as "actual" state or "positive" system of law is in antagonism to the merely subjective ethical postulates of politics as "being." The actual state in being (*seiende*) is positive law in contradistinction to "justice"; and the problem of positivity is that of reality within the sphere of normative knowledge.[1]

Finally, Kelsen discussed the place of the theory of the state within the general theory of law. If the state is a system of law, the theory of the state and the theory of the law must be together. But it was customary to comprise in the term "general theory of the state" certain special problems whose true nature as problems of the theory of law had, Kelsen thought, been obscured in most of the literature of the subject because looked at from the ethico-political or natural science-sociological standpoint; the chief of these problems relate to the validity and creation of the state-system—to its validity in respect of space, time and persons—and to the stages, instruments and methods of creation of the system of law.[2] And consequently "the theory of the state, as the theory of state law, is the theory of the system called the state, with special reference to the question of the validity and coming into being (*Erzeugung*) of this system."

The existence of this system is due to its objective, and so far as it is a system of law, just so far is the theory of state law a theory of objective law, and not of subjective law or any subject of law. The theory of the state is as a rule thus thought of and presented as the theory of the duties and rights of the state, that is, of the state as legal subject, i.e. as person.[3]

The theory of the state as person is the foundation-stone and corner-stone of the whole modern theory of state law, and is based on the distinction between law in the objective and law in the subjective sense, and the conception derived therefrom of the legal person.

Regarding the system called "state" as a system of law, Kelsen pointed out that such a system is one of legal norms. He left for later consideration the question of the criterion by which a plurality of legal norms form a unity, a single system of law or a single state, and discussed first the nature of the whole, as it is mirrored in its parts. For every legal norm must manifest the nature of the whole law, if it is to be a legal norm. If the law is a system of compulsion, then every legal norm is a norm imposing a compulsion. Its nature consequently is indicated by

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 45.
[2] Ibid.
[3] Ibid., p. 47.

the principle that any particular stipulation has compulsion as a consequence. It is, like the law of nature, a definite association of fact and consequence, with the difference that "legal stipulation" and "legal consequence" are associated in a definite legal sense which is unlike that of cause and effect in the law of nature. This distinctive difference between the operation of law and nature is expressed by the term "should" (*Sollen*). The law lays down that if A exists, then B *should be*: and not, like the law of nature, that if A exists, B *is*: and this means that the legal stipulation is not the "cause" of the legal consequence and the legal consequence is not the "effect": the act of compulsion is the necessary legal consequence, not the necessary natural consequence, of the legal stipulation as a fact.

Kelsen's main theory was that of "attribution" (*Zurechnung*). The "facts" bound together in the legal norm represent human conduct, but that conduct is not alone the content of the legal norm; it manifests itself in combination with occurrences which are not themselves human conduct and are commonly called "events." The consequential fact called "compulsion" must necessarily be human conduct, for it is the application of compulsion by men to men. The conditioning fact may be a simple event, as when a primitive system of law prescribes that in the case of long-continued drought some man shall be put to death. Where there is a more developed sense of law the conduct of those men against whom compulsion is employed is taken to be the conditioning fact. If "event" is still to be distinguished from "conduct" the connection between the two is generally as follows: human conduct has brought about the event, or has not prevented it. In the former case human conduct is an action, in the latter case inaction or omission. If we represent human action by M, action by M^r, inaction by M^n, event by E, and the act of compulsion of the consequential fact by Z, then we get as the general formula of the legal principle: if $M^r + E$ (or $M^n + E$), then $Z \rightarrow M$, assuming as the normal case that the act of compulsion is directed against the man who has caused the (socially harmful) event or has failed to prevent it.[1] The man who in the conditioning fact appears as active subject, is in the stipulated consequence simply a passive object. It is not his "conduct" which forms the content of the stipulated consequential fact, but that of the man who determines the act of compulsion. The "conduct" towards the act of compulsion of the man on whom the punishment or penalty is inflicted can only come legally into

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 49.

consideration by the man being bound to suffer the punishment or penalty.

It is obvious that the stipulative fact is not necessarily a unitary act, but it may be made up of many parts and can be a series (if A and if B and if C, then shall Z). The decisive thing is simply that in the act of compulsion as final consequence ultimately the whole series of stipulations finds its outcome, and that this act of compulsion is, as it were, the last beat in the rhythm of legal dynamics. Subject to this reservation the conditioning fact may itself have place in a chain of provisional conditions and results.

On the basis of this relation of legal norm and act of compulsion he explained that such a division of the collective facts and the combination of all conditions of the final act of compulsion can be attained by making use of the auxiliary hypothesis that the relationship establishing the act of compulsion should be left out of account.

Then that which originally is only one legal standard appears as a combination of several legal standards of which only the last establishes the act of compulsion as the consequence, and the others are comprehended as a unity only because of their connection with that one.

If anyone concludes a contract he must comply with the conditions of that contract, but if he does not do so, then at the instance of the other party to the contract proceedings may be taken against him. On account of this specific final consequence the norm which imposes behaviour in accordance with the contract is a legal "norm," a relative, independent secondary legal norm, and only in so far as the behaviour is the content of a legal obligation does it stand as the contradictory opposite under compulsory sanction, that is to say, as the condition of an act of compulsion.[1]

Kelsen pointed out that this incursion of politics into legal theory had been favoured to a very important extent by what had come to be regarded as a fundamental distinction, namely, that between private and public law. As to this he asserted that whilst this antithesis had come to be the backbone of all systems of jurisprudence, it is impossible to make any clear statement as to what precisely is meant by it. One can, indeed, point to certain branches of law which are conventionally regarded as public law as contrasted with private law—constitutional law, administrative law, criminal law, law as to legal procedure, inter-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 51.

national law, ecclesiastical law; but the reasons adduced for this division are very confused. The subject-matter of the division is especially uncertain. Sometimes it is the objective law—the principles of law, sometimes the subjective law—the rights and obligations and legal relations created by them, which are divided into private and public. There are many theories, but two predominate.

(1) In accordance with the theory of Roman law, with which the distinction originated, the term "public law" is used to describe those legal norms which are concerned with the general or collective interest, and "private law," those which are concerned with individual interests. But to a division on this basis Kelsen objected on the grounds first that the purpose served by the legal norms has no bearing on their nature as law; and, secondly, that it is quite impossible to assert of any particular principle of law that it serves either the collective or the individual interest—every principle serves both equally.[1]

(2) A theory entirely different from this interest theory finds the essential distinction in the fact that private law regulates the relations between subjects of law which are on an equality, and public law the relations between superior and subordinate legal subjects, and particularly between the state and its subjects. Thus the division is one of legal relations, and it is customary to call the former "legal relations" in the strict sense of the term, and so to contrast them with "power" or "rule" relations. The determining factor is a difference in the quality of the legal subjects—some, and especially the state, are given a higher quality than others; their will has greater validity than other wills. In this, as in the theory of subjective law, there are the two contradictory theories of "interests" and "will." The "will" theory is that of the super-value of certain wills, of the will of certain persons, a theory of super-value. The distinction between private and public subjects of law—subjects of law and subjects of "power" or "rule"—leads to the distinction between public and private relations—relations of "law" and relations of "power." Kelsen held that the idea underlying the super-value theory—that the subjects of law, with qualities originally independent of the law are in their mutual relations also independent of the law, and in opposition to the system of law; and it is only when that system regulates and brings these subjects and relations under its control that it makes them into subjects and relations of law—this he held to be quite untenable. The subjects of law are not

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 80–82.

independent and distinct from the system of law as different entities; they are in it as parts of the whole. The legal relationship is therefore not a natural relationship, to which the system of law adheres as a regulator, but is a relation of fact set up by legal norms.[1] The legal relation is defined more correctly as a relation within the system of law than as a relation between facts determined by the provisions of the law (*Rechtssatz*), and it is a relation between facts and not between persons. It is obvious that only facts can have differential qualities and have only one character—that of being the expression of the unity of a complex of legal norms. In the—only relative—antithesis between fact and norm, legal transaction and law, application of law and creation of law, the fact of the public law authoritarian command is the same as that of the private law transaction vis-à-vis those whose legal obligations are determined by the facts; it is the norm, though admittedly a norm of higher grade.

Every fact has the precise validity, i.e. the precise legal consequences, given to it by the system of law, i.e. the legal norms of a higher grade. Like an expression of human will, the system of law can attach obligations to external events, without one being forced to ascribe to those events a super-value because they create legal obligations upon men without their assent. Admittedly the division of the facts which determine legal obligations into events and—positive or negative—expressions of human will (actions or omissions), and the division of the latter into those in which the will of the men who are to be bound by it is itself the determining fact and those in which there is an external will operative, is of great importance, but this division coincides only very approximately with the customary one between private and public law. So again Kelsen contended that freedom from the existing system as to public and private law is a prerequisite of any logical division of the obligation-imposing facts. Above all it must be borne in mind that the really determining standpoint, from which the facts are divided according as they are unilaterally or bilaterally binding, is the basic principle by which within constitutional law—which is indisputably a part of public law—the methods of forming the state will, that is to say, the forms of the state, are classified. The theory of so-called state forms, however, only applies to the highest or to a relatively high degree of state will formation (creation of system of law), the creation of general norms (so-called legislation), whilst the super-value theory of public law—so far as it is based on the division into

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 83.

unilateral and bilateral obligation—applies only to the lowest or to a relatively low degree of state will formation, to the creation of particular norms, to the acts of officials and the conduct of legal business.[1]

In another connection Kelsen remarked that "commune, communal union (self-governing bodies), territory, member state in federal state, individual state, confederation, differ from another only or mainly in the degree of decentralisation, which presents the law of continuity in which one form changes constantly into another, and consequently it is merely a matter of terminological convention to which member or members of the series the term 'state' is applied."

The difference is quantitative, not qualitative.[2] This system of the relation of legal norms, with the graduation which it involves, is Kelsen's "grade theory" (*Stufentheorie*).

Finally, in this connection, Kelsen pointed out that as soon as legal theory made an end of the dualism of law and state, it denied any essential difference between private and public law.[3] For such a difference is irreconcilable with the idea of the legal state. By the term "legal" state is not meant a state-system of any particular content—not a state with quite definite legal institutions, such as democratic legislation, requirement as to the counter-signature of a responsible minister to the executive acts of the head of the state, etc., liberty of the subject, independence of the judiciary, etc.—but a state all of whose acts are based on a system of law. From a strictly positivist standpoint, excluding all laws of nature, every state must be in the formal sense a legal state, in so far as each state must be a system of some kind, a coercive system of human conduct, and this coercive system, whether created autocratically or democratically and whatever its content, must be a legal system which forms itself gradually, starting from the hypothetical basic norm, through general norms into individual legal enactments. "That is the conception of the legal state, which is identical with both the law and the state."[4] The extent to which there are legal guarantees that the individual enactments shall actually be in harmony with the general norms is admittedly a different matter.

Kelsen's highest speculation in his system of law is the *Stufentheorie*, which is the principal hypothesis of legal federalism. But however far this theory may be logically and methodologically admissible, the test of its validity is not that of its theoretical accuracy but how far it can be verified by actual reality, be-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 84–86.
[2] Ibid., p. 195. [3] Ibid., p. 91. [4] Ibid.

cause the basis of theory itself is nothing but an approximation to the generality of the facts concerned.

Passing next to the consideration of the validity of the state system, Kelsen pointed out that if the state be recognised as system, all further problems as to its nature are only problems of the form and content of a system. According to the prevailing doctrine the state is something corporeal and spatial, a conglomerate entity made up of three constituent so-called "elements"—the state territory, the state population and the state power. The state is not only regarded as a whole composed of these three elements, but is sometimes separately identified with each one of them. But with regard to the coalescence of all three into a whole the state is summed up as a "territorial corporation," i.e. an organised plurality of human beings, under authority and bound up with a definite area.[2] But to Kelsen this merely shifted the problem, and against it he thought it necessary to make clear what is the aim of this theory of the so-called "elements" of the state, and to put the problems involved on a proper basis as legal problems arising out of the fundamental problem of the validity of a normative system. By thus bringing them down to a question of legal relations, established solely by a legal proposition, between the facts of some possible legal system, both the posing of the problem and its solution are freed from all those elements which have intruded from the realm of nature, i.e. from the natural conditions of state and legal ideology. There is in this way an end of all ethico-political postulates.

Among the three elements named, "state power" occupies a special position. In the traditional exposition it forms the kernel of the state's being; but the emphasis laid on the nature of the state as power or force drives the state into that—highly doubtful—position of antagonism to the law which dominates the modern theory of the state. But in that case the power which is the basic element of the state, in the sense of being an actual, natural power, must be thought of as a causative force, and as expressing only the existent fact that some men rule other men and impose on them a particular course of conduct. Each particular relation to the unity of an association (*Verband*), the attribution to the state, is possible only on the basis of a normative system, by means of the individual human acts first taken out of the unlimited fullness of human conduct, then made definitely normative and brought into that unity which is called the state. As this system can be only a legal system, and the normative state act must be

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 96.

a legal act, the state power must be legal power, i.e. the specific power of the law. But Kelsen pointed out that before we can discuss the question to what extent there is according to the state system—and not in actuality—a subordination of one man to another, it is necessary to prove that all the men "forming" and belonging to the state are subordinated to the state system. If the traditional doctrine regards the central function of the state power to be that it "rules" over them, that clearly is the same as the function of the system of law, which subordinates men to itself by imposing obligations upon them.

Discussing the theory which regards state power as something natural—an inherent force, Kelsen pointed out that the terminology of that theory calls the power of the state its "will." But "will" in the sphere of the theory of state and law means "norm," and when we speak of the will of the state or a juristic person we mean its "should be" (*Soll*). If it is contended that "power" is possessed only by unions which present a unity different from the unities of those who compose the unions, this clearly shows that the power-conception is only the mental personification of an existing system. That follows also from the fact that the state-power, which was originally regarded—when looked at from the natural causative standpoint—as a demonstrable reality of being, is finally held to be a power legally limited in some way. But if the power is legally established, legal system takes the place of mere power; and it is the rule of the "should be" that appears as state power. State power is the real subject-matter of the theory of state law, and that is possible—as the subject of a theory of law can be only law—only because the so-called state power is state law.[1]

Next, if the state be regarded as *Herrschaft* (authority), this is an effort to express not only the normative application of the state system as binding upon men or the physical binding influence of the presentation of the system, but also a specific content of the state system. It is a peculiarity of the system of law that it regulates its own coming into being, i.e. that it comprises norms which relate to the fixation of norms.[2] This fact, that the law can have as its subject-matter its own creation, is perhaps the theoretically sound kernel of the so-called "self-obligation" of the state. The unity of the system of law is in essence the unity of a system of coming into being. The typical content of a basic norm is that there is set up an authority, a source of law, whose pronouncements are legally binding: it says—in its simplest

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 97. [2] Ibid., p. 98.

form—"do as the legal authority, monarch, national assembly, parliament, commands." But the norms of every grade of validity include the setting up of authorities of an inferior order, with powers of establishing norms of a lower grade: the monarch appoints local governors, the central parliament local representative bodies, and these in turn appoint judges, administrative officials, etc. Law—as positive law—is established norm, and this applies equally to customary law—which is the outcome of the practice of those subjected to law, at any rate in the sense that in order to take concrete form in the individual norms of legal business (verdicts, etc.) it must appoint delegates with power to make law. The antithesis between command, that is, making of legal norms, and obligation to obedience, that is, to the observance of the norms, is the characteristic content of the legal system, even if those who are subjected to the norms themselves determine the content of them. The state system is therefore in this sense an authority system—a system of power.[1] If in the traditional way one represents the state as a relation of authority or power, and thereby considers only the factual relations between rulers and ruled—in the belief that any legal definition or limitation can be ignored—this is an attempt at a theory of a relation of authority, which embodies a system of "should be" (*Sollordnung*), without regard to its specific form. Kelsen held that the idea of state power or state authority is not that men are subjected to other men, but that they are subjected to norms, even if it is men who determine those norms, being themselves subject to norms in so doing. This indicates the whole importance of the perception that the state is a system of law, of legal norms, and that to be subjected to the power of the state means nothing more than to be bound by a system of law.

The power of the state is a "compulsive" power in a twofold sense. In the first place the norms of the state system are norms imposing compulsion, i.e. legal norms. And, secondly, the state system is a "compulsion" system because it has objective validity for the men who "form" the state.[2]

Kelsen next discussed the general belief that the state is essentially differentiated from other unions (*Verbände*) by the fact that the state power can be designated "ruling" power, whilst the power (i.e. the guiding will) of other unions is "non-ruling." The difference is to be expressed by saying that a man can withdraw from a union which is not invested with "ruling" power, but cannot withdraw from the "ruling power" of the state. To

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 99. [2] Ibid., p. 99–100.

this assumption Kelsen could not wholly agree. Clearly it *is* possible to escape from the effective operation of the state system of law or of particular legal norms, and it is consequently not possible to speak of the "irresistibility" of the state will. But so far as it is believed, the effect is to magnify the power of the state, and Kelsen remarked that this had long been the chief task of the theory of state law. In his own opinion, on the other hand, there is in respect of legal validity no essential difference between the "ruling power" of the state and the "non-ruling power" of a union. In neither case can the obligation be escaped: the only question is, How can it be terminated? Put in general terms the problem is: Under what conditions does the validity of the collective legal system, of a part-system, or of particular general or individual norms begin and end? This is not the same as the entry into or withdrawal from a union: those are facts which involve only the possible creation or annulment of certain obligations. Entry into or withdrawal from the state means the gain or loss of citizenship, as the prerequisite of specific rights and duties. The conditions of admission and withdrawal are laid down by the state system of law, just as the rules of the union laid down conditions as to admission to, and loss of, membership. The argument as to an essential legal difference between state and union, "ruling" association and non-ruling association of such a kind that in the latter entrance or withdrawal is a unilateral act, but is not so in the former, is entirely mistaken. It is not a necessary consequence of the nature of the state—and of its irresistibility—that the gain or loss of citizenship cannot be the result of a unilateral act of the individual concerned; it may not be politically expedient, but it is not legally impossible. And the theory conflicts with the actuality of positive law if it maintains that a man can only withdraw from one state in order to become subject of another. It is quite possible to lose citizenship of one state without acquiring that of another; though this does not mean that one can get out of the range of any state system of law whatsoever. The decisive question is: Is there a system of law which can possibly apply everywhere and always, as distinct from those systems which are limited both in extent and duration?[1]

This is the distinction which is decisive for the theory of the "ruling" and "non-ruling unions," namely, that between a system whose sphere of validity is or can be limited in space and time by a higher system, because the conditions of its validity and,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 100–101.

indeed, its very content, are determined by the higher system; and a highest system, with which that is not the case and is irresistibly powerful, because it can have whatever content it likes, and is unrestricted in respect of the possibilities of that content. The factor which is obviously decisive for the distinction between "ruling" and "non-ruling" unions is if it can be shown to be a characteristic of the former as compared with the latter that not only can they issue regulations to their members but they can enforce them by their own power and by their own means. This implies that there are associations (*Verbände*) which can within prescribed limits lay down conditions which result in obligations: this authority or delegated power derives from a higher system, which, however, reserves to itself the direct determination of the penalties on non-fulfilment of obligations and of the necessary organs of enforcement. The union sets up the system of norms, but it is the state that enforces their observance. So the "organs," the "norms" of the unions, are in fact only delegated from a higher system—the state system. And the decisive problem is that of the relation between the higher and lower system, the problem of a highest instance, that is, the problem of sovereignty.[1]

As to this, Kelsen remarked that the recognition that sovereignty is a quality of the state, and not of some one of its organs (prince or people) marked a great advance. The sovereignty of the state means that it is the highest power and there is no higher power above it. But he held that if state power be regarded as a physical-psychical force then this quality of sovereignty cannot be ascribed to it, for in the realm of nature a supreme force would be like a *prima causa*, something which influences others, but is itself not the result of a cause. This is an unrealisable conception. He thought sovereignty to be intelligible only if one regards the state power as the normative operation of a system of "should be," of a state system of law. That the state power is sovereign means that the state is the highest system, with no higher system above it, so far as the validity of the state legal system is not derived from any higher norms. If the state, as a system of law, is sovereign, then the dispute as to whether sovereignty is an attribute of the state or of the law is settled; sovereignty is an attribute of the law because it is an attribute of the state. The problem of sovereignty is therefore the central problem of the theories of state and law.

To Kelsen the attribution to the state of the absolutely strongest power or force was meaningless (the contention that the state is

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 101–102.

the supreme system of "should be" can be maintained, though it is disputable). Nevertheless, the problem of the sovereignty of the state is generally posed as if it were a matter of determining by empirical investigation of natural facts the quality of something which can be seen or handled or experienced. It is supposed that by the observation processes of natural science or similar observations of the various social bodies they can be classified into sovereign and non-sovereign unions; and especially that the question as to whether in any particular case the state is or is not sovereign can be answered. But the problem is one not only of fact but of value; it is concerned not with the proof of a natural or social fact but with an hypothesis. The dispute as to the sovereignty of the state is a dispute as to the assumptions underlying constitutional and juristic theory. The real problem is not as to the existence of a particular fact, but as to its meaning. And there is the possibility of various interpretations, according as one does or does not assume the state to be the highest system; and if not, assumes the existence of a higher system, that of international law, as the highest of all. It is not a question as to whether the state in general or a particular state is sovereign, but whether the understanding of the state makes use, or can or must make use, of a scheme of interpretation which leaves the individual state system sovereign or assumes the system of international law to be sovereign.

In his work entitled *Das Problem der Souveränität und die Theorie des Völkerrechts* Kelsen pointed out that German theory of public law tried hard in respect of state law to rule out sovereignty as an essential characteristic of the state, but clung fast to it in respect of international law. This was a strange inversion. Indispensable as sovereignty is to distinguish a system, or the collectivity which personifies it, from other sectional and subordinate collectivities, it is equally incompatible, as an attribute of the state, with the assumption of the co-existence of other equally sovereign states on the same footing under a system of international law binding on them all.[1] But this conception of the relation of international law to the state system is not the only possible way, or the predominant one, or even one which has been logically thought out. One thinks of international law as a system subordinate to and delegated by state law, or attempts to present it as an independent system of norms independent of the state legal system. The sovereignty of the state remains. From the

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 102.

standpoint of a theory of international law the problem of sovereignty is identical with that of the reciprocal relations of two systems of norms.

In order to understand the nature of the problem, one must realise it is one for which the standards of positive law cannot provide a final answer. It is no doubt possible for a state system of law to lay down a formula of its relation to international law which will either assert the international law or parts of it to be an integral part of itself or expressly to renounce such a principle. And it is equally possible to imagine a norm of international law which would lay down authoritatively the relation between that law and state law. But every such positive regulation presupposes a definite hypothesis as to the basic relationship of the two systems of norms. The task of science is therefore to work out the possible hypotheses systematically and examine all their consequences. Kelsen pointed out that in the newer theory of international law the question of the relation of that system of norms to state law had been pushed into the background by the question whether international law had, completely or incompletely, the character of law. But in his opinion a far safer conclusion as to the nature of international law could be expected from an answer to the first than to the second, since the problem posed by the second question was based on a more or less arbitrary definition of law.

The question as to the basic relation between international and state law is closely connected with the theory of the origins of the two systems and their mutual relations, with the determination of the subject-matter or norm-objects of the two systems and the assumption of similarity or dissimilarity between them, and with their norm-subjects, i.e. the subjects to which the norms of the two systems are directed. These problems do not characterise only the relation between international law and state law; they present themselves in every investigation of the relation between law and morality and, indeed, of every relation between two systems of norms. A general theory of the normative is a necessary preliminary to the solution of this special juristic problem as of many others.[1] But as to the methodological nature of this preliminary task there was generally great uncertainty. Kelsen, therefore, stressed the fact that the questions are purely ones of logic-norms, that is to say, the search is for possible logical relations and not for some psychological relations between different possessors of will or the interactions of particular relations of

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 103–104.

power and authority. To the average observer there seemed to be three possibilities; either the two systems of norms are entirely separate and independent, or the relation is one of superiority and subordination, or the relation is one of co-ordination.[1]

The third he ruled out, because there is no third system standing above international law. The assumption that two systems of norms are completely separate and independent and unrelated to each other does not allow the possibility of their contemporaneous and concurrent validity. The assumption of two systems of norms is conceivable only in the sense that they are alternatives.[2]

The consequence of the assumption that the state is sovereign is the ruling out of the possibility of any correction of the individual state system by another norm, that is, the norm of another norm-system.[3] So far as positive-legal norms exist there is no other basis for the state legal system. The sovereignty of the state means that one starts with the assumption that there is no question of any basis of validity external to that system. This exclusion of any other norm is valid only on the assumption that the system of positive law lays down clearly what sphere positive law occupies. The fact that this can be done only with the help of an hypothesis, which is a hypothetical norm not actually within the system of positive legal principles but first providing a basis for them, does not really affect the positivity of the system. As to the nature of this hypothetical norm, this originating principle, Kelsen thought it unnecessary to inquire further. The assumption involves something that is called the sovereignty of the state legal system set up by the basic norm. If one classes together the norms which do not belong to the state legal system as morality, then one can say that as a jurist one must not judge an event from the moral standpoint and as moralist not from the juristic standpoint, but that one must start from one or the other standpoint. This is the dogma of the singleness of the standpoint of juristic knowledge; a system of norms can be valid only if it does not contain irreconcilable inconsistencies. This does not mean that men do not in fact let themselves be animated by norms of different systems, norms of morality and law, and consequently get involved in conflicts of duty. But the fact that a man wavers as to whether he shall act according to a moral norm or what seems to him to be a conflicting legal norm, does not involve any contradiction in

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 104. [2] Ibid., p. 105.
[3] Ibid.: *Allgemeine Staatslehre*, 1925, p. 103.

logic and is only an instance of the conflict between two motives. A contradiction and so a breach of unity is apparent only from the standpoint of a consideration directed to the norms as such, that is, as the content of those ethical acts which as acts were the object of knowledge. From that standpoint the one norm says "*a* shall be" and the other norm says "*a* shall not be." But from that standpoint only one or the other can be valid and find its place in this specific "*shall* system," that is, in a definite system of knowledge of values.[1]

Discussing, from his Kantian point of view, sovereignty as the expression of the unity of a system, Kelsen asserted that "all knowledge aims at unity, the negative test of which is lack of contradiction." The unity of the system of norms called "state" or "law" must be the impregnable foundation of any knowledge of state and law, and of any science of these things. And the sovereignty of the state is the expression of this unity[2]; and its obvious consequence is the exclusive validity of this system. The unity of the legal universe is, from the standpoint of the theory of knowledge, of the same kind as the unity of nature. And just as to the observer of nature everything in nature must be governed by the law of causation, and there is nature and only nature, so from the standpoint of legal theory there exists law and only law, and there cannot be anything which is not legally determinable and in accordance with the specific legal system. If, then, the state system be conceived of as "sovereign," i.e. as independent and underived and unrelatable to any other system, this is an assertion of the singleness of standpoint, of the unity and singleness of the system, and of the exclusion of any other system whatsoever. Sovereignty is, then, to Kelsen, the expression of the unity of the legal system and of the parity of legal knowledge. That the state, so far as it declares itself sovereign and is assumed to be the highest legal entity, must be the *only* legal entity (i.e. that the sovereignty of one state excludes that of another) had, Kelsen held, been recognised in principle but not yet generally accepted.[3]

He also pointed out that there had been a widespread tendency to try to avoid the extreme consequences of the idea of sovereignty, and whilst calling state power the "supreme" power to give to this superlative only a relative meaning. The state, according to this, is a supreme, positive superior will only in relation to the individuals and unions comprised within it: to others, and

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 104–105.
[2] Ibid., p. 105.
[3] Ibid., p. 106.

especially to other states, it is not superior but only (negatively) not-subjected, i.e. on an equality. This doctrine results in the distinction between "constitutional law" (state law) sovereignty and international law sovereignty. But Kelsen held this idea to be unrealisable because self-contradictory. The idea that the state is only internally "supreme" and externally is only independent, because its power is only on an equality with that of other states which are outside its sphere, is tenable only on the assumption that there is above all the states a co-ordinating system, to which the individual states are in the relation of part-systems. And if so, then the individual state is no longer the highest system, but there is above it the higher one of international law, on which the individual state systems as a whole depend, although the actual content of these systems is left to the determination of their own organs within certain wide limits. But the so-called limitation of the sovereignty of the state to its own members is simply tautology: it means only that the state is superior to those who a e subject to it. But in this relative sense every person or body is sovereign, that is, superior to any other person or body—the commune, for example, is sovereign, but only vis-à-vis its members, and is "independent" of the other communes in the same state. So the whole differentiation between state law and international law sovereignty is untenable: if the state is sovereign, then the whole sphere of law must be contained within it; if there is a field of law outside the state, then the state is not sovereign. "External" and "internal" are then different strata of law, different stages of one and the same legal system.[1]

If the state system of law is sovereign, i.e. can determine its own content, then the state is in that sense in fact legally omnipotent. But it has no power other than a legal power. This is commonly called "supremacy of competence," meaning thereby the possibility possessed by any system of determining by itself the subject-matters which it will regulate. "By itself" means that it is not empowered by some higher system, which can determine the scope, territorial extent and duration of the validity of the inferior system. Only the sovereign system has this supreme competence. This determination by a higher system of the sphere of a lower system is not of the same nature as the legal obligation of an individual. Admittedly it does, from the juristic standpoint, also impose on individuals, i.e. the norm-making organs of the lower system, the obligation not to establish norms of a particular content, but this limitation of the lower system by the higher is

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 106–107.

especially expressed in the fact that norms which go beyond the sphere assigned to the lower system are null. There is no legal obligation not to establish them, but there is legal disability to do so.[1]

On this point Kelsen rejected the conception of the state as "territorial supremacy" put forward by Preuss, the champion of the *Genossenschaft* theory in Germany, and concluded from his examination of Preuss's doctrine that though the latter tried to eliminate the idea of sovereignty from his theory of the state, his "territorial supremacy" was "actually supremacy of competence, and tacitly presupposed sovereignty."[2]

Discussing next sovereignty as the illimitability of state power, Kelsen pointed out if the state system of law be assumed to be sovereign, the individual can legally be subject only to the state system, but all individuals need not be so subject. By reason of its supremacy of competence the state system of law can, but need not, limit or withdraw its operation vis-à-vis particular individuals, but cannot extend it. And the whole of human conduct need not be covered by the state system, though it can be. As the state system of law, being sovereign, can determine its own conduct, it can leave more or less large fields of human conduct unaffected. There are no absolute limits to the content of the state system; but sovereignty, nevertheless, does not mean that the state power is illimited and illimitable. In the sense that a man is limited by the state, the state itself cannot be limited. If its operation is limited in any way, this means only that the state system, as it positively exists, does not include certain matters. But to deduce from the fact that the state is not illimited and illimitable certain political consequences—of some sort of liberalism—is sophistry.

If the state is sovereign, then all other unions, and especially all persons, are only part-systems of the state system of law, which embraces them all and delegates something to them. The unity of the collective system, the person of the sovereign state, can rank as the ultimate of attribution. The unity of the part-system—particularly that part-system which is constituted of the so-called physical person—is a temporary point of attribution, a transitional point, constantly striving towards ultimate unity. That the state is the ultimate of attribution means that its will is "free," unaffected by any higher will. And the sovereignty of the state and the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 107.

[2] Ibid.: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 81–82.

freedom of its will is incompatible with freedom from the law of any other persons—physical or juristic—which are merely personifications of part-systems and therefore of transitional points of attribution; and it is also incompatible with the freedom of individuals, as freedom of being (*Frei-Sein*).[1]

Kelsen criticised Krabbe's argument—put forward in opposition to the traditional idea that the state as a legal personality is subordinate to the system of law—that if the state subordinates itself to its own system of law it has no longer sovereignty, which vests only in the law. That theory, Kelsen held, must disappear along with that of the dualism of state and law. If the state as person is only a personification of the law, it is impossible to speak of its subjection to the law in the sense in which an individual is subjected to the law. The sovereignty of the state means that the state system of law is the highest, that it comprises all other systems as part and delegated systems, that therefore in its sphere it is self-determinative and not determined by any higher system. In this sense sovereignty is a formal conception, belonging to the nature of law; and this formal conception must be regarded as the primary and basic conception of sovereignty. It obviously excludes at once the idea of a system of international law, standing over the sovereign state and legally determining it. But so far as legal theory will not renounce that idea, and yet at the same time clings to the claims which are expressed in the idea of the sovereignty of the state, this is a complete change in the meaning of the term, so as to allow of the assumption of a super-state system of international law, and even of the derivation of state sovereignty from that system. But in that way the formal conception of sovereignty is changed to a conception of legal content which has hardly anything in common with the former except the term "sovereignty."[2]

Discussing next the question of treaties or agreements (*Verträge*) between states and their relation to sovereignty, Kelsen observed that if one regards sovereignty as a conception of the content of law, and as made up of a number of competences or rights, then every state treaty means a limitation of state rights. By a treaty a state can bind itself to adopt a particular kind of constitution, or to make particular laws, e.g. as to the equal treatment of all creeds, as to accident, sickness and unemployment insurance, and so on. By treaty it can undertake not to administer some matters independently, that is, by its own regulation and its own

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 107–108.

[2] Ibid., p. 109.

officials, and even to administer these jointly with another state by organs appointed under the treaty. The treaty limitation can extend to rights of sovereignty of every kind and grade. When, then, does a state cease to be sovereign, to be a state? It is commonly assumed that sovereignty is unaffected by a treaty, since every such limitation depends on the will of the state so limited. But this sovereignty which is not affected by treaty is clearly something quite different from the sovereignty which can be of different degrees and by which the wholly sovereign state can be distinguished from the semi-sovereign or non-sovereign states in a federal state. Sovereignty, which suffers no loss by treaty limitation, is a term expressive of the formal quality of the state as a "highest system," whilst in the other sense it merely expresses the completeness of a legal content. So Kelsen said that the widely held doctrine that the treaty does not modify sovereignty is false, at least if it assumes that the treaty limitation is based on the state's "own" will. For a treaty is an agreement of two subjects of law. And inasmuch as these subjects must be assumed to be co-ordinate, then it is necessary to assume the existence of an international law, superior to the states, which makes the states into subjects of law, and binds them generally and in particular to the carrying out of the treaty. But then "the basis of the treaty obligation of the individual state is not its own will—of which the expression is only the determining fact along with the expression of the will of the other state—but that 'will' of international law, of the community of international law, which is expressed in the rule *pacta sunt servanda*."[1]

Kelsen pointed out that the conception of sovereignty as a legal content has been historically and is still directed not so much to a theoretical understanding of the nature of the state as to political purposes. To take only one example, interpreting state power, of which sovereignty is a characteristic, as material power, people have turned the doctrine that the state by its very nature is sovereign into the postulate that it must have a minimum of accessory strength—a sufficiently large territory, adequate population, natural resources, armaments. The possibilities of political abuse of the conception are obvious, and are still more apparent when it is made to postulate a maximum of material power. The state power must be neither too weak nor too strong, and so the dogma of sovereignty has been brought to the aid of the doctrine of the balance of power.[2]

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 113.
[2] Ibid., pp. 113–114.

Kelsen next formulated what he described as being now the most important problem of the whole theory of sovereignty, namely: Is sovereignty an essential characteristic of the state, which differentiates the state from other legal collectivities, especially the territorial corporations which closely resemble it, and what is the relation of the state to other states and consequently to international law?

The purpose and result of Bodin's doctrine which prevailed even in the nineteenth century was the conception that the state is by its nature sovereign. That making the state absolute, which was completed by that conception, is the chief feature of modern political science. And only by means of it could a distinction of principle be made between the state and the communes and other territorial corporations and these be treated as members of, and subordinated to, the state. The state is the highest, i.e. most comprehensive, union. The fact that this juristic theory was given an ethical turn and the state—and therefore the monarch—consequently deified, only shows what important interests were behind the doctrine of the sovereignty of the state at a time when all states were monarchical. But the importance of the need of some clear test of statehood must not be under-estimated. That test was offered by the theory of sovereignty. But there were difficulties, particularly that presented by the relation of the state to international law and to other states. But these difficulties were not insuperable, especially in view of the dubious position of international law, which was only slowly developing as a substitute for the *imperium Romanum*—its legal nature could therefore readily be denied if it did not fit in with the required theory.[1]

The first real opposition to the theory of the essential sovereignty of the state appeared in the federal theory, particularly as developed in Germany in connection with the founding of the German Empire. The federal state generally came into being through the fact that states hitherto held to be unquestionably sovereign formed a union and set up a new union which purported to be a state. But in the view of those who created the union this was to be only of such a kind that the members kept their rank as "states" and their highest organs the rank and dignity of supreme state organs, and their citizens retained the sense of still belonging to their original and special unions which were on an equal footing with the "states" of the community of nations. From the standpoint of state theory there was to be no alteration in the meaning of the unions, despite their combination; parties to

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 116.

the union were to continue to be "states." But the answer to the questions: "What is a state? and When is a union a state?" does not depend on the wishes of the parties or of the leading personalities concerned. Definite political interests were concerned with the acceptance of a political theory; and the "scientific" solution of the problem set by political science was not altogether uninfluenced by political desires. Rather did it regard it as its task to fit theory to desire and cloaked this *sacrificium intellectus* by professions as to the avoidance of "abstract, unworldly speculation" and the desire to serve practical needs. But it was impossible to contend that states subordinate to the federal state could be sovereign, and so recourse was had to what Kelsen called the grotesque idea of the division of sovereignty between the super-state and the member state—an idea which, he held, was not worth refuting.[1] The theory (based on the erroneous assumption that sovereignty is only legal content) means nothing more than that competences are divided; it says really nothing of sovereignty.

But there is another theory, which deprives the member states of sovereignty but still leaves them state-character (thereby dropping sovereignty as an essential feature)—that is, the theory of sovereign and non-sovereign states. Then arises the question: When is a state sovereign and when is a non-sovereign collectivity a state? Kelsen held that this statement of the problem was entirely wrong. The theory drops from the state the factor of sovereignty, but yet refuses to abandon the attempt to distinguish —in essentials, i.e. absolutely—the state from the unions, e.g. communes or autonomous provinces, comprised within it. The state can—as it is not necessarily sovereign—have some higher system, some higher union, above it—the super-state in a federal state. There can, in this theory, be no fundamental and inherent distinction between the state and the unions within it. These latter are equally "authoritarian" (ruling) unions and, like the state, have legislative and executive authority, and the requisite organs, and can take over all the functions of the state for prescribed portions of the state territory, as subordinate to the state whole. Everything comprised within the state system can be comprised within the part system—as something empowered by or delegated or transferred from the collective system. The only difference arises from this difference in the order of rank of the validity of authority, and not from a difference of content. And consequently the state can be differentiated in essence from its

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 117.

constituent parts if it is assumed to be a comprehensive whole, i.e. a highest system. So in Kelsen's judgment the renunciation of sovereignty as an essential feature of the state meant that the state is not the highest but only a relatively high degree of the system of law. The difference between the state and the commune becomes merely quantitative, not qualitative; between the commune and the member state in the federal state there is no longer any essential difference.[1]

The theory which abandons the sovereignty of the state and yet tries to find something to distinguish the state from the commune, attempts an impossibility. Consequently it is not surprising that in the test which puts forward this theory as to the difference between the non-sovereign state and the unions which compose it—in reality the factor of sovereignty reappears. The attempt at the renunciation of sovereignty is only superficial; the need to make the state "absolute" proves to be the stronger. The "science" of the state is thereby thrown into complete confusion.

What is then to be the criterion to distinguish the state from other unions, if it is not to be that of sovereignty? There is the theory that not sovereign power, but power of rule or authority (*Herrschafts-gewalt*) should be the test. But if the authority undoubtedly exercised by the communes is not state authority, that is because the former is not authority of the commune's "own," but one granted by the state. The power of the state is a right of authority derived from its own "force," from its own right. The nature of the state power is that it is "original," not granted by any higher power. But this is only to repeat that the state system of law is supreme, that is, that it must be regarded as sovereign. For if above one system another is assumed to exist, the lower one must be assumed to be derived from the higher and the inferior power to be granted by or delegated from the higher power, and it is a matter of indifference whether the powers of the lower system, within the exact limits imposed by the higher power, are or are not exercised by its "own" organs in respect of legislation, administration or both. That is to say, whatever the scope of the powers of the lower system, that system must be regarded as going back in respect of its full validity to the higher order, and as derived from it. The lower system must as a whole rank as a part system of a higher system, and its "own" organs are only directly its own; indirectly—by means of delegation—they are also organs of the higher system. As the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 118.

function of a part must be a function of the whole, attribution (*Zurechnung*) must lead ultimately to the union of the collective system. There is an obvious inconsistency in assuming the state system of law to be possible under a higher system (i.e. to be a part system of a collective system) and yet treating it as the ultimate of attribution, in declaring its system to be its "own" and underived. It is self-deception if one looks on the "right of self-determination" of the lower union, within the limits imposed by the higher union, as "freedom," and so makes this the basis of state character or of a theory of limited sovereignty. This "freedom" is not "freedom" from the higher union; it is simply a delegated power to establish norms. If one abandons the absolute criterion of sovereignty, then the only differences are quantitative not qualitative.[1]

It is a mistaken conclusion from the theory of "original" or "own" authoritative power that it is inherent in the nature of the state—in contradistinction to non-state unions—that it must have all the essential material functions of the state, that is, legislation and administration. Quite apart from the fact that the boundary between these two is an indefinite one—administrative ordinances are in the material sense laws—communes and autonomous provinces have legislative and executive competence, i.e. competence to lay down general or individual norms, without the theory finding it necessary to speak of them as "states." And in the federal state the member "states" may have only a part of the administrative "power," may have no jurisdiction and only a minimum of legislative power, so that one could almost speak of it as an ordinance-making power exercisable by an administrative organ.[2]

So, in Kelsen's judgment, the attempt to distinguish the state in essence from the non-state unions leads directly to the dogma of sovereignty. But this does not answer the question: Is the state sovereign? Is it in principle different from non-state unions? The answer is: Two distinct juristic hypotheses are possible, of which one assumes the state, the individual state system, to be the highest, and the other assumes international law as a system standing over and above the state. The first can be called the theory of the primacy of the state system of law, and the other the theory of the primacy of the system of international law.[3]

As regards the first of these two hypotheses, Kelsen remarked

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 118–119.
[2] Ibid., p. 119.
[3] Ibid., p. 120.

that the theory of the state had failed fully to appreciate that from its own standpoint it is not possible to assume the existence in isolation of two or more state systems of law. It is entirely a mistake to think the problem solved by laying down that in one place one particular system is valid, and in another place another system, that here is one state and there another, clearly marked off from it. To do so is to overlook the fact that, as soon as one speaks of state or law, and recognises another community, outside one's own state, as a state, one is concerned not with the particular conduct of men by whatever motives actuated, but with the validity of systems of norms. But two systems of law cannot be simultaneously valid, unless that validity is somehow founded on a unitary basic principle. (Even the theory that one system is valid in one place and another in another place, without overlapping, tacitly assumes a system or norm which lays down that principle.) If one holds that a state, in order to take a place in the legal community of states, must be "recognised" by the other states, this recognition theory arrives at the unity of the system of law from the standpoint of the primacy of individual state law; in that theory the individual state law delegates an external system for a definitely delimitated area, and so itself remains sovereign.[1]

The same doctrine applies to international law. The rules of international law, it holds, in order to be valid in the case of a particular state, must be "recognised" by that state. International law, regulating men's conduct in certain directions, is regarded as a system delegated by a system which is sovereign and therefore fundamentally omni-competent. The "recognition" of international law by the individual state as the cause of that law's validity is merely a juristic assumption, even though some constitutions may by positive law determine the recognition of international law. That the individual state system of law is the starting-point of law, that the validity of international law depends on this system, of which international law is a delegation—all this cannot be laid down in positive law, because it is a presupposition of positive law. The "recognition" of international law by the state is therefore, in Kelsen's opinion, just as much an "assumption" as the basing of the validity to the individual of the state system of law upon such a recognition; in both cases it is necessary to make use of the function of "tacit" recognition. As the validity of international law and of the external state systems comes back to that of the individual state system of law,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 120–121.

all these are comprised within that state system of law, and so the validity of this last is the source of all law. That is to say, the individualised state system of law appears as being formally a universal system of law comprising all materially differentiated complexes of norms, but as complexes of norms materially "qualified" to a special degree.

As a result of this conception international law can, from the standpoint of the sovereignty of the state, be classified as "external state law,"[1] or—to adopt the terminology of the self-obligation theory—as the state can be bound only by its own will, that obligation of the state which is described as an obligation of international law must refer back to that will, and the international law must be deemed to be part of that will. If one assumes the state recognition of historical international law, the material legal determination of international relations is unaffected by it. In particular it cannot be argued that the conception of international law as external state law excludes the possibility of treaties between states. With the whole of international law its most important principle—*pacta sunt servanda*—is "recognised," adopted as the will of the state, becomes part of the state system of law. The treaty is an act setting up certain norms, and that act creates international law in the sense that the norms so formed are operative until they are cancelled by another treaty. And if the validity of international law depends upon the state will, the state—if it has recognised the international law—cannot withdraw unilaterally from a treaty. All conduct conflicting with a treaty is to be judged in exactly the same way as a legislative act which conflicts with the constitution or an administrative decree or action which conflicts with the law.[2]

But however logically this principle of state sovereignty vis-à-vis international law may be applied, it cannot be regarded as completely solving the problem of the relation of the individual sovereign state to other state systems of law. Even from the standpoint of the dogma of sovereignty it is believed that one can still hold fast to the idea of a plurality of co-ordinated but independent and therefore sovereign states. This idea had become extraordinarily important in the juristic conception of the universe, but it was, in Kelsen's opinion, not reconcilable with the sovereignty of the individual state. If that sovereignty exists, then the other states are not equals of it, but are subordinated to it and delegated by it; if the individual state system is sovereign, it is itself the collective system, and all other systems

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 122. [2] Ibid., p. 123.

are but parts of it. Sovereignty makes the state not only the highest but also—as it comprises all others—a unique collectivity, in that it constitutes the unity of the system of law.[1]

Turning now to the other hypothesis—the primacy of international law, Kelsen remarked that if one sees in the existence of a plurality of co-ordinate states the essential content of international law, the state-law interpretation of that law—determined by the sovereignty principle—involves a change in the nature of that law. And actually the tendency of those who interpret international law as external state law comes closer together with the tendency of those who deny altogether the existence of international law, i.e. deny that its rules are of the nature of law. This latter conclusion must unquestionably be the final result of the assumption of a sovereignty of the individual state system of law, if one rejects the fiction—very doubtful in many respects —of a recognition of international law by the individual state. "Should the international, but not treaty-based, law—and consequently also the principles of law laid down by treaty—rank as objective legal norms independent of the will of the states bound by them, should above all the presentation of a co-ordination of the collectivities which historically ranked as states be possible and that of the subordination of all to a single state ranking as sovereign be excluded, then juristic interpretation must start from the primacy of international law, that is, from the assumption that the rules described as international law are a complete system of law standing over all states, assigning to each its sphere of activity, treating all on an equality and comprising them all as 'part systems.' "[2]

That means, however, that no state is sovereign, that all are equally subordinate to the system of international law, to the international law community. And it means, further, that there is no difference in principle between the state and the non-state unions included in it, and that the state is to be regarded only as the "highest" union, because immediately subordinate to the system of international law, without thereby excluding the possibility that between the historical structures called states and the community of international law other structures may be interposed, as, for example, the federal state, which stands between the member states and the community of international law, but has the nature of a state. There is indeed no reason of principle why one should not apply to the union constituted by international law the term "state," as being the *civitas maxima*,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 123. [2] Ibid., p. 124.

so soon as the state is recognised as being a system of law—but only subject to the assumption that the description of the community of international law as a "world state" implies only the unity of positive international law and not any natural-law political postulate as to the further development of the system of international law. That is in any event the case, if one understands by the term "state" only a system of law which sets up law-creating organs based on a division of functions, and by the term "world state" postulates such a formation of the international law system with legislative and executive organs.

The question whether the international law community is a state can only be identical with the question of whether international law is "law."[1]

As to that much debated question, Kelsen pointed out that it must be understood to mean whether and in what way the complex of norms called international law can be brought into the unitary system of all law, i.e. the universe of law. If they can, they can be called law, but then arises the secondary question as to whether they contain any element of compulsion. The fact that the principles of international law are frequently violated, without any penal consequences following, is used as an argument that it is not "law." In Kelsen's opinion this argument scarcely needed refuting; it need only be stated that the legal nature of international law is not to be doubted, even if the content of the principles formulated in the customary manner as rules of law contain no element of compulsion. If international law is based on the principle *pacta sunt servanda*, that means simply the creation of a course of law, a legal authority.

The absence of an enforcing power does not deprive the law of its nature as law. But there are principles of international law which determine the conduct of particular men and are subject to a definite sanction—that of war. The fact that this act of compulsion is not carried out only by organs expressly and exclusively charged with it, but by the state which judges its interests to be adversely affected—and therefore without the determination of the fact of illegality by some objective procedure—is no doubt a technical defect in international law—which is thus shown to be a very primitive form of law—but is no reason for denying to international law the title of law, if it be established (and as to this there can be no doubt) that war in the sense of the rules of international law which allow it is only permissible as a reaction

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 124. Cf. *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 241–257.

against the violation of international law, that is, under definite conditions formulated by international law. The fact that the interested party himself determines if these conditions are fulfilled, and that therefore it may be extremely doubtful if the act of compulsion is the enforcement of a right or the doing of a new wrong, differentiates the international system from the individual state system only quantitatively, not qualitatively.[1]

If one starts from the primacy of international law, this is to presuppose a system of law superior to the individual states, for in this case the basis of the validity of international law is not in the will of the state (as it is in the hypothesis previously discussed), but conversely the validity of state law is based on the "will" of the community of international law. That scope and validity which make up the unity of a state system of law is expressed in a norm which establishes a supreme authority and source of law. From the standpoint of the primacy of the individual state system, this norm has a hypothetical character; the basic norm is not itself formulated, but is a presupposition of jurisprudence. But if one starts from the primacy of the system of international law, there must be in the realm of this some positive formula of law by which the highest legal authorities of the individual state systems of law are established and their respective spheres delimited, "That is to say that what from the standpoint of the primacy of state law is only a juristic hypothesis is from the standpoint of the primacy of international law a positive legal formula."[2]

That formula of international law which presents the scope and validity of the individual state system of law and the principle of "individuation" is to be found actually in the norm which lays down the conditions on which a state exists as such in international law. The recognition of a state as entering into the community of international law is the result—rightly understood—not of individual declarations of will by the states forming that community, but of a general legal formula.[3] That formula may be thus expressed: A state in the sense of the community of nations comes into being when an independent authority is established over the people within a definite area—in other words when in fact there is no compulsory system regulating human conduct in the defined area other than that subordinate to the system of international law. That law does not trouble about the way in which the authority is established or its nature—whether it is democratic or autocratic, or the content of the system—in

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 125–126.
[2] Ibid., p. 126.
[3] Ibid., pp. 126–127.

these matters the authority is delegated, subject of course to restrictions arising from the content of the principles of international law which directly govern human conduct and from the sphere of validity of the provisions of international law in time and space. In this way not only is there determined the existence of the state of international law, or the legal existence of the state, but the very state is determined, that is, there is created that condition of affairs which forms the basis of all legal conditions within the general system of state systems of law. Of course the rise of the state, which from the standpoint of the primacy of the individual state system is an *extra*-legal problem, becomes in this case the same problem of law as the rise of associations within the individual state systems of law. If certain norms are actually set up and if they become actually operative to a certain degree, then, for the sake of law, that ought to happen which those norms prescribe: international law confers on the actual deeds and acts of the authority (*Herrschaft*) a legal character and thereby the true character of authority; that is to say, the immanent idea of a system of commands (*Soll-Ordnung*), with which certain actions emerge, is—under certain conditions—legitimised by international law, and this system of commands becomes a system of law and is made within the limits prescribed by international law a part system of the universal system of law.[1] Thus the individual state system of law lays down that whatever the parties agree between themselves shall be law, and entrusts these—within definite limits—with the creation of law. The peculiarity of this delegation of the individual state system by international law is only that among the conditions prescribed by international law for the validity of the individual state systems there is included a certain degree of effectiveness of the acts which embody the system. But that is, in Kelsen's opinion, not incompatible with the antithesis between "command" (*Sollen*) and "being" (*Sein*).[2]

The fact that the rules of international law which determine the basic fact of a state include a certain degree of effectiveness, decides not only the beginning but also the end of the validity of the state system of law. If, that is to say, the state system loses that minimum of effectiveness—because the previously current ideology has been replaced by another—i.e. there has been a revolution, then according to international law the subject of the new ideology, showing the required minimum of effectiveness, begins to be valid. It is a generally recognised principle of inter-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 127. [2] Ibid.

national law that a victorious revolution, a successful usurper, becomes a legitimate power. So Kelsen concluded that "if revolution means so much as a break in legal continuity, if the conception of revolution is that the individual state system of law has not undergone a change which is in accord with its inherent nature but has been replaced by another, which has not been derived from the former in accordance with the prescribed rules as to change, this means—from the standpoint of the primacy of international law—not that the change is extra-legal, but that it has been carried out not according to the law of the individual system, but rather in accordance with the prescriptions of a law of a higher grade of international law, so that there is only a *relative* break in legal continuity, and the unity of the legal system remains in time unbroken."[1]

Kelsen held that looked at from the standpoint of a theory of positive law the juristic hypotheses which he had thus discussed are of equal validity. But it is necessary to adopt one or the other; Kelsen held that one of the worst defects of the theory of state and international law which had prevailed hitherto was its confusion of two antithetical assumptions and the tying-up of the consequences of the one with conclusions which can be deduced from the other. It is also not permissible to attempt to combine the two mutually exclusive theories of the primacy of the individual state and international law systems respectively by assuming a reciprocal delegation from the two systems of law and deducing therefrom the co-ordination of the two systems. The conclusion which reduces this assumption to an absurdity is not that the two systems of law are co-ordinated—though that is of course only possible if they are in common subordination to a third system—but that each is at once subordinate and superior to the other, that is, must at one and the same time be regarded by the other as delegated *by* and delegating *to* it, which is a *petitio principii*.[2]

Kelsen also regarded it as hopeless to attempt to avoid these two theories, which both lead to the unity of the legal system, by treating the system of state law and international law as two entirely separate spheres of norms, that is, by substituting a dualistic for a monistic theory which, however, results in a plurality of law. A plurality of bodies of law, isolated in time and space from one another, is an unrealisable conception, because it is not possible to regard all these diverse systems of norms as equally valid legal systems without carrying them back to one

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 128. [2] Ibid., p. 130.

common source from which they derive their legal nature. This way out cannot be admitted. If there is any criterion at all of the truly scientific understanding of the state or law, it is the unity of intellectual standpoint. It is at the same time the unity of the system which is called state or law.[1]

Finally, Kelsen pointed out that these two dogmas—of the primacy of state law and the primacy of international law respectively—are only applications of the two most general principles of the theory of knowledge. The antithesis which he had discussed thus becomes one between subjective and objective knowledge, and so ultimately to the conflict between two conceptions of the universe.[2] Without attempting to decide between these two conceptions, Kelsen thought it necessary to point out further that the subjective idea of law must lead finally to a denial of law generally and so to that of a science of law. For the whole existence of law depends upon the objectivity of its operation. It is mere tautology to add that the state, a collectivity, is possible only on a collectivist or universalist, that is, an objective, basic conception. The subjective tendency inherent in the theory of the primacy of state law leads to a denial of international law and so to a negation of the idea of law—at any rate in this sphere —and to the assertion of the pure doctrine of force (*Macht*).[3]

Elsewhere Kelsen remarked that in the jurisprudence of to-day the subjective and objective conceptions of law are in sharp conflict. The theory of international law wavers illogically between the two contradictory positions as to the state—the individualistic and a humanity-universalist mode of consideration —between the subjectivism of the primacy of the state system of law and the objectivism of the primacy of international law. This unsatisfactory situation is, he thought, due in the last resort to the fact that the social conscience in its development of the individual has not yet broken down the barriers of the nation and of the national or otherwise limited state, and has not attained to a consciousness of humanity. The state of transition is shown by the contradictions of the theory of international law, which on the one hand strives to the height of a legal world community set up over the individual states and on the other hand remains firmly held in the sphere of force of the individual states; but there is a trend towards an objective conception of law. "As the subjectivity of the natural law theory of the state contract was overthrown by the idea of the sovereignty of man

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 130.
[2] Ibid., p. 131.
[3] Ibid., p. 132.

and the objective validity of the individual state system of law was placed beyond dispute, so with the overthrow of the dogma of the sovereignty of the individual state there will be brought into being an objective universal law, independent of all recognition," an international law over the individual states, a *civitas maxima.* And so Kelsen concluded that "the idea of the sovereignty of the individual state has been—rightly or wrongly—an obstacle to all effort directed towards the development of the system of international law, to an organisation based on division of labour, to the setting up of special organs for the elaboration, application and enforcement of international law, and to the further expansion of the community of international law from its present primitive state to a *civitas maxima*, even in the materially political sense of that term."[1]

§ 4

If the state be accepted as being a system of norms covering essentially though not exclusively human conduct, the content of these norms includes implicitly *space* and *time.* The validity of these norms is then a validity conditioned by space and time, in the sense that they have as their content occurrences in space and time. This is of course not peculiar to legal norms; every norm, every command (*Sollen*), which is concerned in any way with human conduct must relate to the space and time in which human actions or omissions take place. But it would be a mistake to assume that consequently the antithesis between "*Sollen*" and "*Sein*" (being) is done away with, because time and space are forms of the conception of being. If space and time are not accepted as content of legal norms, and it is not admitted that the legal norm is valid everywhere and always, this means that it has no possible content and validity. But as the factors of space and time which are essential to the content of the norm are *a priori* unlimited, that norm, so far as it does not impose limitations of space and time upon itself, is valid everywhere and always. Wherever and whenever the particular determined condition of affairs is established, then everywhere and always the results ensue; that is the sense of the norm, if it does not fix particular limits of space and time.[2] On the other hand the norm

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 319–320.

[2] Ibid.: *Allgemeine Staatslehre*, 1925, p. 137.

can restrict both in space and time the conditions to which it applies.

The norms whose systems form an individual state system of law are fundamentally limited locally in their operation—they apply only to a prescribed territory; the conditions which they regulate are qualified by the fact that they must be established within a defined area (space). It is only by reason of such space limitation of their operation that it is possible for a plurality of individual state systems of law to operate side by side without coming into conflict because of their diversity of content. This local limitation is not in any way an outcome of the legal norm; it can be attained only as the result of a positive determination (*Satzung*). It is a definite function of international law to limit the scope of the individual state systems of law as between one another: indeed it is only from this local delimitation that the conception of the individual state system of law arises.[1]

The space to which the validity (operation) of the state system is confined is the so-called "state territory." That term means the space within which the state system is valid, not the sphere in which it is actually operative. That in the conception of the state territory it is impossible to leave out of consideration the state system of law and the state as a system of law is shown most clearly by the fact that the unity of the state territory—and it is essential for a state to have a territory and for that territory to be a unity—is in no way a natural or geographical unity. The state territory can be made up of parts, separated from one another by other territories belonging to other states or to none at all (as the sea). And if such territories form a unitary whole, a single state-territory, this is only because they are the sphere of validity of one and the same system of law. From the purely juristic standpoint the identity of the state territory is the identity of the system of law.[2]

Just as it is not possible to maintain that the individual state system of law applies only within the narrow state territory (although this is true in most cases) so it cannot be maintained that only the one state system of law can apply within the narrow state territory (though that is fundamentally true). In all cases in which the operation of the individual state system of law extends beyond the narrower state limits—apart from the case of the open sea—a foreign system of law is operative within a state. Examples of this are furnished by military occupation,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 138. [2] Ibid.

diplomatic acts of state and the confirmation under treaty of foreign state acts.

A particular instance of the valid operation of two or more systems of law within the same territory is the "condominium"; that is, when a territory distinct from the narrower state territories of two states is under their common rule, that is to say that for that territory certain legal norms are valid, which rank as norms of each of the two systems of law. They are in substance identical parts operative in a common territory of two systems of law. The organs entrusted with the setting up of these norms rank as common organs of the two states.

As an example of the fact that exceptionally two individual state systems of law can be valid for the same territory it is customary to point to certain unions of states, and especially the federal state, where the territory of the super-state is at the same time the territory of the member states. But this example is relevant only so far as state-character is attributed to the member states : s well as to the super-state—a matter which Kelsen left for discussion later.[1]

With regard to the relation of international law to the state territory Kelsen argued that the limitation in principle of the validity of the state system of law to the so-called state territory in the narrower sense, and yet its non-exclusiveness, is a function of international law so far as that makes possible the co-existence of a plurality of systems of law—to be regarded only as part systems—or individual states. It is above all things international law that—limiting the validity of the state system of law to the narrower state territory—takes from that system its characteristic of exclusiveness, by making possible—if only in exceptional cases—the validity of other systems of law in that territory, so that one state has a place within another. In this way international law is assumed to be a comprehensive system of law, standing over all individual state systems of law which are on an equality below it, and comprising them all because they are its delegates for their individual spheres.

From the standpoint of the primacy of the individual state system of law the exclusiveness of this system must be admitted at once. From that point of view every system of law other than the individual state system appears as simply "recognised" by it, i.e. delegated for a certain sphere. For all spheres the all-comprising state system of law is valid—at least as the supreme delegating authority. With this sovereignty—or the sovereignty

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 140.

of the state—there is admitted also the absolute exclusiveness of the validity—or the existence—of the state internally and externally, i.e. for both the narrower and the wider state territory. But from the standpoint of the primacy of international law the exclusiveness of the individual state system of law disappears with its sovereignty. The individual state system of law does not appear in this case as being in a relation of superiority and subordination resulting from delegation, but all individual state systems of law are in common subordination to the international law—that alone has sovereignty and exclusive validity. It is not as if one can say: the individual state systems have no exclusive validity within their own territories because international law is a super-state system of law, and the individual states have no exclusive existence within their territories because the community of international law co-exists with them as a kind of primitive super-state. It is rather that the individual state systems of law rank only as part-systems of the universal international law system, and the individual states only as part-corporations of a comprehensive community.[1] So Kelsen declared that the exclusive validity of the individual system of law or of the existence of the state can be thought of as compatible only with the sovereignty of the state system of law, i.e. with its primacy, and not as compatible with the primacy of international law.

One of the chief mistakes of the modern theory of the state is, according to Kelsen, the idea that the state is marked off from other corporations by the fact of having a territorial basis. That the state as an ideal system does not occupy space any more than any other system of norms is obvious. The state is not a visible, tangible space—occupying numbers of people; it is only a system of norms relating to human conduct.[2] In this respect it does not differ in any way from other corporations, which are only part systems of law. The only distinction which can be made is between those which operate within a clearly defined space and those which have no such limitation. But in this sense no corporation can be unrelated to space. The only complete territorial corporation—in the sense of the prevailing doctrine—is formed by that system which is competent to determine the conduct of men in all directions; and that is simply the sovereign complete system.[3]

Next as to time, Kelsen remarked that the prevailing theory included space among the elements of the state, but not time,

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 141.
[2] Ibid., p. 143. [3] Ibid., p. 144.

although this had an equal right to be included, especially if one conceives of the state—as does the naturalistic-empirical doctrine—wholly as a natural reality, as a material-ethical entity which must exist in space and time. According to the customary theory, two states cannot exist in the same space at the same time—the exclusiveness of validity in one and the same space involves the exclusiveness of validity at one and the same time. But in successive periods different states can exist in the same space—a fact which any theory based on historical actuality cannot overlook. The failure to appreciate it is probably due to the fact that there is an obvious limitation of the state in respect of space, whereas there seems to be for the individual state system no such limitation in respect of time. And that is true if one looks only at the content of the individual state system of law—it claims to be eternal. But international law contains positive norms as to the point of time at which a new state is to be regarded as formed and an old state as at an end. Thus, apart from the rise and fall of states through treaties, the fact of a successful revolution is recognised by international law as the condition of the beginning of a new individual state system of law and the end of an old one. In this way the beginning and end is set to the state system just as it is to part systems—to societies, unions, associations, corporations and so on within the state systems. It is only the actual circumstances which differ in the two cases.

In respect of its individual norms or body of norms the individual state system itself contains time-limitations. On the assumption that the individual state system presents a body of unchangeable norms, a legal norm continues, fundamentally, until it is displaced by a norm of a conflicting kind. As the most general principle determining the duration of the validity of a norm Kelsen laid it down that "the period of validity can be limited only by positive legal provisions (*Bestimmungen*)" and that every attempt to solve the problem of the period of a legal norm by the "nature of things," as a law of nature, must be rejected.[1]

Kelsen next proceeded to apply his general juristic principles to the subject of federalism.

If the state is conceived as a system of human conduct and therefore as a system of norms, valid in space and time, the problem of the territorial division of the state is simply a special problem of the space-validity of the norms which form the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 148–149.

state system.[1] The usual presentation of the state starts with the simple assumption that all those norms apply equally to the whole state territory or emanate from one single authority (*Instanz*), a single "power," and that a single state power rules the whole state territory from one centre. In this last-mentioned idea—that of the so-called unitary state—there are combined the ideas of the space-validity of the norms which constitute the state and of the unity and plurality of the organs which set up those norms. But those two ideas must be kept sharply distinct. "As in the conception of the unitary state there is expressed the antithesis of centralisation and decentralisation, and the unitary state as a centralised legal community, this antithesis is presented solely from the standpoint of the space-validity of the norms which constitute the state system—but statically and without the aid of the dynamic factor of the unity or plurality of the norm-making organs."

Kelsen thought that the idea that the state norms apply equally in the whole state area had been stimulated by the fact that the state system of law consists only of general norms, and that it is identical with the norms formulated in legal enactments. For cases in which the state laws apply to the whole state area, and there are no state laws applying to only part of the state area, are quite common. If we regard as the state power simply the law-making power, then there is not much conflict between the idea of the state as a centralised legal community and historical actuality. But if we look at the individual norms established by administrative decree and judicial decision, and making concrete the general legal norms—because both belong to the state system—it is apparent that any particular state has hardly ever accorded with the idea of the unitary state or the idea of centralisation. Even if the general legal norms are issued only as applying to the whole state territory, the laws take as a rule the concrete form of particular norms which in a sense apply only to parts of the territory and are established by organs which for this purpose have a competence limited to part of the territory. The states of history—the positive individual state systems of law—have been neither wholly centralised nor wholly decentralised; they have been partly one and partly the other, approximating to one or the other ideal types.[2]

Theoretically, a centralised legal community is one whose system is made up exclusively of norms applying to the whole

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 163.

[2] Ibid., pp. 163–164.

territory covered by the law, whilst the decentralised legal community is one whose system is made up of norms applying to only parts of that territory. The division of a legal community into a number of territorial parts means, in Kelsen's opinion, that the norms or some of them apply only to parts of the territories—in the latter case the system of law which constitutes the legal community is made up of norms of differing space validity. He held that in the case of complete—and not merely partial—decentralisation there cannot be any norms applying to the whole area alongside those applying to the parts of the area. As the unity of territory is determined by the unity of the norm-validity, it is questionable if in the "ideal" case of pure decentralisation it is possible to speak of a collective territory (*Gesamtgebiet*) and of *one* state system at all. Decentralisation exists only when it is a case of the division of one and the same legal community and one and the same territory. If it went so far that a number of legal communities and systems of law, with independent and separate territorial spheres of validity, existed side by side, without it being possible to regard these spheres as parts of one territory, then the extreme limits of decentralisation would seem to have been exceeded. But a plurality of legal communities existent side by side without a totality system, comprising them all, demarcating one from another, and constituting a collective community—this was to Kelsen inconceivable. And as all states, regarded as co-ordinate legal communities, must rank as members of a comprehensive community of international law, so all state territories must rank as part-territories of that extent of space to which the universal system of law applies.[1]

Kelsen proceeded to point out that it is a mistake to think that centralisation or decentralisation is possible only inside the individual state, and that it is to go beyond the limits of the problem to enter into the sphere of inter-state relations and into the realm of that community of nations, created by international law, which lies over and beyond the systems of the individual states. The connection of these with the community of international law generally, and with concrete unions like the confederation, union and federation, can be considered from the standpoint of centralisation and decentralisation. Moreover, the international legal community does not present the greatest possible measure of decentralisation. The customary so-called general international law is a body of norms applying to the whole space-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 164.

realm of the international law system; in contrast with it the actual treaty-based international law applies only to part territories, i.e. the territories of the contracting states. This is, to Kelsen, only partial decentralisation. If complete decentralisation exists only in so far as there are no norms applying to the whole territory, this can be understood—with due regard to the necessary unity of the system—as meaning that no norms have been set up which apply to the whole territory, but that at least there is a basic norm applying to the whole territory, which is divided into part territories according to the part systems delegated by the total system. In this basic norm there must be constituted the unity of the whole territory along with the unity of the full system which comprises all legal communities as its part-systems.

"The extreme instance of decentralisation is at the same time the extreme case of the co-existence of a plurality of legal communities." The minimum presupposition, applicable to decentralisation, is at the same time the minimum requisite for the assumption of such a plurality. If this be adhered to, it is possible to talk of decentralisation in a narrower sense if the unity of the whole territory is formed by positive norms and not merely by some hypothetical basic norm. But this is a matter of minor importance, because the effectiveness of law does not extend beyond these narrow limits and the extreme case of positive legal decentralisation which comes under consideration, namely, the division of the community of international law into individual states, answers to this idea of decentralisation in the narrower sense.[1]

Differences in the areas to which the norms of any system of law apply give rise to the possibility that norms of differing content can apply to different parts of the territory. So the formal unity of the territory subject to the law need not be bound up with the material unity of the content of the law. In the extreme theoretical case, if the unity of the territory is formed only by the basic norm, all the established norms apply only in part territories, and there is a unitary system of law without any content common to the whole territory. The necessity for this can be justified on many grounds—geographical, national and confessional differences, and can be increasingly so as the territory increases in extent and the possibilities of differentiation in all the relations of life to which the norms apply are enlarged. It is necessary to distinguish between this territorial differentia-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, pp. 164–165.

tion within the system of law—which alone accords with the principle of decentralisation—and a differentiation within that system in respect of persons. Norms with varying content can be established for people of different languages and races and even professions, but any such division of the state is based on the principle of personality and not, as should be the case if "division" is used in its proper sense, on the principle of territoriality.[1] Decentralisation, in the territorial sense, with the possibility of different positive laws for different territorial parts of the legal community, can—purely quantitatively—be of different degrees. In the sphere of the operation of law decentralisation, and correspondingly centralisation, can be only partial, in that the decentralisation relates only to one particular stage of the system of law or—without regard to the stages—only to some particular matters. Finally, it is conceivable that centralisation and decentralisation, as differing principles of organisation, can succeed each other in the course of time in one and the same system of law. And a combination of all the three possibilities mentioned is not excluded.

There are two types of partial decentralisation or centralisation.[2]

1. There is the case in which only the constitution—in the positive legal sense—is valid for the whole territory, that is, is common to all the members, and the laws and the individual norms which give substance to the constitution, apply to the part territories. But there can also be this position, that all laws, i.e. all general norms, apply to the whole territory and only the individual norms have local validity. This is the position with the so-called unitary state. The purpose of this decentralisation—limited to the stage of the individual norms—is to give due regard to the peculiarities of the part-territory within the scope of the free action allowed to the individual norms. But it must be pointed out that it is conceivable not only that the particular grade of legislation is centralised and that of administration decentralised, but also the reverse case that the legislation is decentralised, but the determination of the individual norms is actually centralised (as in the case of the real-union).

2. There is also the case in which the norms that make up the system of law—not according to the various grades of validity, but according to the subject-matters governed by the system of law—fall into two classes, namely, those which apply to the whole territory and have uniform content and those which apply

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 165.
[2] Ibid., pp. 166–167.

only to part-territories and have differing contents. Thus the civil and criminal law may be centralised. If decentralisation of this kind actually extends to all grades of the system of law, then the constitution and the norms as to the manner of making the laws relating to these decentralised matters must also be decentralised. That is the case with the federal state in so far as the constitutional rules relating to the legislation of the member states appear as laws of those states and not of the union. It is also possible for the constitution of the member states to be only partly within their competence, and for the main lines of the member states' constitutions to be determined by federal law. The case in which the decentralisation in respect of individual matters of law applies only to the grade of validity of the law and the lower stages of making orders and individual administration, is exemplified in states divided into autonomous provinces and self-governing corporations.

It follows from what has been said that the problem of centralisation and decentralisation, that is, the problem of the territorial validity of the legal community, is primarily one of the territorial validity of the norms which constitute the system of law. Kelsen, however, thought that in addition to this static factor there is a dynamic factor which is often confused with it.[1] Whilst from the first standpoint the operative norms are looked at only in respect of the extent of their territorial validity, from the second standpoint attention is directed to the way in which these norms of varying territorial validity come into being. A distinction is made according as the norms, affecting the whole territory or part of it, are set up by a single organ or a plurality of organs. And although a centralised or decentralised legal community is possible with both a unity or plurality of norm-imposing organs, yet as a rule the idea of centralisation is associated with that of norms imposed by a single organ placed in the centre of the legal community, and forming the centre of it, whilst with the idea of decentralisation is associated that of a plurality of organs not situated at the centre, but scattered over the whole area, and competent only to set up norms applying to part areas. In the terminology of "decentralisation" and "centralisation" the secondary dynamic factor presses so much to the front that the primary factor is apt to be overlooked even in scientific discussion.

There are three possible combinations of these two factors:[2]—

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 167, sig.

[2] Ibid., pp. 168, 174.

1. In the case of ideal or complete centralisation, i.e. a system of law of which the norms apply equally to the whole area, there exist two possibilities in respect of the dynamic factor; the norms can be established by a single organ or by a number of organs. In the extreme case all the norms can be set up by a single individual organ, that is, by a man: that is the ideal type of autocracy which is essentially centralist. The single organ can also be a compound one—as, for example, the national assembly, or a nationally elected council: that is, democracy can be centralist. But a plurality of relatively independent organs is compatible with centralisation: different organs can be called on to set up norms of various grades of validity, without the need —in theory—for any territorial delimitation. Even with complete centralisation different organs may be given the function of setting up norms of diverse content. This system, known on the continent as the *Ressortsystem*, is frequently compared with the territorial or provincial system, but wrongly so, for the latter is one of territorial decentralisation, whereas the former is actually only a form of centralisation.

2. Again, complete decentralisation is possible both with a single norm-making organ and with a plurality of such organs. If by decentralisation one means that the unity of the system of law and therefore of the territory is based only on the assumed basic norm, and that there are no positive norms applying to the whole territory, but only some applying to mutually exclusive territories, then the same result can be obtained by setting up a single (simple or compound) organ to establish norms for the various territories or a plurality of (simple or compound) organs —one for each territory. In the former case a single individual can be entrusted with the task, but it cannot be done by a single act—there must be as many acts as there are part territories. And it is apparent that the same man, in so far as he sets up norms which are different from one another in the extent of their validity, cannot rank as one and the same organ, so far as one thinks of the personification of the organ behind the objective fact of the norm-fixing act. The so-called "personal union"—a union of two states solely in the person of the monarch —is an example of this kind of decentralisation. That the wearer of the crown was an Emperor of A. and King of H.—two quite distinct organs—is always maintained, although he was one and the same man who established laws at one time for A. and at another time for H. This is clearly the case in constitutional monarchies, with parliaments and responsible ministries, which

differ for the two states. And the position was the same in respect of the relation of autonomous provinces, the so-called *Länder*, to the "*Reich*": the legislative competence is divided between them and the monarch must sanction the legislation of both. The so-called "union" can have other common organs besides the monarch, e.g. ministers for particular matters, or a common representative body. But this does not affect the degree of decentralisation, so long as these organs cannot set up norms applying to the whole territory but only norms applying to the two parts individually. As soon as any one of the organs can set up norms applying to the whole area the decentralisation is not complete but only partial. The assumption that historically there have been states having only organs for parts and no common organ of any kind, states which have been only a loose bundle of provinces, is based on a misconception. It is not possible to assume that for the whole territory of such a state there was no norm and no organ competent to set up a norm, because to such a degree of decentralisation, looser even than that of the community of international law, customary terminology would not apply the term "state," for it has refused to call the community of international law a state, a *civitas maxima*. Obviously it is tacitly assumed that the provincial system extends only to certain stages of the system of law, to administration and interpretation of law, and that the unity of the whole territory is based on the unitary validity of the general norms.[1]

3. The secondary factor of the organ which sets up the norms is more important in the case of partial centralisation or decentralisation than in either of the two preceding cases. There are here two strata of norms—those applying to the whole territory and those applying only to part territories, the former covering a territorial collective community, and the latter covering territorial part communities.

It is necessary to distinguish between the organs of the collective community and those of the part communities. That distinction plays a great part in the theory of those decentralised systems of law which are called "unions of states"—a theory in which the idea of "own" organs is very important. Kelsen therefore thought it necessary to determine the sense in which one can speak of an organ of the whole or an organ of the part.[2] He pointed out that the relation of "the organ" to the system is twofold: it is at once the creator and the instrument of the system. So long as the two systems are not differentiated—i.e. the norm which creates

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 170. [2] Ibid., p. 171.

the organ applies to the same thing as the norm created by the organ—there is no problem, if the system by which the organ is set up and the system set up by the organ are in respect of their territorial scope in the relation of the whole to the part. If that is the case, it becomes immediately possible that the system which applies to the whole area can set up an organ whose operation extends only to a part area. The organ can then be regarded as the organ of the whole or of the part. For example, the federal constitution may determine the nature of the legislative organs of the member states; these can then be regarded as organs of the federal state, because set up by the federal constitution, or as organs of the member states or *Länder*, because they set up norms of law applying only to those states or *Länder*. Kelsen asserted very positively that so far as the organ is regarded as belonging to the system which set it up, the whole cannot be constituted by the organs of the part, but the part can be constituted by the organs of the whole.[1]

He thought that this had been overlooked by that theory of unions of states which treated them as cases of decentralisation. It was thought possible to characterise some unions made up of separate states by the fact that the organs competent to set up norms for the whole union territory are not the union's "own" organs but those of the member states, whilst other unions have their "own" such organs distinct from those of the member states. This is the commonly accepted distinction in principle between the confederation and the federal state; the former appears to have no organs of its own, no state power apart from that of the members, no juristic personality other than the juristic personalities of its members, no federal territory of its "own" and no federal people of its "own," whilst all these are attributed to the federal state. But in Kelsen's opinion this theory is untenable. Take the case of a union of a number of states which—by the treaty-based constitution—has set up an organ to serve the union purpose, that organ consisting of the heads of those states or their foreign ministers. The federal organ is then made up of organs of the members; but even so, and though unanimity is needed for its decisions, it is not the case that the federation has no organ of its own. The federal council so set up is an organ created by the federal constitution which, like an international treaty, is from the outset valid for all the territories of the member states and brings them together into a unity as no individual state law can do. It is this federal constitution

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 172.

which forms the union: the federal council must be regarded as its organ: the fact that its members are heads or ministers of the states does not and cannot affect the fact that together they make up an organ of the federation—it only creates a personal bond between the parts and the whole.[1] So far as the exercise of two separate functions—separate because determined by separate systems of norms—by the same individual is to be described as "personal union" and "personal union" is understood as meaning "common organs" (in the sense that the office-holders are identical), it is possible with partial decentralisation for there to be personal union between organs of the parts and those of the whole, for the whole and each part to have "common" organs. But the organs of the whole can never be organs of the parts. The organs of the federation are such not only because they are set up by the constitution which forms the union and applies to the whole territory, but also in the sense that their function is to establish norms applying to the whole territory. And that is so even if the decisions of the federal council are binding directly only on the states, and in order for them to bind the subjects of the states, legislation by the states is necessary.

Kelsen held that not only the confederation, but every international law organisation based on treaty, and the international law community itself, corresponds to this type of decentralisation.

Every international treaty is based on the principle of general international law by virtue of which the declared agreement of the constitutionally authorised plenipotentiaries of the individual states as to the reciprocal conduct of men appointed in accordance with the individual state systems (i.e. the governments) is followed by specific legal consequence.[2] The treaty is therefore vis-à-vis the international law system a conditioning fact; vis-à-vis those on whom an obligation is imposed it is a norm, a system, a part-system. The organ set up by this norm or treaty system is a compound one; the function of the organ is determined by the agreement of two or more persons to whose individual determination the international law system delegates the individual state constitutions. It is a unitary but not simple organ, and not two or more organs; it is an organ of the system of international law, and of the community of international law. "The treaty law principle is the constitution of international law."[3] The individual state constitution only provides the possibility of norms applying to a single state. What was said above of the confederation can be

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 173.
[2] Ibid., p. 174. [3] Ibid., p. 175.

said more generally of the treaty community of international law; "it is formed by an organ of the international law system and not by the 'own' organs of the states, parties to the treaty"; "it is international law that determines the functioning of the organ, the 'act' imposing the norms binding upon the states, and not the individual state systems of law, no one of which is competent to empower organs to set up norms extending beyond the spheres of validity of the individual state systems and applying to the territories of a number of states."[1] The collective organ can therefore have as its basis only the system of international law. The individuals who compose it and function as part organs are also organs of the separate states and constitute a personal union of two distinct functions, in so far as they have domestic (*intra*-state) functions alongside of their participation in the conclusion of the treaty according to international law. If, however, this latter function—this part "act"—be regarded as a function of the individual state, then the part "act" has a two-fold nature; it is both an act of the individual state and an act of the community of international law.

The general community of international law therefore presents, in Kelsen's opinion, "the type of a partly decentralised system of law, in which the norms of general international law apply to the whole area of the whole legal community and the norms of the individual state systems in principle apply only to the part territories; the treaty law principle which is one of the norms of international law provides the possibility of (compound) organs to establish norms of particular international law—i.e. norms applying to some and eventually to all the individual states." The fact that treaties between states bind only the states, and not their subjects directly, is of no importance in respect of the territorial operation of the treaties.

If in the case of partial decentralisation central organs are to be distinguished from local or non-central organs, the central organs can be formed out of local organs, but only in the sense of a personal union (of the office-holders) between the central and local organs.[2] An example is the organisation of the federal state, whose typical central legislative organ consists of a popular assembly for the whole, set up by the federal constitution and legislation, and a second chamber composed of representatives of the member states. The central constitution does not appoint as central organs men who are already local organs, but men appointed by the local organs. But it follows from this that the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 175. [2] Ibid., p. 176.

local organs which are called upon by the central constitution to participate in the creative "act" in accordance with that central constitution are themselves central organs.

The quantitative degree of partial decentralisation is not affected by the fact that there are many varieties of it arising from the possibility of the personal union of central and local (non-central) organs, but yet is of some importance in respect of the differentiation between the content of the central and local systems.[1]

And along with this quantitative differentiation there is necessarily—from another standpoint—a qualitative difference. For decentralisation to be complete the setting up of the norm for a particular part territory must be final and independent—final in that the norm cannot be overruled by a central norm, independent in that its content cannot be determined by a central norm.[2] In the sphere of legislation decentralisation is incomplete if the legislation in regard to any particular "material" is divided between a central and several local legislatures (as in the federal state), but subject in the case of the latter to conditions such as "federal law supersedes territorial law." In the sphere of administration the distinction between complete and incomplete decentralisation is of special importance.

What is commonly called "administrative decentralisation," as contrasted with decentralisation by means of self-government, is essentially incomplete decentralisation of administration and judicature. The division of the state area for administrative purposes into a descending series of areas is not made for the sake of complete decentralisation, i.e. a differentiation of the content of the systems of the various areas; on the contrary, in such administrative decentralisation great care is taken to prevent such differentiation.[3] The real reason for the formation of small administrative and judicial areas is simply the need that the making of the norms, especially individual ones of executive orders and court judgments, by which the general norms are made concrete and so affect the subjects directly, shall take place as close as possible to the persons and matters which they affect. Finally, in this connection, Kelsen pointed out that as a rule local administrative orders (*Akte*) are neither final nor independent; local judgments are independent, but not final.

Passing next to the so-called "self-governing bodies," Kelsen pointed out that almost complete decentralised administration

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 177.
[2] Ibid., p. 178.
[3] Ibid., p. 179.

does exist, and if it has a corresponding scope so that a part-system exists, formed of a number of norms, then it is possible to speak of local administrative corporations within the legal community of the individual states. The so-called "self-governing bodies" are of this nature. Kelsen pointed out that in the German term *Selbst-Verwaltung* (self-administration or self-government) as used to-day two quite distinct ideas are confused—the ideas of democracy and decentralisation. It is generally taken to mean a decentralised part-system, whose norms are established democratically, and relate not only, if mainly, to administration but also to justice, and can be concerned with the decentralisation not only of particular but also of general norms, and especially of formal "laws."[1] The contrast of "decentralisation by self-government" with "administrative decentralisation" is possible only on the assumption that self-government, or, more precisely, the democracy expressed in the principle of self-government, results in a particular kind of decentralisation—as the result of democracy or *vice-versâ*. So far as democracy is the principle of self-determination (norms must be set up by those to be subjected to them, uninfluenced from outside), then this basic principle of democracy appears to accord with the characteristic tendency of decentralisation set out above—i.e. its ruling that the determination of the content of the local norms be independent of any central authority. And this is the case whether the central authority be organised autocratically or democratically. For in the latter case those subject to the local norms have a share in the formation of the central norms, and to that extent the democratic demand is met, even if the content of the local norms is fixed by the central one. But if the demand is that in the making of the local norm *only* those to be subject to it—a part of the "people" and not the whole—shall have a share, it is not a larger measure of decentralisation, but a higher degree of democracy that is envisaged.[2] For liberty in the sense of self-determination is increasingly diminished as the number of people, not subject to the norm, that have a share in its formation increases. If that formation is by means of a majority decision, then, if it is for the whole "people" to make the local norms, it is obvious that the majority can consist wholly of persons who will not be subject to the norms, which is—from the point of view of those who will be—not democracy but autocracy.

Indeed, apart from the case discussed above, in which the tendency towards democracy runs parallel with that towards

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 181. [2] Ibid.

decentralisation, the latter is compatible with autocracy as much as it is with democracy. The creation of the completely decentralised (in the sense indicated above) territorially limited system can be autocratic or democratic. Kelsen pointed out that the historical English county self-government was a mixed form, including strong autocratic and strong democratic elements. In the continental form of self-government the democratic idea has been dominant—it has meant administration by locally elected boards, and not administration of local affairs by officials (even if unpaid) nominated by the central authority. The struggle for self-government has on the continent been one primarily for the democratisation of local government, and part of the general struggle for the participation of the people in the formation of the state will.

The state has often confined itself to legislating in more or less general terms, leaving the elaboration and application of the law to an independent body or union. This elaboration and application has been called "self-government" and the independent unions "self-governing bodies." Their characteristic representative on the continent is the "local commune." And this decentralisation does not confine itself generally to the sphere of individual norms; the organs of the commune may be entitled to establish general norms. And Kelsen observed that the idea of a contrast between the self-governing bodies, especially the commune, and the state develops in the ordinary theory into the assumption that the self-governing body has an independent juristic personality which is different from and in opposition to the juristic person of the state.[1]

It is easy to see why the self-governing body is customarily presented as being vis-à-vis the state a distinct and independent legal creation. There is firstly the peculiarity, resulting from decentralisation, of the local community created by some decree applying only to the part-territory, and secondly the political interest in ever-increasing decentralisation arouses the consciousness of the absolute and essential unity relation in which this legal collectivity stands to the comprehensive relation of the individual state. This peculiarity is closely connected in juristic thought with the conception of the juristic person as a means of expressing individuality. "The personification of the part-system which forms the self-governing body is in fact only the expression of the relative unity and individuality of this part-community."[2] And as Kelsen further pointed out, the competence of the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 183. [2] Ibid.

commune goes far beyond that of a mere commercial administration in the sense of private law. It becomes a subject of so-called public administration, and as it at first becomes as such a self-governing body in the specific sense, it takes on as such the character of a juristic person. But this personification must not lure us away from the knowledge that the basis of the validity of the system which constitutes the self-governing body is the central system which applies to the whole territory of the state, and that the administrative decrees of the commune must in the last resort be attributed to the state as the unity of the whole, in relation to which the commune is merely organ and part, because the commune exists only by virtue of delegation from the state. To say that the state has no monopoly of public administration, which can be carried on by other persons—self-governing bodies—is only a confusing statement of the fact that the administration need not be carried on solely by means of central, autocratically established norms, but can also be by local democratically established norms.[1]

It is only in its independent sphere of activity that the commune is as a non-state union the opposite of the state, and issues decrees in its own right. But the antithesis maintained by theory is not sound in the sense that the "independent" sphere of activity of the commune is in positive law always and in every respect a completely decentralised part-system.[2] The main reason for this is that the commune is often included in a larger local area, and that consequently there is at least an appeal against decisions of the commune to a relatively central organ of the superior local authority. These self-governing bodies approximate—on account of their territorial scope—so closely to the average form of the modern state, that they are almost what in the federal state are called member states, portions of the state, semi-state or state-like bodies. But the state, i.e. the central authority, as a rule has a right of supervision of the communes in respect of their spheres of activity, not only to prevent them going beyond this but even in special circumstances for other reasons, for example, in the case of the violation of autonomous statutes. Various grades or "mixed" forms are possible in respect not only of the degree of decentralisation but also of the degree of democracy; this is particularly the case with the larger self-governing bodies. In these there may be side by side with the locally elected organs officials appointed by the central authorities, and their relations

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 184.

[2] Ibid., pp. 188–189.

with the elected officials may be of many various kinds. Kelsen next pointed out that by the side of decentralisation by means of self-government there was sometimes placed a "decentralisation by territories," "territory" meaning in this case a formation distinct from the self-governing body as well as from the state. This form of decentralisation is alleged to exist owing to the fact that there are states in which the three elements—area, nation, power—are not all present. Kelsen held this idea to be logically impossible, as is clearly shown by a closer examination of the characteristic types of such territory. The state of which the territory and people do not form a unity is the state with protectorates or colonies. The protectorate has professedly a territory of its own which is not state territory, and its own people who are yet not the people of a state. Yet there is a state power functioning there—that of the state exercising the protectorate. Such protected territories are, in Kelsen's opinion, really decentralised provinces autocratically ruled.[1]

The second important case of legal communities, supposed to be included within the term *Länder* as above defined, arises when the decentralised community has its "own" legislative organ, distinct from the central one and competent to lay down general norms for the part-area. The legislative organ must be a parliament, i.e. elected by the population of the area. This latter point is not regarded by the theory as essential, but it is of great importance. According to the doctrine the legislative organ, and indeed the administrative organs, are essentially "state" and not "communal" organs, although they are not organs of the state of whose area the *Land* forms part; because the area called *Land* is not a commune nor a self-governing body, but is also not a state. It is something intermediate: it has neither its own territory nor its own people, but a state power, though a rudimentary one. This is manifested in a legislative organ of its own, which self-governing bodies lack, but which can issue only local statutes, and not "laws." All its organs are "state" organs, but not "organs of the state."[2]

Kelsen remarked that this whole theory was obviously developed to suit the case of the Austrian Empire, whose members bore the statutory name of *Länder*; it was the outcome of political considerations which made a very doubtful attempt to treat them at once as states and as non-states. He held that it is simply impossible not to allow an organ of a part to rank as an organ of the whole. If the territorial parliaments are "state" organs it is

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 190. [2] Ibid., p. 191.

because they are organs of the state. Between what is called the "local statute," the positive law made by the organ of a local commune, and what is called the "territorial law," made by a local representative body to which the name of "parliament" is given, there is from this point of view no difference.[1]

But although the territorial parliaments and other organs are no more entitled to be called "state" organs than are the communal organs (especially those of the superior communal unions), there is between the type of decentralised part-system which is called the "territory" and the communes and superior communal unions a noticeable difference in respect of the kind of decentralisation. The former is a more complete decentralisation than the latter, in so far as particular subject-matters of legal regulation are left entirely to the norm-fixing organ limited to the part-territory, without any need for the approval of the central organs to the content of the norms. The competence of the self-governing bodies to regulate matters within their sphere by general and special r orms is generally not so granted as to exclude the possibility of the regulation of such matters by the central organs, so that the content of the norms must be within, i.e. determined by, the general norms of a central organ. This factor warrants a distinction of degree, though not of kind, between the two types to which the terms "territory" and "self-governing body" are respectively applied. And from this standpoint there is the possibility of a further differentiation, accordingly as the decentralisation in respect of any matters extends only to the state of the law or that of the constitution. If the general local norms are determined not only as to content, but as to the form and manner in which they come into being; if the constitution of the part-community forms the subject-matter of local legislation; if the part-community has autonomy in respect of its constitution; then there is attained a still higher degree of decentralisation, to which there corresponds broadly the position of the so-called member states in the federal state and confederation.[2]

§ 5

Kelsen proceeded to discuss unions of states.[3] He pointed out that the federal state and the confederation are the basic forms

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 192.
[2] Ibid., p. 193.
[3] Ibid.

of which all such unions are variations, and that in this regard the term "confederation" is used in a somewhat wider sense than is customary, so as to include unions and protectorate and vassal relationships. The legal conception of the union of states is that the communities called "states" are in a legal relation, and that means that such collectivities are formed by some higher legal system into a unity. That higher system can be the universal legal system of international law, and can form the general union of all the states of the community of international law; but a partial or special system can—by virtue of the international law system—form a special union between particular states. But in any case the system of international law must juristically be maintained as the ultimate source, the supreme principle and highest system of law from which the part-system derives its binding force.[1]

The confederation and the federal state, the two chief types of state unions, differ from each other, in Kelsen's opinion, only in respect of the degrees of decentralisation which they present. In both cases there are legal collectivities with systems made up of norms applying to the whole territory and norms applying only to part-territories, but in which the scope and importance of the matters which are regulated by the central norms, i.e. those applying to the whole territory, are in one case greater than those of the matters regulated by local norms, so that the system which applies to the whole territory and the totality of all the part-systems comprised within it can in the one case still be called a state and in the other only a "union" (*Bund*) of states. There is also involved in this distinction a number of formal and technical organisation factors which do not, however, provide by themselves a clear differentiation of the confederation from the federal state, and for the rest present a difference between them of kind and not one of principle. The prevalent theory did, indeed, assume a difference of principle, by regarding only one (the federal state) as a "state," i.e. a legal whole, and the other (the confederation) as simply an international law community of sovereign states, in which each should rank as a legal unity, and the union should not form a legal collectivity or legal unity superior to the members. The conception of state unions according to this covers two essentially different species, a state and a union of states which is not to be called a state; the institution (*Gebilde*), forming a federal state, is internally a state, and the institution called

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 194.

confederation is only externally a state. That this distinction is one of principle and not merely of degree can only be maintained, Kelsen thought, on the basis that the conception of the state is made absolute and represents only the legal whole (*Rechtsganzheit*). But, if so, it follows that the existence of states "within" a state, and the existence "outside" the state of states which are co-ordinate with it and are united to it in some community, are alike impossible, unless one assumes some higher more comprehensive whole, which gives to the associated elements the character of member states, and has therefore the nature of the supreme whole. But if one takes away from the state the meaning of an absolute whole and gives it a relative sense, then the difference in principle which the traditional theory seeks to maintain disappears entirely, and attention must be directed to the factor of which the gradation forms the distinction between the two types of union of states, that is, to decentralisation.[1]

It is by stages of this same route that the final and most comprehensive collectivity of positive law, the *civitas maxima* of international law, is reached. If this means that all the legal communities—commune, union of communes (self-governing body), territory, member state of a federal state, individual state, confederation and community of international law—are distinguished from one another only by the degree of decentralisation which each represents, and embody the law of series, by which each form is constantly changing into the next, then the application of the term "state" to one or another member of the series is merely a matter of terminological convention. What matters scientifically is the understanding that there is no qualitative distinction between them, but only a quantitative one, and that all are comprehended within the universal collectivity of law, which is conceivable only as a unitary system comprehending the whole of law and alone presenting that whole.[2]

Kelsen next pointed out that the main distinction of principle drawn by the prevailing doctrine between confederation and federal state accorded with a fundamental division of unions of state, based on the manner in which they are formed, i.e. whether it is according to international law—by treaty (the case of the confederation), or state law, i.e. by a state enactment (the case of the federal state). This, however, assumed a difference in principle between the treaty as a legal transaction

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 194. [2] Ibid., p. 195.

and consequently a mere act applying the law, and the "law" as an act-creating "law"—a distinction which in Kelsen's opinion cannot be maintained. As the basic act forming the constituent system of a union of a number of states the legal transaction of the treaty is as much an application of law as the creation of law. As law-creating acts, treaty and law are to be distinguished only in so far as the former stands necessarily on the agreed expressions of will, whilst the latter need not do so, but can do so (in the case of ultra-democratic legislation). In answer to the contention that the confederation is based on a treaty of international law, and the federal state—as a state—on a constitution, it must be emphasised "that treaty and constitution, treaty and law are not mutually exclusive conceptions, and that the treaty has the constitution of the federation as its content and—in relation to those who are bound by the treaty—is the law, that is the binding norm, the *lex contractus*."[1] The federal state can be based entirely on a constitution and yet come into being by means of a treaty, just as the confederation has its constitution and is based on it and yet is the result of treaty. To assume that the constitution of the federal state comes into being as a law of that state in the same sense as a federal law, that is to say, is issued by the legislative organ set up by the federal constition, would be a *petitio principii*. But the possibility of the formation of a federal state by means of a law is not excluded—there is no fundamental reason why a unitary state should not be changed, by a law modifying its constitution, into a confederation. The objection that new states—member states of a confederation or federal state—cannot be created by a state law is no more valid than the objection that a state cannot be brought into being by an international treaty. Both are based on the supposition that the state is the absolutely highest and in this sense sovereign system, the origin of which cannot be juristically conceived. For the legal origin of anything requires a superior law-making system.[2]

The dogma of state sovereignty, with its treatment of the state as something "absolute," appears to Kelsen to be the cause of the widespread theory which tries to relate the rise of the federal state to some *extra*-legal fact—as, for instance, to some national deed. Although the most important structures—everywhere recognised as federal states—have historically come into being through treaties between states previously independent and subject only to international law—so that the first federal

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 195. [2] Ibid., p. 196.

constitution, like the constitution of the confederate state which has equally come into being by process of international law, appears as the content of a treaty under international law, the theory just mentioned believes that the treaty fact must be ignored, and the new federal state must be allowed to arise by means of some juristic ultimate creation in a legally changing world of law. "By adopting this legal *generatio aequivoca* the theory results in an absurdity."

An attempt at a middle course is taken by the theory which, in order to distinguish the federal state from the confederation in principle, tries to find the starting-point of the former, not indeed in some extra-legal fact, but in some condition which receives its law-making force from some higher norm, but is yet of a legal nature. The designation "constituent" applied to the treaty creating the federal state means to Kelsen only that international law is not to be regarded as the basis for the creation of the federal state, or rather that the hypothesis of the primacy of international law is rejected, and that there is an acceptance, as sovereign, of the legal system of the individual states—systems which from the standpoint of international law are only part-systems—and the assumption of the primacy of the state law system.[1]

In Kelsen's opinion the distinction drawn by the prevailing theory between confederation and federal state, as having a treaty and legislative origin respectively, has no logical schematic importance. The two do not belong to the same system of knowledge, and the difference so based is really a difference between two incompatible juristic hypotheses. And as soon as the theory has to do with a given legal structure—with the constitution of the German Empire or Switzerland or the United States of America—it quickly abandons the hypothesis of a primacy of international law, and takes its stand on the primacy of that system of law which it wants to call a "state." The political requirement of applying the name "state" to a constitution which is the outcome of an international treaty makes the sovereignty-loving jurists assume this constitution to be something "sovereign," and it is only this assumed sovereignty which marks off the federal state from the confederation. But that fact does not prevent the same jurists from treating the federal state—again for political reasons—as a mere union, and abandoning in the case of the member states the need of sovereignty as an essential of statehood—a procedure which

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 197.

alone makes it possible to regard both confederation and federal states as included within unions of states.[1]

Turning to the "corporation theory," Kelsen remarked that the generally accepted modern theory, which found the difference in principle between confederation and federal state to be the retention by the member states of the confederation of their full sovereignty, was based on the argument that this contrast is only a special case of the private law distinction between the society and the corporation. It is held that in the confederation there is not set up any new juristic person separate from and superior to the juristic persons of the individual states—because there is no new will different from the wills of those states—and the will of the confederation is merely the sum of the individual wills; so that in the confederation the members are sovereign, whilst in the federal state they are not, because there is a higher juristic person above them. But Kelsen, in accordance with his general argument, held that the constitution of the confederation can be presented as a subject of law, a juristic person, quite as easily as can the constitution of the federal state. The blame for what he regarded as the wholly unfortunate private law theory of the antithesis between society and corporation Kelsen attributed to inadequate understanding of the mechanics of personification. And the fact that the international jurists all—without regard to the formulas of the state law theory—treated the confederation as being (just as much as the federal state) a juristic person and practically ignored the supposedly essential difference between the two, had, he thought, really overthrown the state law theory, and helped the realisation that the whole difference is one of legal content.[2]

But if the difference lies simply in the content of the systems of law which constitute the two legal communities, then it is self-contradictory to cling to the legal basis—treaty or constitution—as affording the test. For any desired legal content can be developed on either of the two bases: a radically centralised constitution can be founded by an international treaty as well as a radically decentralised collectivity can be founded by a constitution in the form of a law. Kelsen thought that the prevalent doctrine, combining the two standpoints, had landed itself in a characteristic position; it points to some factor of legal content as a characteristic and therefore distinctive feature, and immediately thereafter asserts that it can be present in the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 198.

[2] Ibid., pp. 200–202.

system of law which has arisen from a treaty just as much as in one which has arisen from a constitution.[1]

Kelsen thought that by basing the distinction between confederation and federal state on this factor of legal content one escaped the vicious circle of the argument which presented not a difference between two sets of conditions, but—without any justification—two different meanings of one and the same thing, or at least of a thing which does not afford scope for such different meanings. It is not sufficient to distinguish the two multi-membered state structures (confederation and federalism) by assuming that the members are sovereign in the one case and not in the other, unless it can be shown that the material difference is itself sufficient to warrant the difference in interpretation. It is of no use to maintain that the member states are sovereign in the confederation but not in the federal state, that the latter is a state and the former is not, unless one can base oneself on material-legal factors which compel this difference of interpretation. The prevailing doctrine, Kelsen remarks, runs through all the legal-content factors which operate in any way in respect of the confederation and federation without finding one which does not operate more or less in respect of both. But instead of drawing from this the appropriate conclusion, it is customary to add: "But nevertheless the members are sovereign in the one case and not in the other; the whole is a state in the one case, but not in the other." So Kelsen held that the lack of positive legal data was made up for by a baseless and quite untenable theory—a hypothesis for which there is no basis of fact.[2]

A comparison of the historical structures called confederations and federal states gives in respect of their legal content the following results:—

1. The confederation represents a higher degree of centralisation than the federal state, in so far as the scope and importance of the matters vested in the central system are greater with the former than with the latter. (It must be remembered that from the purely juristic standpoint the content of the system applying to the whole territory is the same as the "purpose" of the union.) The question is, how does the union forming the constitution of the federation (using that term in the widest sense) divide the actual competence between the central and local systems? From this standpoint there is a delimitation of the confederation in the narrower sense from other unions which

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 203. [2] Ibid.

can be called confederations in the widest sense. Treaties made in accordance with international law, by which states mutually undertake lasting or temporary obligations, are not called unions—"federations of states" in the widest sense. And treaties by which several states combine together for common defence or attack in given circumstances—the so-called alliances—are not counted as real unions of states (confederations in the widest sense) because of their limited duration. The same applies to the so-called "administrative unions," formed for action on common lines in various administrative matters, e.g. the international postal union, even if they have their "own" organs, in the shape of international commissions.[1]

2. Among the criteria as to the content of the legal systems which characterise unions of states, one of importance is whether the system of the union is or is not created or developed by an organ distinct from the organs of the associated states. (The difference sometimes spoken of between "organised" and "unorganised" unions is only a relative one.) The union can treat the members equally in respect of their obligations and rights, and can give them all equal rights in respect of the development of the union—in that case they are state unions based on equality of the members; or the obligations and rights are not the same for all, so that one is legally dependent upon another. The first group includes the union (*Unionen*), the confederation in the narrower sense, and the federal state; the second group includes the protectorate and the *Staatenstaat.*

The protectorate is defined by Kelsen as a union of states in which one state binds itself to the defence (under international law) of the other, particularly against attack by a third state, and the protected state in return renounces the independent exercise of certain functions, particularly in the field of foreign affairs, so that in all or in important international law relations it is represented by the protecting state.[2] By *Staatenstaat* is meant that form of union of states in which a kind of vassal-relationship is set up between two states and the so-called under-state, like the protected state, has no important functions in foreign affairs; it has obligations to the over-state (e.g. to supply men, money, services) and in return has a claim to defence by the over-state. Juristic theory, which has paid little attention to these forms of union, mainly characteristic of the Orient, describe these protected, vassal or under states as "semi-sovereign"—"sove-

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 204.

[2] Ibid., pp. 204–205.

reignty" then clearly means in this case "fullness of competence," and any treaty renunciation of a competence is a diminution of sovereignty.

3. Unions in which the bond of union is the presence of a common monarch are also usually included in unions of states in the narrow sense, and are divided into "real" and "personal." This identity of ruler may have no common legal basis, e.g. it may not be the result of a treaty between the states, but may be purely accidental; consequently, in the legal sense there is no union of states. Or it may have a treaty or other legal basis (it has the latter, for instance, if the unitary state divides itself by law into two parts, having only the monarch in common). The characteristic of this type of union is that the common monarch and any common organ are entitled to issue only particular norms and not general ones.[1]

Kelsen next proceeded to discuss the confederation and federal state, and began with the scope of the central competence.

The federal state differs from the confederation—whose main purpose is defence—by the much larger amount of the competence of the central system. The collectivity of law, i.e. the range of matters for which the federal state can make norms applying to the whole territory, is very much greater than in the confederation—it is a characteristic feature of the federal state that its law can comprise the whole of civil and criminal law and a large part of the field of administrative law, and another characteristic is that its whole territory is, or tends to be, a unitary economic and transport area.[2]

The division of competence can be made in two ways; the powers reserved by the federal constitution to the central system can be enumerated and all others left to the members or *vice-versâ*. But the competence of the federation can be described in general terms, so that the federation is charged with watching over the general interests of all the members, and what is of "general" interest has to be determined in each particular case. The constitution of the federal state—in which the central competence has a wider sphere—makes use as a rule of the first method, whilst that of the confederation makes use of the second.

The fact that the competence of the federation as a whole system vis-à-vis the competence of the members as part-systems is essentially limited in the confederation to a few matters whilst in the federal state the tendency is the other way, is in Kelsen's judgment the reason why the customary conceptions of these

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 206. [2] Ibid., p. 207.

two kinds of unions of states start from two very different standpoints. The conception of the confederation is as a rule based on the purpose of the union, i.e. its legal content; that of the federal state puts the purpose aside and relates to the legal form. The confederation is usually defined as a union of sovereign states for external defence and the common pursuit of certain internal purposes: the federal state is commonly defined as a sovereign state formed of a number of states and its purposes cannot be enumerated, whilst in the confederation external defence is at least the most conspicuous purpose and main content of the union. But Kelsen thought that these definitions, based on quite different factors, were not adapted to facilitate that comparison of the two state unions determined by them on which the whole traditional theory is based.[1]

Next to the division of competence between the central and local systems a matter of importance is whether that division applies or does not apply to all stages of law-making—in other words, are the central and local organs entitled to regulate the matters included within the competence by general and special norms, that is, have they, and if so to what extent, legislative and executive powers, or only one or the other, wholly or in part, and especially have they competence in respect of changes in the constitution, i.e. constitutional autonomy? As regards the last, in both confederation and federal state the central organ whose function it is to establish general norms for the whole area, i.e. the legislative organ of the federation, is called upon to regulate the process of constitution-making, i.e. its competence is not limited to legislation but extends to constitution-making. That means it is empowered to determine the material scope of the federation and thereby—indirectly—that of the member states. Consequently, the organ of the federation—as a part-system—can deal not only with the constitution of that part-system, but also with the collective constitution, with the result that the two are customarily regarded as consolidated.[2] Competence in respect of constitution-making is frequently limited for members of a confederation or federal state alike to the extent that in the first collective constitution there are provisions as to the state-form of the members—in such a way that monarchy or republic, estate or constitutional organisation, democracy, direct legislation, fundamental rights of the subjects and the like are guaranteed by the federal constitution, i.e. made binding on the members. The federal constitutions frequently

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 208. [2] Ibid.

include a complete code of basic rights, so that it is not necessary to establish these in the state institutions. The federal constitution can determine at least the main lines of the state constitutions, so that by means of the legislative organ of the federation can bring about changes in the constitutions of the member states, and the legislative organs of these latter are competent only to alter their constitutions within the limits imposed by the federal constitution. And the more the constitutional autonomy of its members is limited the nearer does the federal state approximate to the type of unitary state divided into provinces, self-governing bodies, etc. Between the imposition of the obligation as to a particular state form—which is customary even in confederations —and the regulation of the main lines of the member states' constitutions—which is possible in federal states—the difference is obviously only one of degree.[1]

In the confederation and federal state alike the competence given to the federation is exercised in the form of legislation, i.e. by general norms, and in that of administration, i.e. by special norms. There are in both forms of state unions federal laws in the formal sense of the term. Similarly, in both forms of union the federation can have administrative authority, and that authority may be both executive and judicial. Or the federation can have no jurisdiction, that vesting entirely in state courts. A definitely limited federal jurisdiction is the rule in the federal state and is quite compatible with the confederation, especially if it is for the settlement of disputes between the states.

In the division of the competence between the federation and its members, it is not necessary for the spheres of legislation and administration to be identical. It is possible for the carrying out of federal laws to be within the competence of the member states and *vice-versâ*.[2]

As regards federal legislation, there is an important difference between the confederation and the federal state in so far as in the former the general norms laid down by the federal organ do not bind the subjects directly, whereas they do so in the federal state. In the confederation the federal laws become binding upon the subjects only by being promulgated as laws of the constituent states. But the states are bound by the federal constitution to promulgate them. This is also possible in the federal state, especially if the federation is only allowed to determine principles which must be worked out and applied by state laws, so that the norms only become binding upon

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 209. [2] Ibid., p. 210.

the subjects by means of state laws. And it is possible for a certain indirectness of federal legislation to come about in a federal state in this way, that the division of competence there may not be quite simple, because one and the same subject-matter can be looked at from different standpoints, e.g. a case falling under the federal criminal law may also be a case under the state forest law. If foreign affairs are the concern of the federation and industrial matters are left to the states, what is the position if the federation makes a treaty affecting industry?

Kelsen was certain that the indirect nature of federal legislation which characterises the confederation cannot be deduced from the international law character of the confederation, or related to what he regarded as the wholly mistaken idea that an international treaty binds only the juristic persons of the states and not the physical persons who are the subjects of those states.[1]

That can only mean that treaty obligations are only binding upon the people who under the individual state constitutions have the functions of norm-making, i.e. legislative and higher executive organs, so that if in a treaty there is a stipulation as to the conduct of the subjects the treaty means only that the relevant legal obligations must be set up by norms which these organs are bound to issue. This is the so-called "transformation" theory according to which the treaty content must be turned into a source of state law before it becomes legally operative "internally." Kelsen held that the international treaty can, but need not, have this meaning: it is quite possible for states to make an international treaty of which the content is a norm directly binding on their subjects. There is nothing *a priori* opposed to this either in international or in state law. And, similarly, there are constitutions which make the treaty a source of as binding a law to the subject as is a law.

The assumption that two or more states cannot by international treaty create an organ whose norms shall be directly binding on the subjects is, Kelsen asserted, quite baseless. The federal constitution set up by international treaty proves the contrary. It is not true that direct legislation by the federation is possible only if and because the federation is a "state," a federal state and not a confederation.[2]

Next, not only the making of general norms, but also the making of special norms by the federation, can be simply indirect. Administrative decrees and judicial decisions, made by federal

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 210. [2] Ibid.

organs and applying to the whole area, may, in order to become binding on the subjects, need some intermediate action on the part of those states whose subjects are affected. But in the confederation executive acts directly affecting the subjects are not excluded; in the federal state indirect executive acts of the federation are not uncommon. So far as administration (other than judicial) is concerned the federation in the federal state generally acts only indirectly, making use of the organs of the member states. And in general terms Kelsen declared that the doctrine that in the confederation (and as marking it off from the federal state) the federal power has authority only over the members as such, i.e. only over the states, cannot be regarded as an invariable rule.[1]

One other point may be noted in this connection. Kelsen held that there is no necessary connection between citizenship of the federation and citizenship of the member state. It is conceivable that it might be possible to gain or lose one without gaining or losing the other. But a connection is the rule; generally in the form that state citizenship carries federal citizenship with it. But the converse is possible, though hitherto this has been rare in positive law.[2]

Kelsen passed next to the organs and methods of norm-making, but it is unnecessary to summarise his views on these matters, since they did not differ appreciably from the generally held theory of the federation and confederation. But as regards the relation between the law of the federation and that of the individual state he pointed out that the case in which an act of the federation conflicts with and therefore directly or indirectly damages the state law is one of real importance. The federal law which is *ultra vires* is the chief case.[3] Whilst on behalf of the federal state the principle is asserted that the law of the federation in all circumstances supersedes state law, on behalf of the confederation it is contended that every state is competent to declare void any act of the federation which is *ultra vires*, and refuse obedience. This is the so-called right of nullification. It comes forward as a special case of the right to challenge the validity of the norms, and because of the absence of any positive legal check. But if the constitution does not impose a check upon the challenge of the validity of the norms established by the federal organs, then the individual state is called upon to determine in the last resort upon the norms to be applied by

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 211.
[2] Ibid., p. 215. [3] Ibid., p. 220.

it, and to annul them so far as it is called upon to apply them. But if the constitution provides for federal enforcement (i.e. compulsion upon the individual state), then clearly the ultimate decision (in the absence of provision for a judicial decision) rests with the organ entrusted with the exercise of that compulsion: and it is impossible to maintain that the individual state possesses the right of nullification.[1]

Kelsen went on to argue that the fundamental rule, formulated in many federal constitutions, that "federal law supersedes state law," is of practical importance only in so far as it is understood to mean that in the event of a conflict between a federal and a state norm the latter is to be treated as null and void, and only the former is to be valid, without regard to which was formulated first in point of time. A conflict is possible only if both apply to the same subject-matter: if they do, one or other must be *ultra vires*. So the principle, "federal law supersedes state law," means that the federal law, though *ultra vires*, is to apply. In the case of law it carries the consequence that even if a formal change of the constitution is possible only under very strict conditions, a simple federal law can widen the competence of the federation and restrict that of the states. This Kelsen thought was a more than doubtful conclusion.[2] The consequences of the application of this basic principle to individual norms he regarded as even more serious, as making uncertain the whole constitutional division of competence between federal state and member states.

If that division is an essential part of the federal constitution and a change in it cannot be made by simple process of legislation, because it is a guarantee of the continued existence of the member states, then the idea that "federal law supersedes state law"—which is a direct denial of any such fixed division—cannot, Kelsen thought, be regarded as compatible with the idea of the federal state.[3] The attempt to derive it from the sovereignty of the federation or its supreme competence must fail. The supreme competence of the federation lies in this, that the provisions of the federal constitution as to the demarcation of competence can be altered only by a federal constitutional law. Only where there is no difference made between such a law and ordinary legislation can the constitutional division of competence be altered to the advantage of the federation by a simple law. Consequently no harm would be done either to the sovereignty or supreme competence of the federation if the

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 221.
[2] Ibid. [3] Ibid., p. 222.

principle that "federal law supersedes state law" did not appear any longer in the federal constitution, and the federal constitution in return contained guarantees that unconstitutional federal law would be annulled just as unconstitutional or *ultra vires* state enactments.

Kelsen next discussed the dissolution of unions of states, and particularly the right of secession, the most important legal problem of both the confederation and the federal state. He pointed out that the opinion is widely held that an important difference between confederation and federal state is that the former can be dissolved with the consent of all the members, whilst the latter can never be legally brought to an end by the will of its members. Connected with this is the doctrine that in the confederation the member state has the inalienable right to secede, if continued membership threatens its existence, whilst in the federal state such a right is wholly excluded. But just as he had rejected other distinctions between the confederation and the federal state, so Kelsen held this one also to be quite impossible.

An inquiry as to the duration of legal norms can be answered only from the actual content of the norms and not from the nature of things generally; to do the latter would be to invoke the law of nature. And this is, in fact, done by the assumption that the duration of norm or system set up by a treaty can (in the case of a confederation) *a priori* be ended by a treaty. The duration of the validity of the treaty system must be determined by itself or by the norm setting up the treaty as a law-making fact. If in such a way no period of duration is fixed, it cannot be evolved from a theory of law. The contention that the indissolubility of the treaty is incompatible with the sovereignty of the states combined in the confederation is quite irrelevant, because with this sovereignty of the individual state (which the prevailing doctrine assumes) the treaty obligation is equally incompatible, for that treaty obligation is only possible on the assumption of an international law superior to the individual states and without which again no confederation is possible. No conclusion can be drawn as to the absence of any provisions as to the termination of the validity of a norm. It may be due to the deliberate intention to make a permanent treaty. In any event no confederation is ever formed with a deliberately limited period of duration. Whether the provisions of a federal constitution as to amendment are applicable, under like conditions, to a complete annulment is uncertain.

A special case of the dissolution of the federation is presented by the so-called *jus secessionis*, which is attributed, according to the generally accepted theory, to the member states of a confederation, but not to the members of a federal state; but that the right could not be unconditional is obvious, for otherwise the treaty obligation would be meaningless—it would be a case simply of "you shall, so long as you are willing." The right of withdrawal is therefore to be granted only on definitely prescribed conditions; if it is not so granted there is no positive legal basis for it. The right of secession of the members of a confederation formed by international treaty can only be maintained by reference to the notorious *clausula rebus sic stantibus*, which cannot be shown to be a principle of positive law. The argument is that the federal treaty cannot continue if changed conditions cause it to endanger the vital interests of a state. The treaty exists for the sake of the state, not the state for the sake of the treaty. Such is the general line of argument, and in effect in using it one assumes the individual state system to be the highest purpose, but only so long as it coincides with one's own interests after one has invoked, in order to serve them, the treaty principle of international law, which is incompatible with individual state sovereignty.[1]

The theory, in order to maintain the possibility of secession, frequently falls back on to the standpoint of mere power (*Macht*)—the associated state has power enough to enable it to withdraw from the union, leaving unfulfilled a treaty injurious to it. But that is equally true of every wrong-doer who escapes the consequences of his wrong-doing. Breach of treaty is wrong-doing in the same sense as an offence against the criminal law. Wrong is done not only to the *lex contractus*, but to that principle of international law which does not arise by treaty, but makes the treaty a source of law—*pacta sunt servanda*. And the consequence of such wrong-doing—be it war or federal "execution"—is a coercive act corresponding to the penalty for the breach of an individual state law. And consequently, in Kelsen's judgment, the assumption that the exercise in the confederation of a right of secession which has no treaty basis is an illegal act, but yet is only a breach of treaty and not rebellion, and a similar act in the federal state is rebellion, sets up a distinction which is entirely without juristic validity or meaning.[2] The prevalent theory that the right of secession is derived from the sovereignty of the associated states is only logical if it maintains the right

[1] Hans Kelsen: *Allgemeine Staatslehre*, 1925, p. 224. [2] Ibid., p. 225.

despite a positive legal renunciation of it. So there is a vicious circle: the states in a confederation are sovereign, that is, they have the right of secession, but on the other hand their sovereignty is ultimately the result of the fact that—unlike the states in the federal state—they have the right of secession. If the federal state constitution, as in most federal states, has arisen by means of international treaties, then it is not easy to see why the same conclusion is not reached as in respect of confederations. In reality, the reason why the member states of a federal state have no right to secede applies equally to the member states of a confederation—it is that the constitution does not give the right, that is, authorise such a means of ending the federal system.

This offers a final and purely political reason for the attempted division—which Kelsen had already shown to be untenable—between unions of states based on state law and international law respectively. "As the traditional theory holds fast to the *rebus sic stantibus* clause, and consequently to the right of secession for the members of the confederation based on international law because based on treaty, it is understandable that it should try to place the federal state—when it represents national unity—on a basis securer than the international law which that theory has undermined. If the federal state is not to be shattered at any time by a secession of its members purporting to be justified by international law, the treaty on which the federation is founded and which puts it into the sphere of international law must be argued away, and the federal state must be represented, in contrast with the confederation, as a union of states in accordance with state law and based on a constitution."[1]

Thus Kelsen's federalism was the juristic interpretation of his *Stufentheorie*, of a series of stages from the norm of part-system of law to the basic norm of the collective system of law. As long as the theory of the pre-eminence of the international legal order should be accepted, with the ideal *civitas maxima* of Christian Wolff and the juristic idealism of Kaltenborn, Kelsen's juristic federalism was the complete system of the legal mechanism of our future ideal world. In order to attain this ideal he pointed out very definitely that the most important thing of all was the repudiation of the theory of the pre-eminence of the individual state order, or, in other words, the renunciation of the sovereignty of the state.

[1] Hans Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 267, 273.

His disagreement with the theory of divided sovereignty and with the individualistic theory of the corporation, in respect of the unions of states, was the natural outcome of the convincing justification of his theory of "norm standard" and his *Stufentheorie* freed from the subjective hypotheses of the juristic person and sovereignty.

Objectivity of the norm system of legal order is the result of his positive legalism. Objectivism, not subjectivism, is Kelsen's maxim and criterion for every system of law, whether it be commune, communal union, self-administrative body or state, confederation, federal state or international legal community. The relationship of subordination in the federal state was according to him one of graduated stages (*Stufen*) from the lower grade of legal norm to the highest basic norm. As the objective acceptance of this relation conflicted with the "theory of transformation," his legal federalism was a graduation of the various stages of decentralisation according to space and time.

This legal norm standard of the state, with a limited sphere of validity determined in space and time, was Kelsen's legal objectivism, as against any subjective theory of the state. This was his unique juristic theory, independent of the political theory of the state. The attack on his theory by sociological writers on the state was itself entirely outside of his criticism, as long as Kelsen assumed that the validity of the norm standard should be based on a given duration of time. Taking this principle almost for granted, although it is not at all a novel conception in German legal history, since Ihering asserted the validity of natural right on this very assumption, his disregard of the origin of "norm-standard"—in other words, that of the state—is an acceptance of the sociological theory of the state in its basis, but according to him the juristic definition of the state should stand quite outside this mystery of human association.

As his attack on the theory of the existing individual state system was the adumbration of his ideal of the theory of the pre-eminence of the system of international law, then the criticism directed against his legal theory of norm standard by other sociological theorists as to the state was not really an attack on his intrinsic theory itself. And in other respects Kelsen himself, in propounding his legal view and establishing the objective theory of the state, endeavoured to avoid as much as possible any subjective scientific considerations, and, moreover,

he accepted entirely the sociological-psychological theories as the most advanced in social science in criticism of the previous theories such as that of the organism.

Therefore it must be recognised that Kelsen's legal maxim of norm standard and his *Stufentheorie* are up to now the most explicit juristic statement of the objective theory of law in justification of legal federalism.

CONCLUSION

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The development of the federal idea has been shown in political history in several federal states, but especially in the United States of America and in Germany, on which two countries I have concentrated my attention in the preceding chapters. Federalism itself is as a political theory, as well as a political technique, antagonistic to unitarism; it is based on the principle of relativity and not on that of absolutism; it proceeds from the principle of empiricism and not from that of *a priorism.* In its political mechanism it provides for the creation of various kinds of unions of states, from alliances to federal states. It presents the way to the creation of a pluralistic political organisation, such as the distribution of state authority between the collective state and the individual states in federalism, or the participation of the member states in the decisions of the central authority, i.e. the creation of a senate or federal council, based on decentralisation in legislation and in administration.

Federalism in its political technique provides the solution of the essential problem of the division of political and administrative powers and their functions between the central and local authorities. The question of *ultra vires*, the problem of sovereignty and the question of decentralisation vis-à-vis centralisation, all arise.

The philosophical argument of federalism is based on the highest possible utility, in the conditions of a particular time and place, in the course of development towards decentralisation or towards centralisation. This being the philosophical assertion of federalism, federal theory in our own time should be based on pragmatic utilitarianism. As a great philosopher, William James, has pointed out, "Although the sciences have developed farther, the notion has gained ground that most, perhaps all, of our laws are only approximations," and "no theory is absolutely a transcript of reality," but "its great use is to summarise old facts and to lead to new ones."[1] Therefore the idea of federalism, no matter what legal theory be adopted, cannot claim to be more than an approximation to the highest possible utility in the prescribed conditions of a particular political formation at a given time and place. Since theory itself is a "conceptual shorthand," the theory of federalism by its very nature should be based on empiricism—the synthesis and

[1] William James: *Pragmatism*, 1922, pp. 56, 57.

subjective consolidation of human experiences and intelligence of the past and of the present; and not on *a priorism*—a transcendental idealism in which human arbitrariness "has driven divine necessity from scientific logic."

I am in entire agreement with William James in his pragmatic account of the significance of truth, at any rate for politics; truth is "nothing but this, that ideas, which themselves are but parts of our experience, become true just in so far as they help us to get into satisfactory relation with other parts of our experience, to summarise them and get about among them by conceptual short-cuts instead of following the interminable succession of particular phenomena."

As the individual makes his way towards an acceptance of a new opinion as a true idea, with its subjective recognition, with a minimum of friction with the old opinions and the utmost harmony between the old and the new experience under the spiritual and material influence of the environment of the community which surrounds him, "an *outrée* explanation, violating all our preconceptions, would never pass for a true account of a novelty."

Since it is true, as James indicated, that "the most violent revolution in an individual's belief leaves most of his old order standing,"[1] and "time and space, cause and effect, nature and history and one's own biography remain untouched," new truth is "always a go-between, a smoother-over of the transitions," and is the harmony of the old idea with the new fact "so as ever to show a minimum of jolt, a maximum of continuity."

In this respect I agree with him in the conception of the theory which is "true just in proportion to its success in solving this problem of maxima and minima." Therefore the main criterion in solving this problem is a "matter of approximation."[2]

If the new idea or conception which will bring about the theory counts as "true" just in proportion as it gratifies the individual's desire to assimilate the novelty to his experience, to his beliefs in stock, it should not be an objective reason but subjective reason, because the reason why he calls things true can be found in the "marriage function" of giving human satisfaction by harmonising the previous parts of experience with a newer part.

Therefore pragmatism is entirely coherent with the facts involved, whereas rationalism is comfortable only in the presence of abstractions. Since objective truth is "non-utilitarian," the

[1] William James: *Pragmatism*, 1922, p. 60. [2] Ibid., p. 61.

pragmatic test is naturally subjective and finds its truth in pluralities and in their utility and satisfactoriness.[1]

Considered pragmatically, "pluralism, or the doctrine that it is many, means only that the sundry parts of reality may be externally related"; in other words, "things are with one another in many ways but nothing includes everything, or dominates over everything."

Against this the theory of monism is that everything is present to everything else "in one vast instantaneous co-implicated completeness," and "nothing can in any sense functional or substantial be really absent from anything else, all things interpenetrate and telescope together in the great total conflux."

But in pluralism all that we are required "to admit as the constitution of reality is what we ourselves find empirically realised in every minimum of finite life," in which every part of experience is plurally related so that each relation is "one aspect, character or function, way of its being taken or way of its taking something else."

The pragmatic differences, as William James designated them, are nothing more than the differences between the each-form and the all-form of reality.

Pluralism in his conception "lets things really exist in the each-form, or distributively, whereas monism regards that the all-form or collective unit form is the only form that is rational."

In this respect, according to James' pragmatism, the most important sort of union which obtains among things is their generic unity, and the whole motive life is based on vehicles of continuity; if the world is one, it means nothing but unity of purpose in the sense of unity.

Although the relations of parts in all forms are "essentially and eternally co-implicated," a thing in each form is to be connected by intermediate things, and its connection should be dependent "on which actual path of intermediation it may functionally strike into."

Nevertheless, in spite of the temporary appearance of each form, the pragmatist asserts that we have "a coherent world in which every part is not in actual or immediate connection, but is corporated as 'multiverse' in some possible or mediated connection with every other part, however remote, through the fact that each part hangs together with its very next neighbours in inextricable interfusion," i.e. what Otto Gierke calls "interdependence (*Zusammengehörigkeit*)." This type of union, according

[1] William James: *Pragmatism*, 1922, p. 67.

to William James, is the "synechistic type."[1] The recognition of manyness in oneness, with "the fact of coalescence of next with next in concrete experience," and with the perfect independence of ethical appeal of every part of manyness within oneness is the "full mystery of difference between pluralism and monism."

Since "compromise and mediation are inseparable from the pluralistic philosophy," the probable compatibility between all-form and each-form can be assumed by this theory of "compounding consciousness."

Whilst his argument shows that "a collective experience of any grade whatever can be treated as logically identical with a lot of distribution experiences," he rejected entirely the rationalist objective logic in regard to the identity of the collective and distributive reality.[2]

According to this principle, no matter how irrational it may be to the intellectualist, there is "the impossibility of understanding how your experiences and mine, which as such are defined as not conscious of each other, can nevertheless at the same time be members of a world experience defined expressly as having all its parts co-conscious or known together."

The "one thing is the all-form of experience and the many things are the each-form of experience in you and me," but according to James to call them the same we must treat them as if each were simultaneously its own other, "a feat on the conceptualist principle impossible to perform." Therefore this thing does not mean unity, but compounding of consciousness.[3]

Assuming this pragmatic consideration, James' expression that "ever 'not quite' has to be said of the best attempts made anywhere in the universe at attaining all-inclusive" is the secret of federalism.[4]

The spirit of federalism is explicitly represented by this remarkable sentence: "The pluralistic world is thus more like a federal republic than like an empire or a kingdom. However much may be collected, however much may report itself as present at any effective centre of consciousness or action, something else is self-governed and absent and unreduced to unity."[5]

In this principle, though the pragmatist might think that in plurality our world of objects falls into "discontinuous pieces quite as much as did our world of subjects," yet "the secret of

[1] William James: *Pluralistic Universe*, 1925, p. 325. [2] Ibid., p. 204.
[3] Ibid., p. 281. [4] Ibid., p. 321. [5] Ibid., p. 322.

a continuous life which the universe knows by heart and acts on every instant cannot be a contradiction incarnate."[1]

This notion of pragmatic plurality in the compounding of consciousness, where an individual is not only himself but also the state, is the basic spirit of federalism. The state, in James' famous term, is "distributive," but not "collective."

Federalism in this respect cannot be easy to consider on the basis of *a priori* metaphysics or of the idealistic philosophy or logic, but is so on the great system of pragmatic philosophy, what F. C. S. Schiller calls "Voluntarism."[2]

Pragmatic pluralism provided a basic philosophical criterion of the theory of federalism, but at the same time federalism as it has developed in political life holds its ground on the actual development of the modern state. The ideal of pluralism in the legal sphere was explicitly formulated by the introduction of the *Genossenschaftstheorie.* Von Schelhass' *Pragmatische Geschichte der deutschen Reichstags—Verhandlungen* in 1805 is a somewhat new attempt at historical survey. But the real founder of this theory was Dr. Georg Beseler and later Otto Bähr who prepared the way for the concrete development of the association theory by Otto Gierke.

Gierke's work was the effective beginning of the application of the pluralistic conception to law and politics as against the prevailing theory of Hegelian unitarism. Gierke's ideal was evolved from the *Genossenschaft* nature of the mediaeval period. Mediaeval political pluralism was the historical basis for his assertion of the pluralistic conception; but at the same time the rise of the territorial state, on the basis of institution, provided in his view the modern state with its basis of corporation.

The great champion of this *Genossenschaft* theory in recent times, Hugo Preuss, indicated clearly that the modern state is a compromise form of the corporation and the institution. No matter how people define the state, the state itself has already developed as the territorial state having an institutional nature, and the growing tendency, resulting from the complexity of state functions and the introduction of the idea of democracy as against autocracy, is towards the revival of the mediaeval functional pluralism within the state. Gierke himself was happy to describe the latter in the first volume of his *Genossenschaftsrecht,* and to show the rise of corporative autonomy in the economic and professional associations as well as in political mechanism.

[1] William James: *Pluralistic Universe,* 1925, p. 207.

[2] F. C. S. Schiller: *Logic for Use,* 1929, p. 454.

This tendency, however, has itself a quite different basic political and economic organisation from that of mediaeval society. I will not go into the detail of this difference, but content myself with stating here that the modern tendency of pluralism is by its nature different from that of the mediaeval association.

One of the great arguments against political pluralism is derived from the conception of sovereignty. As soon as the idea of sovereignty became an essential part of the theory of the state, the dualism of economic and political power possessed by the mediaeval lord came to an end and the idea of political sovereignty was the essential factor in the defence of the Bodinian theory of the state and the justification, in Hobbes' *Leviathan*, of the absolute state. The basis of state theory in the modern state was this conception of sovereignty. The Hegelian dialectic logic and its metaphysical idea of the state did more to bring about the philosophical assertion of the absolute unitary state than any other theory in modern times. The Hegelian synthesis with its monistic basis meant the incarnation of manyness into oneness.

There is no sense of relativity in the Hegelian "co-implicated completeness" of total oneness. But the bankruptcy of this unitary theory of the state had already been foreseen by the middle of last century, and has now been more or less completed by the growing influence of the pluralistic conception, and is the result of the actual lessons of the past history of the federal state idea.

Pluralism vis-à-vis functionalism and pluralism vis-à-vis federalism is the kernel of modern political theory.

Though Ernest Barker is to some extent Aristotelian, he has stated that "every state is something of a federal society and contains different national groups, different churches, different economic organisations, each exercising its measure of control over its members."

The discredit of the state is a sign that the pluralistic conception has come into existence. In this respect the past history of federalism is that of a compromised theory of the formation of the union of states, on the basis of the traditional state theory. There is no doubt that the greatest contribution to the real federal movement, next to the immortal service of the introduction of the *Genossenschaftstheorie*, has been the rise of the English pluralist theory of the state. Laski pointed the way for the new movement of federalism by his statement that "we must not think of federalism to-day merely in the old spatial term," and it "applies not only to territories but also to

functions." Maitland, with his typically English juristic mind, accepted the *Genossenschaftstheorie* assumption of the group personality and group will as a reality not on a legal but on a moral basis. The something behind the screen of "trustee" is the group personality, servant of the unknown somewhat, Nusquamia, as the ultimate moral unit, though the idea of trust is an extremely individualist theory. Laski, however, placed the system of natural rights, as L. Duguit put *solidarité sociale*, outside of the state and of its authority as ethical validity. Organic creative co-ordination is Gierke's highest test of the spiritual-ethical organism, without any external criterion. Laski's justification of creative co-ordination, i.e. creative adjustment between conscious satisfactions of the desires of members, whether individuals or groups, is the highest means of attaining harmony between individuality and collectivity in order to give a greatest possible chance of continuous initiative. Modern pluralism, since the social organisation is, after all, made up of men, indicates the transference of importance from biological to psychological interpretation; the great contribution of Graham Wallas to political science is a landmark in the decline of Darwinian influence. Laski's pluralistic state is the perspective of the pragmatic utilitarian theory of state. Quite apart from the pluralistic conception which Gierke called the unity in plurality, federalism provides diverse forms of mechanism.

According to the categories formulated by Jellinek the main organisation of the union of states is what he called the "organised union," and in this modern federalism has more or less concentrated into the confederation and the federal state. American political genius set up a new type of federal state which has been the standard form ever since 1789.

This American system provides that unique characteristic of the "unity in plurality" by means of territorial representation, i.e. the creation of congress and the senate; and it provides for the distribution of the executive, legislative and judicial power, but it empowers the senate to be the intermediate body between the particular interests of the member states and the general interests of the federal executive power, giving it dual authority, executive and legislative. Federalism in this sense is the union of states in which there is a dual state authority. No matter what theory of divided sovereignty may be adopted, no state activity can be completely guaranteed without this combination of two authorities.

The theory of compromise, or the theory of divided sovereignty

in early American federal ideas, and its reflection in Germany in the theory of Waitz, are early stages in the transition period from the confederation towards the complete federal state.

Although Calhoun's theory of confederation and Seydel's conception of the constitutional confederation provided for the complete recognition of the indivisibility of sovereignty, yet they refused to subscribe to the theory of the federal supremacy. The complete bankruptcy of Calhoun's theory as applied in the southern confederation during the Civil War in America (1861–1864) cleared the way to a real recognition of the federal state.

As long as sovereignty is regarded as the main characteristic of the state, and as long as the theory of the sovereign state is the centre problem of the federal state, no true federal state can ever reach the stage of the pluralistic conception. I will not discuss in great detail the theory of sovereignty, although it still remains the central problem in political science.

Ever since the idea of supremacy has been recognised in state organisations, it has acquired something of absolute validity, of dominance over all other powers. Power itself should not be absolute, indivisible or inalienable in character, but the state, as it exists now, has a power which, though undesirable, has universal reference. Sovereignty in that sense is not an essential characteristic of the state at all, but it is the necessary way through which the state carries out its function, what Preuss called its "territorial supremacy," and Laski its "legal imperative."

Therefore I object entirely to the formalist positivist theory of the necessary association of the theory of the state with the conception of sovereignty; and I am in agreement with Gierke, Preuss and Laski that the state theory should be independent of the idea of sovereignty, and that both it and the theory of the federal state should proceed from the pragmatic existence of human association.

Preuss indicated that the method we apply for the formation of the theory of the state, as well as its political organisation, must be inductive first and deductive later; in other words, it must be, as the Germans say, "from the bottom upward, not from the top downward."

In this respect, if the theory of the federal state or federalism is to be discussed on the basis of the growth of human association from the individual states towards a greater state organisation, it is quite impossible to recognise any theory of the federal state, such as I have described, without the essential interest and

desire of the component members in and for the creation of a federation.

It cannot be denied that without the sacrifice of particular interests of the member states for the sake of the common interests and collective purposes of the whole, and without getting rid of the orthodox theory of the federal state, there could not have been any possibility of those federal states which have gradually developed towards the pluralistic state or decentralised unitary state. Federal aid in the United States of America and increasing federal authority and right of supervision in the new federal republic of Germany have indicated the shift from the orthodox federal state towards the new decentralised state. I do not extend my argument to the actual political organisation in federal America, but if the people of America continue to resist the natural development of the federal state and remain content with such crude political mechanism as the existing distribution of powers, the inefficiency of administration and the inadequacy of representation, they will at some time have to pay a very heavy price. For federalism itself, as it is now in America, has made no tangible progress since the great political genius of Hamilton, Madison and Jefferson laid the foundation of the present-day America in the society of 1787. The nineteen amendments have shown no real advance in American federal ideas. The great contributions which the United States of America have made towards the progress of the federal idea have, I think, been two—the production of a new system of philosophy, that of pragmatism, by William James, on the one hand, and on the other the practical lesson of the inadequacy and inefficiency of the federal state mechanism, of the separation of powers and of a purely territorial organisation.

Criticism of the German federal state before 1919 is omitted, since it had not attained to that higher development in which the member states have a similar form of state.

Federalism in Germany made a great contribution towards the legal justification of the federal idea, which very much influenced later American federal ideas as to the justification of the supremacy of the union.

The most important contribution of Germany, however, was the introduction of the *Genossenschaft* theory of Otto Gierke, which is representative of the growing doctrine of pluralism.

Federalism is represented by its plurality purely on a territorial basis, in other words on the established territorial states, whereas pluralism finds its unity in plurality on both a functional and

a territorial basis. The defect of the modern federal state is that it is merely a federal union of territorial divisions, without any consideration of functional decentralisation. Article 18 of the new German constitution gives opportunity for the remedying of this defect. Is it quite adequate to substitute functionalism for the system represented by the organisation of the senate in America or the *Reichsrat* in Germany, as W. Apelt has indicated?

The federal state, as it is at the present stage, where the Bavarian Beyerle and his school can still argue for the union of states on the "compact constitution," does not altogether get over the traditional evil of particularism. The scales of unity and plurality are not satisfactorily balanced, as Otto Gierke thought they ought to be in order to secure the happiness of the people.

Federalism in the orthodox sense has given a practical lesson, in America and Europe, of its functional and technical demerits as a political system, but it has nevertheless prepared the way for the modern conception of decentralised political, as well as economic, organisation.

In this respect I will examine as briefly as possible the functions of federalism, which is after all the typical political experiment of modern democracy.

Federalism, as it is understood in the confederation or federal state, provides chiefly for the division of the state functions between the central and member states. According to the modern federal constitution, which limits the type of political system in the state form of its members, none of the federal state constitutions interferes in any way with the state systems as to whether they should be pluralistic or unitary, have representative or responsible government, beyond imposing the restriction that they shall be republican.

Federalism in this sense is limited to the states, and does not extend to the individuals. It is said that in the federal state, differing in this respect from the confederation, the individual has direct relations with the collective state as well as with the individual state, and also that the rights of individual freedom and citizenship are guaranteed by the federal constitution. This relation and the security of rights of individuals in the federal state are shown partially but not fully; the dual relations of individuals to the dual state authorities are the mystery of the modern federal state. If the modern state and its authority, as Laski points out, is federalistic, federalism should be distributive

in character, and also not discontinuous in so far as its members can maintain a right of appeal up to a final authority.

But federalism itself does not admit any plural elements within the federal state except the territorial federal authority. The right of the member state to participation, through the senate or federal council, in the final decision of federal matters does not allow any right of similar co-operation to other groups, such as economic associations or ecclesiastical associations, in the making of the ultimate decision. Even the economic council created by the new German constitution is only an advisory body to the federal republic in economic affairs, and has by no means reached the ideal of the guild state. One cause of the non-success of this council is the unsatisfactory nature of the representative system on which it is constituted.

The recognition of functionalism in state activity and organisation is something quite different from the justification of the functional state. The groups which in the modern state are the only way in which the individual will can find effective expression should be guaranteed as to both their rights and obligations in the state organisation. But the federal technique, in its gradual progress, does not always provide such security for groups, i.e. ethical or occupational associations, as essential bodies which are more responsive to wants and have a broader interpretation of purpose than the state, because, as Laski has indicated, "the interests of members in the group have for them (citizens) a marginal utility which exists in the perspective of knowledge that loyalty may be transferred elsewhere."

This is the central idea of pluralism, in that the compounding of consciousness can be attained by the subjective solidarity of desire, and the justification of authority over us is due to the "fact that it has grown within our own conscience and our own mind is so to speak ultimately a part of each." Therefore Laski's ideal, that "equilibrium is the centre of pluralism," is "the meeting ground" where the differences of men are pooled by the constructive combination of their divergent interests in order to attain a due measure of realisation by means of "creative adjustment."

Nevertheless, the federal state mechanism is, after all, based on territorial federalism along with decentralisation of decision in legislation and administration, but its great inventions, such as the system of senate or of federal council, or the dualism of direct allegiance of citizens to federal or individual states, are almost impossible to be solved through the prevailing monistic

theory of the state unless the pluralistic political idea responds to the reality of political organisation. From the purely theoretical standpoint a confederation is more pluralistic in character and in function than the federal state. This transitory form—"confederation" with its inevitable evils of inefficiency—is simply a political invention, a compromise between unitarism and federalism. Therefore in this respect the federal state is the highest form of federal organisation, in which the highest purpose—the balancing of unity and plurality—can be attained. But the main point which we political scientists criticise is the shadowy form of the federal state when based on traditional political theory.

The compromise devised by the genius of Hamilton, Jefferson and Madison, however theoretically weak, was the only way out from the prevailing theories of sovereignty and of the social contract. They failed to give the right weight to Montesquieu's theory of the distribution of powers.

Federalism in the technical sphere is a test of the validity of sovereignty in the state and of the administrative expediency of the distribution of authority between the central and the member states. In American political history Calhoun's theory of nullification and secession raised, and the Civil War of 1861 decided, the controversy as to the divisibility of sovereignty. Lincoln's assertion of the supremacy of the union was confirmed by the victory of the Washington federal government. Just as the introduction of the Hegelian theory of the state was a fortunate thing for the earlier political thinkers and jurists of America, so the later thinkers were well served by the German federal ideas of Laband and Jellinek. Wilson and Lowell, though their basic ideas of the state were different, were vis-à-vis Willoughby defenders of the supremacy of the union. Modern American political scientists as well as jurists admit the sovereignty of the union, and are rather in favour of unified administration, owing to the inefficient functioning of the state governments. The idea of regionalism, which was helped by the publication of F. J. Turner's book *The Frontier in American History* and Beard's contributions to the "economic interpretation" of the American constitution, offers a new direction for American federalism, corresponding to the growing tendency towards regionalism in local government.[1]

The growth of federal aid or subsidies, which are the traditional

[1] Charles A. Beard: "Social Aspect of Regional Planning," in the *American Political Science Review*, May 1926.

British form of central interference in local government, will tend without doubt to the decentralised unitary state, but so long as the existing federal mechanism remains to block the pluralistic development of the United States of America, the evils of orthodox federalism will continue. At the same time Jefferson's prophecy at the end of the eighteenth century that, when agriculture gave place to industrialism, American democracy would cease to exist, has been realised in the modern capitalism of America, where the highest level of capitalistic activities and ethics has been attained. Regard for the *status quo* of an "acquisitive" community is naturally strong, in order to preserve the existing constitution as the supreme law of the land and resist any legal amendment of it.

In these circumstances the natural development of federalism towards the pluralistic decentralised state is prevented. The exposition of the merits of federalism made by James Bryce in 1888 does not entirely accord with the facts of present-day America. The United States have reached in trade and industry, as well as in agriculture, the highest stage of development. There are no new lands available beyond the frontiers, unless the United States enter upon imperialist expansion. From the political and administrative points of view it is quite absurd that any political mechanism cannot operate more efficiently over the existing area. The rigidity of the constitution is the main obstacle to necessary reforms which will disregard the states.

The constitution is in the United States not only the supreme authority in law, but it also has, for its defenders, an ethical validity. The ethical and juristic consideration of "constitutionality" is left to the majority decision of the judges of the Supreme Court. The history of that court shows that it reflects the political and legal theories prevailing at any particular time.

It is quite true that the "political system which produces great judges can feel some real assurance about its future." Chief Justice Marshall in the time of Hamilton and Jefferson, and Mr. Justice Holmes in our own day, have laid down the constitutional road in the right direction of actuality. Laski's tribute to the latter judge says of him that "the criterion by which he has worked has been an effort so to shape constitutional dogma that it is not a Procrustes' bed upon which men lose their human shape."[1]

But unfortunately these cases may be rare. In general few

[1] H. J. Laski: "Mr. Justice Holmes," in *Harper's Magazine*, March 1930.

judges realise the need for tolerance in legal dogma. Of course such a constitutional system "implies a large amount of unity among the people about the problems to be solved and the way of their solution." If the American constitution is the reflection of the political genius of 1787 and proceeded from Hume's idea of empirical utilitarianism, any constitutional amendment must equally be in harmony with the actual progress of the community and the general development of thought.

Whilst the close relation between law and politics very largely brought about the political interpretation of jurisprudence and legal history in the past generations, in modern legalism the intimate relations of law and economics tends to their economic interpretation.

As Roscoe Pound has explained that "our Anglo-American method of judicial empiricism has always proved adequate," and "our common law has the means of developing new premises to meet the exigencies of justice and of moulding the results into a scientific system," so the defects of constitutional rigidity should be mitigated by the peaceful change-over from the nineteenth century's political and legal idea of individualistic justice to to-day's idea of social justice. Otherwise every effort towards the progress of society would be futile because of the difficulty of amending the constitution.

Taking almost for granted that the three R's, as Maitland called them—Renaissance, Reformation and Reception of Roman Law—shook the traditional basis of legal theories, Anglo-American common law finds its way and evolves formulas which save legal theory from the helplessness of *a priori* dogmatism. The new pragmatic attitude towards legal theory makes use of Ihering's principle of social utilitarianism so to shape the content of the common law tradition as to make it serve the purposes of to-day and to-morrow.[1]

I think that until the constitution itself is amended on this principle the American citizens will suffer for many years from the federalism based on individualistic law, and American federalism, as the legacy of the nineteenth century's individualistic political, economic and legal theories, will remain unaffected by social progress.

The conception of sovereignty has been analysed and criticised more fully by German than by American thinkers. Though Waitz's theory approximated to divided sovereignty, he himself held firmly the doctrine of the indivisibility of sovereignty, whilst

[1] Roscoe Pound: *The Spirit of the Common Law*, 1921, p. 205.

admitting a division of the functions of state authority. Despite the analogy between the doctrines of Calhoun and Max Seydel, due to the similarity of their political backgrounds, there was marked political progress on the part of the latter, who accepted the constitutional confederation as something different from the mere confederation of Calhoun.

All German jurists, no matter to what schools they belong, have accepted the theory of sovereignty, but since the *Defensor Pacis* of Marsiglio, published in 1324, asserted that the people were the supreme power in the state, there have always been some who believed that the absolute theory of sovereignty could be carried much too far.

From this standpoint, and in respect of the problem of federalism, the greatest political thinker and jurist of Europe in the sixteenth and seventeenth centuries was Johannes Althusius, who bravely adhered to the theory of popular sovereignty and gave it a systematic form and its scientifically most important presentation against the then overwhelming authority of Bodin's absolutist sovereignty.

Bodin's conception of the indivisibility and absolutism of sovereignty was denied by the schools of Althusius and Locke, who held the power to be divisible and by no means absolute, though they still adhered to the conception of sovereignty as such. It was not till much later that Preuss in Germany and Laski in England categorically denied the conception of sovereignty as the chief characteristic of the state.

Otto Gierke has pointed out that one of the most striking things about Althusius' political system is that it was permeated by the spirit of federalism. The development of society on the lines of a whole made up of corporative members was a central idea of the true mediaeval system, but with Althusius there was this difference, that the mediaeval organisation had been from above to below, whereas with him, by means of the idea of the social contract, the organisation was built up from below.[1]

After the fall of the world union of the middle ages, which was "neither absolute nor exclusive, but formed only the overarched dome of a social structure incorporated in an independent whole," i.e. after the bankruptcy of the mediaeval theory of corporation, the jurisprudence of the sixteenth century defended those rights of communes and corporations which were threatened by the authoritarian state and thereby upheld to no small extent the idea of a special and independent sphere in public law of

[1] Otto von Gierke: *Johannes Althusius*, 1880, p. 226.

every *universitas*. But as a whole all remnants of the conception of the corporation as a collectivity were swept away by the development of the idea, derived from Roman sources, that the legal subjectivity of the *universitas* has only the importance of a "fictitious" person, and could only in individual cases, and by reason of special privileges, possess certain public law powers derived from exclusively state law.[1]

Within this dominant idea a centralising theory prevailed amongst those who adhered to the Catholic Church and the principles which it represented, and the idea of federalism was vigorously represented by those of the Reformed faith who were known as "Monarchomachs" (a term originally applied to those publicists who, particularly during the French Civil Wars, justified rebellion against rulers who violated their compacts), whose ideas in this respect were obviously connected with their theories of church organisation.

Althusius it was who brought the federalist ideas, thus current in affairs and opinions both ecclesiastical and political, into a system and gave it a foundation of theory.

He admitted the conception of social contract without reserve into this system, which at bottom dissolved all public law into private law. The result was a purely natural structure of society, in which the family, the vocational association, the commune and the province are all necessary and organic members intermediate between the individual and the state, and the wide union is always consolidated in the first place from the corporative unities of the narrower unions and obtains its members by this means. In this structure of society every narrow union as a real and original community creates for itself a distinct common life and a legal sphere of its own, and gives up to the higher union only so much thereof as the higher union absolutely needs for the attainment of its specific purpose. And finally in this structure the state is in general similar to its member unions, and differs from them only in its exclusive sovereignty, which as a highest earthly legal authority embraces a wealth of new and peculiar attributes and functions, but encounters an insuperable obstacle in the "own" rights of the narrower unions, and if it encroaches on them will break down before the rights of the members which will again develop into full sovereignty in consequence of the violation of the pact of union.[2]

Therefore according to Althusius the distinction between *consociatio publica particularis* and *universalis* provided the demar-

[1] Otto von Gierke: *Johannes Althusius*, 1880, p. 239. [2] Ibid., p. 244.

cation between local unions, such as their local communities (village, church land, market), various towns, communal union or province and state. He defined the state as *universalis, publica, major consociatio, qua civitates et provinciae plures ad jus regni mutua communicatione rerum, operarum, mutuis viribus et sumptibus habendum, constituendum, exercendum et defendendum se obligant.*[1] The members of the state are neither individuals nor families nor *collegia, prout in privata et publica particulari consociatione,* but *civitates, provincias et regiones plures inter se de uno corpore ex conjunctione et communicatione mutua constituendo consentientes.*[2] The agreement among the members is the bond of the *corpus* (body politic) and *consociatio* (association).[3]

This organic theory of Althusius' ideal state was a specific conception of the federal state based on the private law theory of social contract which unfortunately has not developed directly to the growing *Genossenschaft* theory of the modern federal state on a public law basis, but his idea of federalism prepared the way for a dual development of German federal ideas to Hugo's conception of "the state consolidated from states" based on Aristotelian experimentalism on the one hand, and to Pufendorf's theory of confederation, which depended on Bodinian sovereign absolutism, on the other.

In the history of German federal ideas, as elsewhere, the diversity of the theories of federalism and of the conceptions of the state and sovereignty is due, as Hugo Preuss put it, to the conflict of "two great workshops"—philosophy and history, idealism and empiricism, *a priorism* and *a posteriorism,* formalism and pragmatism, unitarism and pluralism.

As federalism is a form of state organisation, it was natural for German *Staatslehre* to seek first to find a theory of the state from which the theory of federalism could be derived. There was no significant progress of the federal idea, though the theory of the state had greatly advanced, between the time of the controversy between Hugo and Pufendorf and the introduction of Waitz's theory. German political conditions did not develop beyond the mediaeval confederation until at earliest the formation of the Frankfurt parliament of 1848 and practically until the creation of the North German Union in 1866, and even then had not reached the stage of the North American federal state of 1787.

Waitz's theory of the federal state was a theory of divided

[1] Johan Althusii: *Politica,* 1654, p. 167.
[2] Ibid., p. 168. [3] Ibid., p. 169.

sovereignty. As he assumed sovereignty to be independence of any higher state authority, and thought of it as essential to the idea of the state, his theory indicated only the possibility of the division of its application, not of its content. Thus his principle does not go beyond laying down that, as he himself put it, the relative existence of the collective state and the individual state is "not in space, but in theory and law."

The rise of positivism and the growth of the *Herrschaftstheorie* in Germany meant a considerable advance of the federal idea in general. One development of great significance was the attempt to make the theory of the state independent of the conception of sovereignty. Von Mohl in 1852 declared that, as a characteristic of the state, sovereignty was internally unnecessary and externally unwarranted, but he did not refuse to accept the principle of "divided sovereignty" in the functioning of the federal state. Georg Meyer made a more striking advance. He endeavoured to find a new theoretical basis for the modern state, as the Bodinian theory of the sovereign state could not claim to be valid for all times and peoples, but only for a particular phase of the historical development of the unitary state. The breaking away from the traditional belief in the identity of the state and sovereignty meant to him the substitution of the idea of the "political commonwealth" as the basis of the state. He ventured to look beyond the horizon of traditional dogma, and to regard the state as a political commonwealth organised by a system of domination and subordination into a variety of structures. He looked to the federal state as "a further link in the chain of political organisations," and as something based on the individual states just as these were based on provinces and communes. But unfortunately as he developed his theory not upwards but downwards, its application to the German federal state resulted in the complete self-contradiction of accepting the old doctrine of sovereignty and to some extent that of the *Kompetenz-Kompetenz*. And it merely stimulated discussion and not the formulation of doctrine. As with Calhoun in America, Max Seydel's idea of the bankruptcy of the federal state theory of Waitz left no room for the existence of anything except the unitary state and the confederation.

The complete identity of state and sovereignty was a principle to Seydel and Held, whose controversial criticism was nothing but the dogmatising of particularism and unitarism.

Haenel made also a considerable development on G. Meyer's idea of the state as political commonwealth by his own *Durch-*

brechungstheorie. According to him the characteristic of sovereignty was *Kompetenz-Kompetenz*; in this way he got over the difficulty of the federal state by treating it as a combination of a state with sovereignty and of member states regarded as non-sovereign quasi-states. But it cannot be said that his work represented any advance in the general theory; his conclusions did not, in fact, differ appreciably from those of G. Meyer.

Von Treitschke's political dynamics foresaw the federal state, the members of which would be no longer states, but provinces with autonomy.

One of the great contributions to German federal ideas was Laband's *Staatsrecht*, published in 1876.

Laband set up a clear distinction between the state and the sovereign state, and established a legal demarcation between the confederation as an international law community and the federal state as a constitutional legal person.

His dictum that "the holder of the authority of several states forms together the juristic person of the public law, which is the subject of supreme and dominating rights combined under the name of the authority of the *Reich*," presents his notion of the federal state, which can be regarded as comparable with a pure democracy since in both the collectivity of the object is the subject of the state authority.

It is beyond doubt that Laband's theory gave the "death blow" to the previous doctrine. The difference of his federal theory from the prevailing idea of the state and sovereignty lies in the idea of the non-sovereign state which is by virtue of its "own right" not a self-administrative area or province but a *state.* According to the commonwealth theory of Gierke and his school the non-sovereign state is a legal entity not differing in quality from the province or self-administrative unity, or even from the state itself, since the "state is only the highest of the human communities, and remains like to them in respect of the essential features of the social organism."

At the same time, though he rejected Waitz's theory, Laband's notion of the *Mitgliedschaftsrecht* of the non-sovereign state and his definition of the federal state as a republic of individual states was an unconscious acceptance of the general doctrine of Waitz with its positivist formalism.

Jellinek, however, in 1882, took up Laband's conception of "own right" and developed it into his basic principle of the state. The state, according to him, should be based on the characteristic of the sovereign that it can be legally bound only

by its own will. If any political organisation can exercise state authority without being subject to any control it must be a state. The sovereign state alone can create the non-sovereign state, but this quality of being able to exercise state authority by its own right without any control is to Jellinek the criterion of the state which differentiates it from the self-governing bodies of a decentralised unitary state. This conception of "own right" certainly showed a great advance in comparison with Laband's doctrine, yet it has a weakness in itself, which is shown in Jellinek's assertion as to the federal state that "by a single dictum of the constitution, by simply setting aside the present organisation of the member states and indeed of the federal power, every federal state could turn itself into a decentralised unitary state by the establishment of the *jus supremae inspectionis* of the central authority."

Rosin, on the other hand, the advocate of a new school of state theory, rejected the *Kompetenz-Kompetenz* of Liebe and Haenel, and agreed with Jellinek in the definition of sovereignty as "exclusive determination by own will," but he made a clear analysis of Jellinek's doctrine of "own right." That political system which is free from central control is in no way different from the member state and commune or self-administrative body which has a certain competence of "own right." Rosin assumed that the distinction of the commune and its like from a mere administrative district depended on whether the former has or has not legal personality. But the main characteristic of his ideas is due to his application of Ihering's theory of interests and purposes to the distinction between the commune and state, which are differentiated in their purposes between local and national interests, whereas the difference between member state and commune in the decentralised state is only due to the differences of people's consciousness as to the state tasks. Rosin's acceptance of the doctrine of purpose is both the merit and demerit of his theory and affords some justification for the criticisms which have been levelled against him.

G. Meyer in his later works made a considerable advance in his juristic idea that sovereignty is not essential to the state, and that in the federal state the collective state is sovereign and the individual states are not; the distinction between the state and communal union is due to the twofold independence of competence which the former allows to the latter, the competence to carry out certain political tasks independently by its own law and the competence to regulate its own organisation indepen-

dently by its own law. This idea is also criticised by the same argument as the conception of "own right."

The failure of these legal theorists was entirely due to the mechanical nature of the distinction made between state and commune, a distinction based on legal relationships of private law.

Brie's theory of *Staatenverbindungen* rejected the entire relation between state and sovereignty, put forward the doctrine of purpose and accepted the idea of *Kompetenz-Kompetenz*. The principle of "all-sidedness of purpose" is the criterion of the state conception and the idea of "all-sidedness and subsidiariness" is the basic principle of the relationship between the collective state and the member states in the federal state. His criticism of the conception of the federal state is based on the dual idea of the union and the state. Although in the modern federal state, especially in the German Empire, the member states are juristically actual states and are different from communal corporations, yet in respect of sovereignty the union is sovereign and the member states are non-sovereign. Nevertheless, in the German monarchical federal state, with its numerous reserved rights and Prussian hegemony, no German states lost all their sovereign rights, and Prussia in particular constitutionally lost nothing of its sovereign authority. I am quite in agreement with Laband's criticism of Brie's theory of purpose that it is due to the idea of the state as "a divine or human creation, always the product of a conscious will." The great mistake in his conception of the federal state was his definition of it partly as a "union"—a federative organic commonwealth consolidated out of states—and partly as a "state," a consolidated commonwealth with powers and duties covering all the purposes of human life. Since the member state is an actual state, it has all-sidedness of purpose ranging over all human life, and the collective state is only subsidiary to it. This theory brings about the false assumptions of *Kompetenz-Kompetenz* and of the non-sovereign state, which are entirely contradictory as simultaneous criteria of the state.

His great misconception is the distinction made between the state and province or commune by the criterion of the comprehensiveness of purpose. In the strict sense there are no political organisations the purpose of which is completely coincident with the completeness of human purpose. The modern state itself is not considered as co-extensive with the all-sidedness of human purpose, since no state can continue to survive without

international co-operation, for which it requires the international law community.

Stammler, the Neo-Kantian, set up the theoretical system of scientific formula, not only in legal science, but also in all other social sciences. Since the highest human achievement is the realisation of justice, the highest value to law and state is itself "just." The real value of justice is derived from his theory of just law, the scientific formula of which to some extent goes beyond its limit of reality.

But since his idea is that "the concept of law signifies simply this, that the conscious contents . . . must be arranged and directed in the spirit of a fundamental unity," his theory of legal science would be useful for the final justification of the marginal point of the development between plurality and unity if one were to limit oneself to *a priori* reasoning.

Hermann Cohen, in his *Ethic of the Pure Will*, critically examined the separation of internality and externality in ethical relation, and pointed to the inter-dependent relationship of action and will as the first postulate of all ethical consideration, and established in the continuity of the transition between externality and internality the *a priorism* of every ethical action.[1]

Although Cohen's theory is entirely based on *a priori* reasoning, yet the philosophical process by which he deduced the harmony between action and will was adopted by Gierke in his utilisation of the assumption of the spiritual and ethical organism.

Kohler, the Neo-Hegelian, starting from Hegelian dialectic and arriving at a more dogmatic concept in his survey of the actual legal and political phenomena, goes beyond Hegel's state absolutism and arrives at a wider conclusion, namely, the realisation of the ultimate necessity of the super-state (*Überstaat*) with the supreme super-national law. The last sentence of his famous philosophy of law, "the butterfly can only evolve from the caterpillar and the cocoon," is the great contribution of the highest *a priori* jurisprudence to the development of the federal conception by denying the supremacy of the individual state in the modern community.

Ihering's theory of purpose has both inherent merit and demerit. His idea of "social utilitarianism" is no doubt the great inspiration of the utilitarian philosophy, but his "calculus" is the value of social purpose. His conception of social utility

[1] Gurwitsch: *Otto von Gierke als Rechtsphilosoph*, in *Logos* Band XI, 1922, Heft 1, p. 112. Hermann Cohen: *Ethik des reinen Willens*, 1904, pp. 112, 162, 192, 212, 330.

marked a great advance in development from individualistic to social and public legal ideas, but the application of the theory of purpose to the federal mechanism is logically justifiable only on the basis of pragmatic jurisprudence.

The sociological school represented by Schäffle and Gumplowicz pointed to a new path by its theory of conflict between groups and interests. They put the state in the same category of human corporation as the social product. So Gumplowicz defined the state as consisting of "ruler and ruled," since no state can exist without this antithesis. Whilst denying the Hegelian spiritual entity of the state and adhering to the theory of interest, this school of thought argued that the subordination of minority to majority interests would be contradictory to the fundamental principle of federalism. The political and legal mechanism of the state and federal system, however, can mitigate these errors, and the sociological school exercises great influence on the general development of the federal idea.

Karl Marx's theory of the class struggle and his political ideas generally were not favourable to orthodox federalism at all, but his ideal state is simply a system of communes in which a genuine federal system was to be looked for. His theory of state is, however, in its philosophical basis *a priori* and unitaristic, and the dictatorship of the proletariat is an entire contradictory formalism of the federal evolutional idea.

So long as the capitalist economic system is the basis of the existing community, the Marxian economic theories have their own special value and manifest without doubt the highest development of economic theory in contrast with the orthodox economic principles. The principle of class struggle, though it may be sociologically justifiable in the present-day economic activity, is the inevitable product of the social dynamics of capitalist economics, arising from the growing divergence between bourgeoisie and proletariat. The theory of pauperism and the principle of the concentration of capital, however skilfully the bourgeois economists oppose them, are the active forces in our time.

Although in the view of present-day orthodox economists the theory of surplus value may seem erroneous as a theoretical statement of value, it is undoubtedly the clearest exposition of the nature of the exploitation of the production of wealth under modern capitalism. Marx's prophecy of the expropriation of the expropriated is only the natural outcome of the highest capitalist development.

What makes Marxism doubtful to my mind is first the problem whether all social phenomena can be settled by the single criterion of "historical materialism," i.e. how far and to what extent can the materialist interpretation be applied. And secondly, though Marx himself is ambiguous, there is the question whether revolution and the subsequent rule of dictatorship is the only method of social reconstruction. The Marxian system may scientifically be consistent as a theoretical structure. It makes use of the most powerful weapon of logic—dialectics—in its materialistic interpretation of economics. But as the logical clarity of the scientific formulation of the theory was due to it being *a priori* and categorical, so its application tended to be dogmatic and one-sided, and the theory itself tended to develop into an idealistic and religious creed rather than a realistic and scientific formula.

If one scrutinises thoroughly and carefully the defects and the general tendency of the capitalist economic organisation, and does so free from the bias of the traditional economic paradox, Marxian economic theory, though incomplete, is the highest economic theory which has ever been formulated. But to the political scientist the application of the material interpretation to the whole of social activity, and the proclamation of revolution, i.e. the reconstruction of the community by force with entire disregard of any communities, invite strongly adverse criticism. Leninism, which is nothing but communist strategy as an expedient, though its purposes are far higher than those of Machiavellianism, is a utilitarian basis for the attainment of the proletariat dictatorship to defeat the counter-revolution.

As long as power is poisonous, the Soviet dictatorship tends to be extreme, to become more and more dogmatic and to have a harmful influence on the proletariat of the world, and so there seems no sign of the attainment of Lenin's ideal of communistic democracy. The sole possibility lies in communist education which can bring about a psychological change in the minds of the people, and lead them really to take a new view, moral as well as intellectual, of society.

For the nations which are not yet politically developed to the stage of democratic control the dictatorship or benevolent despotism may be useful in the period of transition from the traditional form of a social, political and economic system to a new social order.

But as long as the power of a dictator vests in a central authority, whether of one dictator or of several, who is to have

the responsibility of determining when the dictatorship is to be mitigated or brought to an end? Is the decision to be made by the mass of the people or the dictators? If history or the events of the present day afford any guidance as to the merits and demerits of this incredible system of rule, its life must be short, for the evils inherent in its nature are bound to be revealed, and revolt against it is an inevitable result of this system of *raison d'état.*

Under this political system of dictatorship the thing of most essential importance to political and economic democracy—the co-operation of various types of intellects for the betterment of the community, by means of frank criticism—will gradually disappear, and the possessors of the best brains of the country will be either inactive or deported or killed, and the happiness and prosperity of the nation will be left in the hands of a single person, a dictator.

This degeneration of politics will be followed by the degradation of society as a whole, and there seems to be no prospect of communist democracy. The main question is whether so long as the Soviet state is not federal, but is a unitary centralised republic with indirect representation, under a dictatorship, it is possible by communist education to bring about, without a violent change of the state system, a transition from dictatorship to communist democracy.

Among the various schools of thought and juristic theories the greatest contribution to the federal idea which has ever been made in Germany is the introduction of the *Genossenschaftstheorie.*

The great champion of this school, Otto Gierke, though he could not entirely free himself from the prevailing dogma, established firmly a general mode of thought for the future direction of political and legal thinkers.

Since Gierke himself cannot entirely deny the existence of sovereignty—he defined the state as the highest collectivity become a person and possessing the highest power—no political and legal thinkers would be capable of defining the state merely as a commonwealth, like a simple communal or provincial union.

The aim of his *Genossenschaftstheorie* is undoubtedly to establish the harmony of pluralism with unitarism. But with regard to the theory of the state his interpretation of the Germanic state tends to emphasise authority more than democracy in that "the Germanic state was, according to its basis, an association, but in its mode of action a dominance (*Herrschaft*) or—in modern terminology—at once a democratic state (*Volkstaat*) and an

authoritarian state."[1] Though the state itself had its origin in the theory of *Obrigkeit*, the weight of the *Genossenschaft* cannot be overbalanced by that of dominance in the modern state. As Gierke himself points to unity in plurality as the ultimate aim of human association, and not plurality in unity, the basis of his theory should be pluralistic rather than unitaristic.[2]

Even Hugo Preuss himself, though objecting to Gierke's return to the traditional conception of sovereignty, admits the special authority of the state as differing from that of the commune or province, under the name of "territorial supremacy" (*Gebietshoheit*). Kelsen's criticism of this theory of Preuss, though Stengel had already indicated it, made it clear that in the existing political and economic condition of the world the modern state has a certain quality of supremacy in respect of its authority.

Gierke built his system from the foundations of historical actuality; as Preuss said, it is a new method of logical assertion from inductive to deductive and of constructive formation from the bottom to the top.

Rejecting the individualistic and natural right theories, the new system of the *Genossenschaftstheorie* fully accepts public law personality and the theory of organism (as Preuss put it, it is the "Darwinism of jurisprudence"). The highest value of political organism is "unity in plurality," and the highest test for "unity in plurality" is the *Genossenschaftstheorie* by which all human organisms are harmoniously incorporated in the perfect form of "inter-dependence."

As to the relation between law and ethics Gierke, in accordance with his idea of the harmony between the individual and the collective whole, each creating and at the same time assuming the other, conceived of law and ethics as two spheres which overlap, but are not wholly coincident. The progressive distinction between them is a part of the whole movement of civilisation, and is promoted by the idea of the spiritual-ethical organism; but it must not take the form of separation and antagonism of them as is the case with mechanical individualism. But he never succeeded in freeing himself from Kant's separation of law and

[1] Otto von Gierke: *Der germanische Staatsgedanke*, Berlin, 1919, p. 7.

[2] Gierke's theory stands midway between the pluralistic and unitaristic tendencies. Therefore the interpretation put upon his theory of the state differs largely according to the standpoint of his critics, i.e. whether they themselves are unitarists or pluralists. But the main maxim of the *Genossenschaftstheorie* is based on "unity in plurality," i.e. pluralistic in principle.

ethics; the connection between them, as expounded by Gierke, is very slight. "However much law and ethics have in common," he wrote, "as unconditioned norms for free human willing they are fundamentally differentiated by the fact that the juristic law (*Rechtsgesetz*) is directed to the external conduct, that of the ethical law to the internal conduct, of the holder of the will." Juristic law relates to human action; the ethical law to human thought. There is a middle sphere, where both internal and external conduct is concerned; and it is only this sphere which answers to Gierke's ethical presumptions. The separation of action and thought is the outcome of that mechanical individualism to which he was so strongly opposed. Just as he raised basic objections to the isolation of the internal and external in the case of the collective person, so the separation of thought and action in the conduct of the individual ethical subject must have equally little success. The continuous transition from the internal to the external, from action to thought, which can be conceived only as a reciprocal correlation, as ethically relative conduct, is altogether parallel with Gierke's clearly developed reciprocal relation of unity and plurality in the whole of the spiritual-ethical organism. There is indeed only one logically possible way to complete the distinction between law and morality, without abandoning all connection between them, and that is to regard law as a necessary stage towards ethics. This solution lay to Gierke's hand, as it meant that complete orientation of the philosophy of law towards a philosophy of history, and of law towards historical civilisation, which he always called for. "For to postulate law as a necessary means of making possible the realisation of the ethical ideal assumes of necessity the doctrine of the realisation of ethics in historical civilisation by the medium of the empirical society," and "the recognition of the independent ethical importance of the collectivity leads with equally logical necessity to a philosophy of law, as the unconditional pre-requisite of all actual collective life." So "the conception of historical civilisation as a medium of realisation leads directly from the theory of the moral ideal to a philosophy of law."[1]

Does Gierke's recognition of the spiritual-ethical organism provide a philosophical basis for his ideal of the harmony of plurality and unity? His theory of the *Genossenschaft* aims at the co-ordination of these in the collectivity, since his spiritual-

[1] Gurwitsch: *Otto von Gierke als Rechtsphilosoph*, Logos Band XI, 1922, Heft 1, pp. 112–113.

ethical organism is nothing else than the explanation of the reciprocal importance of unity and plurality in the association system as giving concrete value to individuality by the recognition of organic personality.

The idea of unity immanent in the plurality of the collectivity is the same thing as the incarnation of the collective personality as set forth in Gierke's organic theory.

Therefore I believe that the synthesis of the personal ethical organism is the test of the harmony between plurality and unity, to which Gierke himself adhered, saying that "the final goal, by which we measure the ethical justification of both general and individual purposes, is the harmonious agreement of both."[1] That this harmony must be based on the synthesis of personal and community values, or in other words of individual and social ethics, is the cardinal point of Gierke's system. And this idea of synthesis leads to the organic conception in which the relationships of the whole to its members and *vice-versâ* are the real elements of the organic inter-dependence of plurality and unity.

This test of "harmonious agreement" between unity and plurality is therefore a spiritual-ethical organism which is based on the philosophy of history, as the medium of realisation.

In respect of *a priori* philosophical notions Gierke's *Genossenschaftstheorie* is merely the scientific expression of a philosophical system, but its real value to my mind is that of a scientific thema or system in political and legal philosophy.

In other words, it may be described as being a Germanic theory of pragmatism, or, as Hugo Preuss expressed it, the method of creating a system from the bottom upwards, not from the top downwards.

This contribution has a universal value for the development of a new phase of federal idea.

Here I will criticise Gierke's *Genossenschaftstheorie* as briefly as possible. As the kernel of that theory consists in "the conception of the corporation as a real collective person in opposition to the phantom of the *persona ficta*," the basis of his theory is the nature of the corporate personality. This idea of the corporation as a real collective person had, he pointed out, been taken up and developed in varying degrees, not only by the Germanists, but also by Romanists, publicists and legal philosophers, and underlay some later theories of the juristic person,

[1] Otto von Gierke: *Das deutsche Genossenschaftsrecht*, Vol. II, p. 42, Vol. III, pp. 186–664. *Die Genossenschaftstheorie*, pp. 74–338.

although in them it was formulated somewhat differently. He emphasised that "even among its opponents the critical destruction effected by the *Genossenschaftstheorie* of the person which was the outcome of a fiction had exercised a powerful influence." He was quite right in holding that "all modern theories are directly indebted to the *Genossenschaftstheorie* for having created something to replace this fiction, whether they set up in its place the merely formal aggregate of a number of subjects or the subjectless '*Zweckvermögen*' (property assigned to a particular purpose)." He clearly indicated that "the teaching of the *Genossenschaftstheorie* amounts to the assertion of the individuality of corporations."

From this fundamental idea there arise the assertions, which are commonly adduced as the criterion of the *Genossenschaftstheorie*, as to the possible union of unity right and plurality right in the collectivity. Gierke's strong opposition to the mere juxtaposition of artificial and natural individuals resulted in the substitution of the coalescence of collective and member existences as the principle of the law of corporations. This changed conception of the nature of corporation personality led to a new theory of the creation and termination of corporations; to a revision of the dicta as to the scope of corporative legal capacity; and to the justification of the possession by the collectivities of that capacity for will and action which the opponents of the theory so stubbornly disputed.

This new juristic construction put an entirely new aspect on all corporative life-relations and processes, and what appear most distinctly are the new conceptions of the relationship between narrower and wider unions, and particularly between corporation and state. Finally, Gierke asserted that wherever in a community a personality of the collectivity is recognised as existing independently of the members, there arises a legal system of a higher order to which the system of individualistic legal relations does not attain. According to him the *Genossenschaftsrecht* came forward as an autonomous legal conception vis-à-vis the individualistic system of law, and thereby there opened up an "immeasurable perspective." For the law of corporations undertook the task of setting out the basic legal principles on which there should be built up the whole legal system of common life, from the narrowest up to the widest communities. That is to say, corporation law widened out into a social law, the crown of which was constitutional law, and so ultimately to international law.

In the field of private law the *Genossenschaftstheorie* freed the law of corporations from individual law, but nevertheless in so doing preserved the particular character of that part of individual law which bordered on corporation law, so that eventually it expanded into the modern theory of association and society which went beyond the ideas of Roman law. To this indispensable complement of the *Genossenschaftstheorie* the German law "in the abundance of its ancient and still eternally young ideas" furnished the foundations, particularly in the conception of the *gesammte Hand* (the common hand).[1]

Gierke clearly indicated that where the elements of individual and social law are combined into one whole there is no question of a mechanical mixture whose elements remain distinct, but there is an organic compound "in which the heterogenous remains heterogeneous and the difference of grade is preserved."[2]

Expounding the distinction between the individualistic legal community and this conception, he explained that the *gesammte Hand* is in fact a Germanic legal principle, "and it is not an institute of law existing for its own sake, but it is an element of ideas common to a plenitude of legal institutes."[3]

In order to ascertain the personality of the group he unhesitatingly made use of the psychological test in reference to the reality of the personality, that, is the capacity of will and action. As he disagreed with any idea of objectivity, the foundation of the legal subjectivity is, to him, that of will. Among the German jurists and legal philosophers the theory of will has been far more generally recognised than among English jurists.

As Kelsen has pointed out, the weakness of the *Genossenschaftstheorie* is that it regards the corporate personality as a real person. According to sociology it is *de facto* impossible to attribute a real personality to the "company," or even to the state, except that since jurisprudence aims at studying the general lines on which the juristic aspect of the social life is to be explained, the juristic conception of corporate personality can be assumed as something real.

In respect of the relation of the narrower personality to the wider personality, Gierke utilised, without any reservation, the theory of organism. His theory moved away from the psychological interpretation of the corporate personality to the biological explanation of the relation between the narrower and the wider corporate personality as being organic. In the seventies and

[1] Otto von Gierke: *Die Genossenschaftstheorie*, pp. 5–11.
[2] Ibid., p. 340. [3] Ibid., p. 342.

eighties of last century Darwinian biology was the predominant influence in various sciences. But the application of the organic theory in Gierke's legal system did not result in anything precisely similar to an organic synthesis. Neither in similarity to the Hegelian synthesis of the spiritual entity, nor in agreement with the Austinian form of state absolutism, did Gierke set up the value of plurality as corporation, church, communal and *Genossenschaft* self-administrative right as against the value of unity as corporation, church, communal and institutional (*Stiftung*) supremacy.

As he defined the modern state as the embodiment of two elements, corporation and institution, he assumed that "in so far as on the one hand there is allotted to the collectivity as such a sphere of operation of its own, and on the other hand the state reserves to itself a power over the collective conduct of life within this sphere, there arises a peculiar form of administrative activity in which the internal constraint of the narrower collective will by the collective will of a higher system becomes manifest." This administrative activity is nowadays generally called supervision (*Aufsicht*).[1] With regard to this conception of a preventive supervision Gierke pointed out that the corporative determination of will is only supplemented by the state determination of will, and not replaced by it.[2] In this sphere of supervision the internal lack of a corporative will-formation is never cured by the mere state sanction. If, however, by law or constitution the state is empowered to exercise a unilateral will within the legitimate sphere of a juristic person, then to him this proves the fact that "an institutional state element is introduced into the union organism, an element which modifies the corporation conception in the sense of the institution conception."[3] He explained that "from what has thus been set out it follows that from all these legal norms which establish and limit the constraint of the collective wills by higher collective wills there arises at once a plenitude of *subjective rights and obligations*. These are individually of very dissimilar content. But ultimately they show themselves to be the outcome of two antithetical basic personal rights; the right of the superior collective person over against the personality of the constituent member, and the right of the subordinate collective person to the freedom of his own personality."[4]

Gierke assumed further that "as far as the sphere of its legally

[1] Otto von Gierke: *Die Genossenschaftstheorie*, p. 562.
[2] Ibid., p. 670. [3] Ibid., p. 671. [4] Ibid., p. 672.

acknowledged capacity of will and action extends, the juristic person wills and acts by means of the constitutional action of its organs."[1]

The organ of will of the corporation expressed in duly constituted assemblies is considered not as the "sum of the individual juristic persons" which compose the corporation, but as the unity in plurality expressed in constitutional manner, as occupying the position of an organ. Such an organ, according to Gierke, is "clothed within the collective personality of the union, with a particular organ personality, the structure of which can show a more or less complete copy of the structure of an independent social organism."[2] So by means of the division of competence in function and the exercise, with legal validity, of corporate separate rights and duties, the acts of will which operate in this very extensive sphere can in all kinds of ways combine the elements of corporate and individual action. There is then on the one hand need for a sharp demarcation of the diverse parts of the unitary action, and on the other hand account must be taken of their organic cohesion. This relation between separation and union can, however, only be ascertained from the nature of the individual kinds of actions.[3]

On this assumption he regards the general will not as an aggregate of individual wills, but as the collective will of a single real collective personality, i.e. the organic unity of the individual wills is the will of the corporative personality, in the full harmony of unity in plurality. Non-absorption of particular wills into the general will with full independence of the freedom of particular will is his main source of the *Genossenschaftstheorie* of *Zusammengehörigkeit*. The modern English pluralists, such as Laski and his followers, substitute for the organic conception a new philosophical system of pluralistic pragmatism, in order to find the harmony between unity and plurality.

I fully agree with the criticism of the *Genossenschaftstheorie* in respect of the weakness caused by Gierke's psychological test of the collective person as real, and his biological reference to the relationship between the various groups as being that of organism.

The modern science of the human community cannot fully agree with this particular point of his theory. The application of a sociological test to the social reality cannot fully justify any presentation of the corporative personality as a real collective

[1] Otto von Gierke: *Die Genossenschaftstheorie*, p. 672.
[2] Ibid., p. 683. [3] Ibid., p. 713.

person. But in so far as juristic interpretation is concerned, no exponent of the pluralist system of the state, whether in legal or in political science, can wholly eliminate the conception of the group as something real. Maitland's assertion of the "legal right and duty-bearing unit," or Laski's pragmatic justification of the group as real, is the natural result of the pluralistic conception in opposition to the monistic synthesis.

Therefore juristically Gierke's assumption of a corporate personality, though sociologically or psychologically inadequate, points out the new direction to the assertion of the value of plurality in unity as well as of the value of unity in plurality.

As his mind was essentially German, his notion of the ethico-spiritual organism prepared the way for the philosophical justification of the *Genossenschaftstheorie* on the basis of the theory of will.

Gierke himself has already indicated that "the critics of the organic theory, intelligibly enough, fasten upon these exaggerations. They are quite right to attack them. But they are wrong if they regard them as inevitable consequences of the comparison of natural and social organisms. Rightly understood, that comparison means only that in the body social we see a living entity made up of parts, the like of which we observe elsewhere only in the living beings of the world of nature. We do not forget that the internal structure of a whole, whose parts are human beings, must be of a kind for which the natural whole does not provide any model; that in this case there is a spiritual collocation, which is set up and shaped, actuated and broken up, by physically motivated action; that in this the realm of natural science ends and that of moral science begins."[1]

As I have pointed out, the main difference is due to the fact that in his hands the *Genossenschaftstheorie*, as is clearly shown in his work on *Das deutsche Genossenschaftsrecht*, developed from the foundation of the legal structure of the lowest communal community up to the very elaborate edifice of the international community, with full justification of the particular rights and duties of each corporate group in relation to the higher groups; that is, his basic system is neither *a priori* nor monistic, but *a posteriori* and pluralistic.

The application of the organic theory, which is somehow characterised by the motive of abstract dialectic, has been the main obstacle to winning from his successors the full approval of his theory.

[1] Otto von Gierke: *Das Wesen der menschlichen Verbände*, 1902, p. 15.

But the transformation of his legal science into a philosophical doctrine—a thing no English jurist has ever essayed—is a typical German procedure. Whatever philosophical system one may hold, the pluralistic political or legal science cannot attain its aims unless it makes use of an ethical criterion. William James's maxim of the community being "distributive, not collective" is the basic philosophical criterion applied by the English pluralists, whereas Gierke's ideal of harmonious inter-dependence between unity and plurality is derived from his conception of the ethico-spiritual organism on an historical basis.

The greatest merit of his lifelong work is unquestionably the diffusion of doubt as to the validity of the predominant theory of the *persona ficta* and of the concession theory, and the clearing of the way for the new pluralistic theory of the state as against the monistic and positivist-formalist theory.

William James's remarkable expression, "space and time are vehicles of continuity by which the world's parts hang together," is cha acteristic of the pragmatic conception. The spirit of the federal idea springs up from this very conception through the medium of the empirical reality of human community. William James's plurality is more federalistic in theory than Gierke's idea of inter-dependence; in German terminology the former is the conception of the *Genossenschaft* system, whilst the latter is the conception of "corporation" in the unity in plurality. As a political idea, Gierke's theory of unity in plurality is *de facto* far easier to be accepted as a basic idea for the theory of the state in its transitory form of the modern state which is theoretically derived from the authoritarian state and embodies the natural law individualistic theory.

Since Gierke's *Genossenschaftstheorie* laid the foundation of the modern federal idea in Germany and Hugo Preuss put forward the *Genossenschaft* federal idea as the "guiding star" of political theory, no German jurist in our time has made any fundamental progress (unless we except a few thinkers, such as Walther Rathenau and Kurt Wolzendorff, who advocate the pluralist idea of *Genossenschaftstheorie*), and this great system was brought into the British theory of the state through the medium of an English jurist, Frederic W. Maitland of Cambridge. Krabbe in Holland, Max Weber Wilhelm Wundt and Franz Oppenheimer in Germany, Leon Duguit, Hauriou and Saleilles in France, have given a new impulse to the juristic theory of the state.

In Germany the contemporary jurists, who are either the followers of G. Meyer, such as Triepel or Anschütz, or of Max

Seydel, such as Beyerle or Nawiasky, have made no fundamental advance.[1]

Triepel's definition of the federal state is only a new phrasing of the orthodox federal theory of Jellinek or Brie. The characteristic feature of the federal state to him is that it is an intermediary political organ between federalism and unitarism, and his discredited federalism results in the entire negation of federal mechanism or of the justification of hegemony in the federal state.

Anschütz's criticism of German federalism does not go beyond the fundamental negation of federalism, and the entire acceptance of the decentralised unitary state.

On the other hand, Beyerle and Nawiasky, representing the Bavarian school, follow the orthodox Seydelian lines. The new federal reaction of Weimar, except in the mind of the drafter of the constitution, Hugo Preuss and his followers, is a mere reflection of orthodox federalism. But Preuss's ideal of a democratic republic with parliamentary responsible government was then quite new in German political organisation. The unsatisfactory functioning of Germany's parliamentary system at the present time is due not to its federal organisation, but probably to the group system of parties in the *Reichstag* coupled with proportional representation which may have accentuated federal particularism.

How far German political wisdom and practice can attain its aim will be the future test of German political achievement. If the *Genossenschaft* idea roots itself in Germanic spirit and practice, there will be a shift of the present federal republic to a new decentralised unitary state with federal authority. Regionalism or the idea of decentralisation will give way to the ideal pluralistic state of the future. The first requisite of German political prosperity is simply a return to Gierke on the modern social basis of present-day socialism.

Contemporary political and legal ideas in Germany tend to develop along the line of a more scientific formalism, which sometimes goes far beyond political and legal science into theoretical speculation, as in Kelsen's theory of "norm" on the one hand and Smend's theory of integration on the other.

The contribution of Kelsen to the purely legal analysis of the state and federalism, through his recognition of the validity of standard of norm, though hypothetical, is the highest legal speculation which modern legal science has yet attained. His

[1] Fritz Fleiner, Josef Lukas: *Bundesstaatliche und gliederstaatliche Rechtsordung*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Heft 6, 1929, pp. 1–56, 57–68.

Stufentheorie represents, as I have pointed out, legal federalism, the juristic system of the modern federal idea.

The valuable suggestion of the theory of the pre-eminence of international law is to modern legal science the ideal state of the future, in which the "history of dogma" will simply be a past, as Grecian city politics were a regime different from modern state life. The controversy between Kelsen's methodical theory and Smend's theory of integration brings out two divergent theories of state and federation; the former seeks to base the federal organisation on the validity of the "norm" in space and time, in other words, it is a conception of decentralisation of the *Norm-Satz*, whereas the latter believes that "the investigation of the questions which arise from the nature of the federal state as a unitary system of integration, with the two political poles of the collective state and the individual states, and the alternative necessity of a unitary legitimatising of the one or the other, is likely to yield more profitable results for the theory of the state than constantly new theorising as to the conceptual possibility of actual federal states."[1]

Smend wholly rejects, as "spiritual-scientific nihilism," the basis of Kelsen's theory of the state, that it is not a "social reality."[2] To him the state is a part, though only a part, of the whole sphere of spiritual (*geistig*) reality; it is a "structure of spiritual-social reality"—the outcome of the interaction of the individual and society, in which neither factor is to be understood as derived from the other but each is derived from the whole. The state is "not a static whole, that gives some manifestations of life in the form of law, diplomatic arrangements, judgments, administrative actions. It is, indeed, only present in these individual manifestations of life so far as they are activities of a spiritual collectivity (*Gesammtzusammenhang*) and in the still more important renewals and developments of which that collectivity forms the actual subject-matter. It lives and has its being only in this process of constant renewal, constant rejuvenation." To this central process of the life of the state he applies the term "integration,"[3] preferring it to that of "organisation," which has too much of a mechanical, naturalistic and juristic connotation.

Applying this principle of "integration" to the federal state, Smend holds that a theory of the federal state should not be content with assuming as the basis of the federal structure two fundamental political tendencies—one federal and the other

[1] Rudolf Smend: *Verfassung und Verfassungsrecht*, p. 127.
[2] Ibid., p. 13. [3] Ibid., p. 18.

unitarian, between which a compromise is made. "The purpose of the federal state is not to amalgamate these two forces as if they were antagonistic, or to bring them outwardly together, but to be a living unity of them, by virtue of an inward necessity—a unity in which they are not two parts but two forces, and which is itself not their common though heteronomous bond, but the individual and common law of their being."[1] So in "a healthy federal state the individual states are not simply objects of integration, but above all things means of integration."[2]

Smend regards the federal state, in Germany at least, though originally formed by treaty, as the manifestation of the racial consciousness of the nation as a whole, in which the individual state is a necessary help to the integration of the *Reich*, and the *Reich* gives to the characteristics of the *Länder*, i.e. the individual states, a value quite different from that given to them by federalistic particularism. He thinks that this was the great original merit of Bismarck's policy in regard to the constitution of the Empire, and though his elaborate system of "checks and counterchecks" had lost something of its elasticity both before and especially since 1890, yet the constitution had retained its "integration force" undiminished. The Weimar Constitution had largely changed this; for instance, the *Reich* was no longer built up on the *Länder*, but since the date of the constitution declarations by the government of the *Reich* had done much to bring about a return to the former position. The guarantee to the individual states of their remaining rights is "not to be understood simply as safeguarding particular interests"; rather will the exercise of those rights be a part of the process of integration of the *Reich*.[3]

This theory of the spiritual basis of the state as the result of personal, functional and material integration is the outstanding theory in German to-day against the legalism of the Viennese Kelsen.[4]

The conflict between Kelsen and Smend is essentially one between Kantian metaphysical formalism and the idealist rationalism. The entire opposition to Kelsen's theory of *Norm-Satz* among the German jurists of our time is due to the modern growth of antagonism to juristic formalism. As both are rationalists and idealistic jurists, conflicts of this kind are, to my mind, only a way of progress to the same end.

[1] Rudolf Smend: *Verfassung und Verfassungsrecht*, p. 118.
[2] Ibid., p. 119. [3] Ibid., pp. 125–126.
[4] Dr. Hans Kelsen: *Der Staat als Integration*, 1930, pp. 14, 22, 33, 53, 54, 68, 69, 88, 91.

None of the German jurists in our time is in favour of the normative formalism of Kelsen's school, on the ground that the modern force animating German jurisprudence is an attempt to find something both novel and adequate to meet the requirements of German political legal conditions; for this its first effort is to find how to repudiate the traditional formalism, and how far juristic system and sociological facts can be synthesised.

H. Heller, one of the most advanced jurists in our time in Germany, clearly indicated that "all prevalent juristic conceptions are the shadow-images of actual social processes," and that "without constant reference to sociological-empirical facts jurisprudence loses its way in the wide sphere of speculative theory."[1] According to him the jurist does not have before him, as the material on which he is to work, a juristic *tabula rasa*, but a culture-reality permeated by law.

As Heller is a unitarist and a jurist he fundamentally disagrees with the pluralist conception. He thinks that the jurist attempts to give a state a personality, but that the construction of the juristic person is always only an attempt at a relative and never absolute rationalisation or relationing of a real will-unity. Behind the juristic mask—"person" originally meant "mask"—there must always remain for the jurist the irrational totality of a living will-unity. In every sphere of law—private as well as public—the will-unity is as person not only possessor, but also creator of rights and duties. In relation to the theory of sovereignty, it is, in his view, the "Leviathan—sovereignty of the state" against which the association-syndicalist idea wages war. The presentation of the sovereignty of the state as embracing all personalities is so little justified that its direct contrary is the necessary postulate of an enlightened conception of sovereignty.[2]

He lays down the unitary conception that "the sovereignty which cannot be localised in any individual representative is, by its very nature, the conceptional symbol for the indissoluble unity of the act of will which constitutes the law and the power of territorially general decision."[3]

He pointed out that to Hegel the fundamental determinant of the state was the "substantial unity as ideality of its factors," and that Hegel had learned from Rousseau—as he himself admitted—that "the sovereign state is to be understood as immanent unity of will."

Heller asserts that the idea "that the state, as universal unity of

[1] H. Heller: *Die Souveränität*, 1927, p. 97.

[2] Ibid., p. 99.

[3] Ibid., p. 106.

determination, which does not in any way derive its determinations only from positive law, *must* be sovereign is an idea which obviously cannot be understood by a legal rationalism which proclaims a legal sovereignty without positive law and a state theory without a state."

This attitude towards Kelsen's normativism results in the conclusion that the state is not identical with the system of law, but is sovereign as the universal unity of determination.

Therefore he asserts that "sovereignty is the quality of a universal unity of determination and action operative over a given territory, by virtue of which it maintains itself absolutely for the sake of the law, and even should occasion arise against the law."[1]

Heller defined the state as being "the unity of determination operative throughout a defined territory, and therefore necessarily unique and sovereign."[2] Firstly he attacks the notion of divided sovereignty; it is impossible for there to be two sovereign unities of determination in the same territory—that would mean the conflict of two supreme unities of will and thereby overthrow the unity of the state and end in civil war.

From this point of view he discussed the theory of the federal state, and especially that of the non-sovereign state.

The conception of non-sovereign state, according to him, is false in our time. For it is the undoubted fact that in every case the federal state as collectivity presents itself as a sovereign state with universal determination in its territory. But the actual relation between the collective state and the member states in the federal state is that the member state, like every province and commune, is, by its very nature, a determinant unity with a particular territory, whereas the federal state, like all unitary states, is by its very nature a universally determinant authority. He admits that it is understandable that for political reasons the particular territorially-limited determinant unities may be given the same designation as the determinant unities of universal scope. But theoretically the conceptions of the state and of sovereignty would be falsified if the member state and the federal state were included in the same conceptional category and sovereignty were attributed to both of them.[3] Either the competence of the member state within its territory is unlimited, and then it is not within the union of the federal state which governs it, is a state, and is sovereign; or it is in some matters subordinate to another universal unity, and in that case it is not sovereign, and the

[1] H. Heller: *Die Souveränität*, 1927, p. 161.

[2] Ibid., p. 110.

[3] Ibid., p. 112.

term "state" means with it something quite different than it does with the unity superior to it.

Heller believes that, juristically considered, "the member state can possess neither a real statutory nor a real constitutional autonomy"; in administration it must be subject in all decisive points to a supervision of the *Reich* (*Reichsaufsicht*) of some kind, and even justice must in certain points be centralised somewhere outside its territory. His criticism of the impossibility of co-ordination between the member state and the federal state is based on the impossibility of the co-existence of two universally determinant unities.

Therefore Heller asserts that the federal state is state "only because it is able in the event of dispute to decide authoritatively which party is in the right either by its court, or by its president, or by some other federal authority." Criticising the actual facts of the changes in federal theory and practice and analysing the controversies associated with the names of Laband, Jellinek, Gierke and Rosin, he asserted that however great the sphere of self-determination of the member state may be, the differences in this respect in the scale from the individual up to the member state are only quantitative, and it is only at the summit of the pyramid and in the case of a universally determinant unity that the difference becomes juristically a qualitative one. The sovereign state alone is master, and no longer subject.[1] Up to this universally determinant unity all subjects of law have their own rights and rights of government, but they are all derived juristically, though admittedly not historically, from that universally determinant unity. Except on this basis it is impossible to grasp the serious fact that there cannot exist within a universally determinant unity any subject of law which cannot be destroyed if its existence imperils that of the sovereign state. However obvious this fact of constitutional law may be in respect of all other subjects of law, it has not been sufficiently stressed in respect of the member state. "But if the right view is that federal action in such case is not war but 'federal execution' of a legal principle decided upon by the universally determinant unity, then the destruction of the member state is as much a juristically theoretical as a practical possibility."[2]

In these conditions a requirement of scientific positiveness is to reserve the name "state" exclusively for the universally determinant unity.

Finally, Heller said that if the conceptions of state and

[1] H. Heller: *Die Souveränität*, 1927, p. 116. [2] Ibid.

sovereignty be taken seriously it is impossible to attribute to the German *Länder* the quality of a state. The apprehension that the federal state might no longer be capable of legal construction is not really comprehensible. The organisation of such a "deconcentrated" state still offers sufficient provisions of positive law which guarantee to the *Länder* a position beyond that of the ordinary province and, indeed, a juristic position. That position is that on the one hand the *Länder* have a prescribed share in the federal legislature, and that on the other hand there is the arrangement, to be found in all federal states, though differing in its precise legal content, that certain matters which would otherwise be dealt with by state central authorities are here left to the self-administration of the *Länder*.

Federalism, according to Heller, is nothing less than decentralisation of state administration functionally, or the theory of confederation applied to organisation. To his unitaristic and juristic mind the scientific legal system with reference to social and political facts is only theoretically valued by the monistic *Thema*, according to which the pluralistic and empirical theory of the state has no validity.

Inasmuch as Heller strictly maintains the juristic category of the state, the political facts as they exist outside his criterion are to be considered merely as exceptions in which the conception of sovereignty in the modern state tends to lose its absolute validity internally as well as externally. As long as the theory of sovereignty is a legal conception, his argument might be admissible, but as the law is the product of the social conditions prevailing at a given time and place, his attitude of social reference for the formation of the legal theory is confined to the legal sphere, outside which the greater political, economic and social forces are ignored. In this respect, as Heller had the rigid conception of sovereignty that "the identification of competence and sovereignty is the expression of a view which make the state a fiction in order to be able to make use of the fiction of the *civitas maxima*," his ultimate conclusion would not be very different from that of Kelsen.

In contrast to him Carl Schmitt is also one of the German progressive jurists whose conception of the state is somewhat theocratic, but is far less juristic than any other. "Sovereign," he said, "is he who decides the exceptional condition." This definition in his opinion can alone do justice to the conception of sovereignty as a conception of limit, because "the conception of limit does not mean a confused conception as in the slovenly terminology of

popular literature, but a conception of the extreme sphere."[1] Carl Schmitt firmly believes that there is a systematic and juristically logical reason why the exceptional condition is in a very special sense appropriate for the juristic definition of sovereignty. Decision in the exceptional case is, indeed, the pre-eminent case of decision. He admits that the tendency of development in the modern legal state is to put the sovereign aside in the sense that the constitution provides definitely who is sovereign and places the holder of the sovereignty outside of the normally operative legal system. But he indicates that whether the very exceptional case can or cannot in fact be eliminated from the world is not a juristic problem; the hope or belief that it can be put aside depends on one's philosophical (especially historico-philosophical) or metaphysical convictions. He, like other of his German contemporaries, is opposed to Kelsen's normative formula, because "the legal system, like every system, is based on a decision and not on a norm."[2]

He clearly indicates his opposition to the doctrine of the norm, saying that "the basis of the validity of a norm can again only be a norm; and state is therefore, from the juristic standpoint, identical with its constitution, that is, with the unitary basic norm." The important word in this conclusion is "unity." "The unity of the standpoint of knowledge demands imperatively a monistic conception," and "the dualism of the methods of sociology and jurisprudence ends in a monistic metaphysic."[3]

He further criticises not only Krabbe, but also the *Genossenschaft* theory of Gierke and Preuss. He indicates that Krabbe's idea, that in the modern state "the interest of law is the highest interest and the legal value is the highest value," approximates to the *Genossenschaftstheorie* in a common opposition to the centralised authoritarian state (*Obrigkeitsstaat*).

Gierke himself had laid down the proposition that "the will of the state, or of the ruler, is not the source of law, but the organ of the nation charged with expressing the legal consciousness derived from the national life." To him state legislation is only the ultimate final seal which the state sets to the law, that is to say, it is what Krabbe calls the mere enunciation of the legal values—an enunciation, however, which is not essential to law, for which reason, according to Gierke, international law can be law without being state law. Schmitt holds that "if the state can in this way be forced to play the part of a mere herald, simply

[1] Carl Schmitt: *Politische Theologie, vier Kapitel zur Lehre von der Souveränität*, 1922, p. 9. [2] Ibid., p. 11. [3] Ibid., p. 21.

proclaiming the law, it cannot be any longer sovereign." Hugo Preuss was able by means of the *Genossenschaftstheorie* to reject the conception of sovereignty as a residuum of the *Obrigkeitsstaat*, and to find in the collectivity which builds itself up from below on association lines an organisation which does not hold any monopoly of rule and therefore dispenses with sovereignty.

But Carl Schmitt was happy to think that Wolzendorff, a later representative of the *Genossenschaftstheorie*, had been led to reverse Preuss's assumption of the state as a corporate commonwealth, and to argue that "the state needs the law and the law needs the state," but the law, as the deeper principle, in the last resort holds the state closely bound, and that the state is the original authority of rule, but it is this as the power of system or as the "form" of the national life and not as an arbitrary compulsion by authority. Wolzendorff's "pure state" is then a state which limits itself to its function of system. It maintains the law as a guardian, not as a commander; but as a guardian it is not merely a blind servant, but a responsible guarantor vested with the power of final decision. Wolzendorff saw in the system of Councils (*Räte*) an expression of this tendency towards self-administration on association lines and to the limitation of the state to its "pure" functions.

No matter what principles Wolzendorff or others may hold, Carl Schmitt argued that the most recent times are characterised by the struggle against "politics"—a struggle waged alike by American financiers, by industrialists, by Marxian socialists and by anarchical syndicalists, all demanding that the unreal dominance of politics over economic realities must be done away with. "In future there are to be only technical and economic-sociological tasks, and not political problems." The prevalent kind of economic-technical thought is no longer able to formulate a political idea. "The modern state seems to have become actually what Max Weber thought it—a great workshop." Whilst on the one side what is political vanishes into what is economic or technical, on the other side it dissolves into everlasting discussion of the generalities of a philosophy of civilisation and history; in both cases the kernel of the political idea—the moral decision with all its claims—is ignored. The real significance of the Catholic anti-revolutionary state philosophies is that they lay such stress on the factor of decision that they ultimately give up the idea of legitimacy from which they started and come to that of dictatorship.[1]

[1] Carl Schmitt: *Politische Theologie, vier Kapitel zur Lehre von der Souveränität*, 1922, pp. 46, 56.

Although Carl Schmitt repudiates the absolutist notion of sovereignty as being that of final decision, yet his acceptance of the authoritarian state of De Maistre and Bonald is an unhappy relation between state and sovereignty which will undoubtedly prove to be inacceptable to other schools of thought.

Whilst admitting that the Catholic political theocracy is an impassable barrier to the pragmatic pluralists, yet his sympathy with the Catholic belief in independence from state intervention has the result that his theory allows of a certain latitude in the strict juristic interpretation of the state.[1]

In his work *Verfassungslehre*, of 1928, Schmitt examined the basic conceptions of a theory of union constitutions. He held that the community of international law is not a treaty and is not based on treaty; it is not an alliance, still less is it a league. It has no constitution in the specific sense of that term, but is the reflex of political pluralism, i.e. of the co-ordinate existence of a plurality of political unities, expressing itself in individual generally recognised rules and considerations.[2] His justification of pluralism in German *Staatslehre*, except that of the *Genossenschaft* school, is at any rate a proof that he attempted to set the theory of the state on the new basis without the incurable bias of juristic belief. Besides an association or alliance (*Bundnis*), he assumes that there is the *Bund*, a permanent union, based on free combination, which serves the common purpose of the political self-preservation of all the members of the union, and by which the general political status of each individual union member is modified with respect to that common purpose.

The union gives to every member a new status which marks an essential change in its constitution even when there is no formal legal change. The compact of union is in one sense a voluntary compact, but it is not so in the sense that it is terminable or affects only certain matters. Rather is it the case that by membership of the union a state becomes a part of a general system.[3]

From the conceptional definition of the union certain consequences follow: firstly, the union treats every member state in its collective existence as a political unity and incorporates it as a whole in a politically existing union. Consequently the result of the union compact is more than a number of particular relations, even though in the constitution the competence of the union is formally restricted.

[1] Carl Schmitt: *Staatsethik und Pluralistischer Staat*, in *Kant-Studien*, Band XXXV, Heft I, 1930, pp. 30, 31.

[2] Ibid.: *Verfassungslehre*, 1928, p. 363.

[3] Ibid., pp. 367–368.

Secondly, the union compact aims at a permanent and not a merely temporary arrangement.

Thirdly, it is a special kind of treaty, i.e. a constitutional treaty. Its conclusion is an act of the constituent power, and its content is at once the content of the federal constitution and a part of the constitution of every member state.[1]

Fourthly, it is an important principle that the union aims at the preservation of the political existence of all members within the framework of the union. In the federal constitution there is, therefore, in every case, though not always in express terms, a guarantee of the political existence of every federal member against each of the others and of all the members against the union. The political *status quo* within the union must be guaranteed, and this involves normally a guarantee of territorial integrity. Conversely the existence and territory of the union must be guaranteed—this is a necessary consequence of the conception of permanency which is essential to the union.

Fifthly, the union has to protect the members against war and external aggression. This means the maintenance of peace within the union. As Haenel said: "It is the unconditional duty of the individual states to settle each and every dispute with another member state only by procedure of law, as prescribed or permitted in the union constitution," and that applies without distinction of federation and confederation. Within the union there can be only the process of "federal execution"; war within a union is tantamount to its dissolution.

Sixthly, there is no union without intervention by the union in the affairs of the member states. As the union has a political existence it must have a right of supervision and the power of deciding as to the methods of maintaining and protecting the union and, if necessary, of intervening for that purpose.

Lastly, every union has as such the right to make war and peace.

Carl Schmitt next discussed the legal and political antinomies of the union and their elimination by the need for homogeneity.[2]

The first antinomy is that the union aims at the self-preservation, i.e. the maintenance of the political independence of each member, whereas the fact of belonging to the union involves a diminution of this independence—i.e. the right of self-preservation of each federal member. The second antinomy is that the federal members seek to maintain their political independence by means of the union and to assure their self-determination, whereas the union,

[1] Carl Schmitt: *Verfassungslehre*, 1928, pp. 367–368. [2] Ibid., pp. 367–370.

in the interest of its security of union, cannot ignore the internal affairs of its member states—i.e. every union leads to interventions, and this affects the right of self-determination of every individual federal member.

The third antinomy is that "every union as such has, independently of the differences between the confederation and the federal state, a collective will and political existence"; consequently, in the union there is a co-ordination of two kinds of political existence, the collective existence of the union and the individual existence of the federal member. Schmitt indicates that "the nature of the union consists in a dualism of the political existence, in a combination of federative common existence and political unity on the one hand with the continuance of plurality, of a pluralism of political individual unities, on the other."[1] Such a state of flux must inevitably lead to disputes which require decision.[2]

The problem of sovereignty is the problem of the decision of eventual disputes. When a case can be settled by a current and recognised rule there is no real dispute, but as soon as the dispute —a political dispute—is not within the scope of any acknowledged rules and goes beyond the juristic decision of a tribunal, the question of sovereignty arises. The most difficult question is who has sovereignty, that is, the right of the final determination of the dispute. Carl Schmitt thinks that previous theories, such as the distinction between sovereign and non-sovereign states or between confederation and federal state, and the doctrine that in the former the sovereignty rests with the individual states and in the latter with the union, only lead to confusion and offer no solution of the problem. So long as the union as such exists co-ordinately with the member states as such, the question of sovereignty remains an open issue between them.[3]

In this respect Schmitt's interest in the theory of confederation as formulated by John Calhoun and later expounded by Max Seydel—a doctrine the scientific importance of which was not diminished in his judgment by the fact that it had suffered political defeat both in the United States and in Germany—is the natural outcome of his inevitable synthesis of the theory of the state with the conception of sovereignty.

But his highest merit to the English, and chief weakness to the German, criticism of his federal theory is his principle that

[1] Carl Schmitt: *Verfassungslehre*, 1928, pp. 370–371.
[2] Ibid. 371; *Staatsethik und Pluralistischer Staat*, in *Kant-Studien*, Band XXXV, Heft I, 1930, pp. 31, 32.
[3] Ibid.: *Verfassungslehre*, 1928, p. 373.

the solution of the antinomy of the union lies in the fact that every union is based on one essential postulate—namely, the homogeneity of all the federal members, i.e. a substantial similarity which creates a concrete natural agreement between the member states and has the result that an extreme case of dispute within the union does not arise.

His suggestion is that this, like the democratic homogeneity, can be in respect of the subject-matter of different spheres of human life; its basis can be national, religious, cultural, social or any other. Apart from the case of the Federation of Socialist Soviet Republics the subject-matter at the present time is mostly the national uniformity of population. A further element of homogeneity is the uniformity of political principle—monarchy, aristocracy and democracy.

On this principle, if homogeneity cannot be maintained in the union, civil war, such as that between the Northern and Southern States of the United States of America, is inevitable. But if homogeneity can be preserved in the union, then all the three antinomies in the federal system are solved and the union is legally and politically possible, and this substantial homogeneity belongs as an essential postulate to every individual principle of the constitution.[1]

Schmitt points out further that the union is a subject of both international and constitutional law. It is a subject of international law because it has necessarily the right of making war, and its members have surrendered to it their own right to do so. The union exists as a subject of constitutional law because it is the holder of certain constitutional powers vis-à-vis the member states. Two essential institutions of every federation suffice to show that it is a subject of constitutional law, namely, federal execution and federal intervention.

The system of federal representation, the centralised system of a federal civil service, and the right of supervision vested in the federal authority, are all characteristic features of the constitutional union.

He is convinced that if the individual states of the German *Reich* have no longer an independent right to decide as to the exceptional case—and this is the prevailing interpretation of Article 48—they are not "states."[2]

Since democracy as well as the union is based on the postulate of homogeneity, the union must be a state in which democratic

[1] Carl Schmitt: *Verfassungslehre*, 1928, p. 379.
[2] Ibid.: *Politische Theologie*, p. 12.

homogeneity coincides with union homogeneity. The natural development of democracy brings the result that the homogeneous unity of the nation extends beyond the political divisions of the member states and sets aside the fluctuations arising from the co-existence of the union and politically independent member states to the benefit of an all-permeating unity.

Therefore Carl Schmitt reaches the conclusion that the synthesis of democracy and federal state organisation leads to a unique and independent type of state organisation, the federal state without federal basis, i.e. a federal state character with constitutional elements in which out of the previous federal organisation elements are taken over into a new state form.

Taking almost for granted that the United States of America and the German *Reich* of the Weimar constitution are no longer unions, his ideal federal state without federal basis is a "political unity of a nation." Especially Article 18 of the Weimar constitution, despite the criticism directed by Anschütz against it, is, to his mind, the only means of transforming the present German *Reich* into the unitary state.[1]

Carl Schmitt's federalism is less juristic than that of any of his contemporaries. He admits that federalism is a branch of political pluralism. The basis of federalism is the synthesis between guarantee and homogeneity. The highest form of federal organisation is the state with homogeneity of democracy and federal organisation.

His rejection of *Kompetenz-Kompetenz* and of the possibility of any solution of the problem of sovereignty on the basis of the federal distribution of power between the union and the member states is quite right, but he cannot go beyond the juristic prejudices as to sovereignty and the state, as Hugo Preuss had bravely done in 1889. I will not discuss here his conception of sovereignty; but his highest development of political creation is democratic homogeneity which is by no means compatible with his political theology and Catholic philosophy of the state. Pragmatic pluralism presupposes that real democracy to which the Germanic conception of formalism or the eighteenth century's French reactionaries afford no precedents.

Schmitt's contradiction between the ideal homogeneity and the traditional influence of the juristic system is open to criticism

[1] Carl Schmitt: *Verfassungslehre*, 1928, pp. 388–391.—Although its regulation corresponds to the ideas of K. Frantz's equal federalism rather than to that of K. Bilfinger's hegemony federalism, this Article, with Article 76, may help to transform the Reich into a unitary state.

from both sides; yet I must admit that his attempt to lead the way to a new German *Staatslehre* in place of the positivist and rational metaphysics proves that he is one of the most progressive political thinkers in the present-day Germany. I still cherish the hope that the German jurists and political thinkers may overcome the difficulty with which they have been traditionally encumbered and attain to the establishment of a new theory of the state.

The development of the German federal idea from 1866 up to the present time has been a struggle for the repudiation of the theory of confederation and its replacement by the theory of the federal state; the latter is based on the constitutional law and the former on legal relationship; in other words, the latter was constituted on the basis of the state and the former on international treaties. Despite all criticism the fact remains that the course of development was the polemic against historical German confederation in order to set up a new Bismarckian federal state. Since Bismarck's federal state was the hegemony of the Prussian state in the German Federal Empire, the federal idea could not in practical functioning be completely realised, especially after Bismarck decided to uphold the monarchical interests against the democratic and socialistic growth of the *Reichstag*. The maintenance of the reserved rights of the southern states might be regarded to a certain extent as a proof that at any rate federalism still continued to exist at that time in the minds of the jurists until Triepel revealed the facts behind the screen of the German federal constitution. In my opinion, even if the federal system were still applicable, as the actual functioning is not consistent with the federal idea, its existence may quite logically be denied. Therefore to those of us who have followed the course of events in these later years it is clear that real federal practice has been manifest since the formation of the Weimar constitution of 1919.

The new political condition on which the Weimar constitution was based was democratic republicanism in the two conflicting forms, socialism and communism, for the revolutary construction of a new Germany. Evolutionary socialism accepted democratic, constitutional and responsible government, and respected the majority decision of the national assembly on the basis of parliamentarism. The principle of "minima" and "maxima" was applied in the course of the transformation in order to base German federalism on the compromise of a new federal idea with the old federalism. The complete failure of the revolution of November 1918 resulted not only in the entire negation of the communist political system, but also in the rejection of socialism

by a return to the capitalist economic solidarity, apart from the creation of the *Reichswirtschaftsrat* as a compromise system which is bound to be inefficient under the existing economic conditions.

The federal idea is essential to any political system, and especially that of the socialist commonwealth, to which Germany is destined to develop in the future, if she is to avoid the two extremes of fascist and communist dictatorship. It is unfortunate that existing German political conditions tend to diverge from the ideal of Hugo Preuss and revert to a new form of dictatorship under the aegis of fascism. The proper development of the federal conception, on the line of the *Genossenschaftstheorie*, should be the test of German political life in the future. The great need of German legal and political thinking is the revival of Gierke's pluralistic conception, and the further development of this idea as the guiding star of the future state.

I have discussed fully the previous theory of federalism in the United States of America and Germany. The history of federalism as it presents itself in the form of the federal state has clearly shown the demerits of its organisation and functioning as a political body.

It lies outside the scope of this work to deal with a detailed classification of the historical federal organisations, since this matter has already been fully treated by the great jurist Georg Jellinek. Therefore I shall confine my discussion to the federal state theory which has been most fully developed in the federal organisation in the present epoch.

In this respect I believe that since the federal state is, as many political thinkers have already indicated, the transitory form from confederation to the decentralised unitary state, its only alternative is the transference from present-day federal mechanism and technique to the decentralised unitary state with federative authority.

I admit that the theory of the federal state cannot introduce its political system directly into the decentralised unitary state owing to the difficulties due to geographical magnitude, as, for instance, in the United States, Canada or Australia. Two remedies may be suggested to mitigate the defects of the federal state mechanism—these are, firstly, the abolition of the second chamber (Senate or Federal Council), and, secondly, a redistribution of the authority and functions of the collective and the individual states respectively. In order to attain this aim the abolition of the second chamber—the Senate in the United States of America and the *Reichsrat* in Germany—is important because these legislative

bodies, and especially the Senate in the United States, are the characteristic orthodox federal organs with what Laband called the function of *Mitgliedschaftsrecht*. All political writers and jurists have emphasised the merit of a "federal council" as the essential feature of federal organisation.

But a few writers—Waitz in Germany, with some dubiety, and Laski in England, without hesitation—argue that the federal council is not essential to the federal body politic, if the Congress or *Reichstag* is based on territorial representation. Is it necessary to substitute regional representation for this? Regionalism by its very nature means the representation of certain spheres of economic activity. If the regional representation is mainly of economic importance, it must be an economic advisory body to the highest legislative organ, furnished to some extent with higher authority than the first chamber.

If the advisory committee system can properly be adopted in the first chamber, the danger of ignorant and emotional decisions by the legislature can easily be eliminated by means of a well-organised civil service, and also the centralised tendency of a single chamber can be mitigated by means of an efficient party organisation on federal lines. Decentralisation of legislation and administration can also be more satisfactorily carried out by such means than by a Senate or federal council which, by giving undue predominance to individual state interests, jeopardises those of the federal state as a whole. It is quite evident that since the basis of representation on the federal councils is the member state, and since all these states are mere historical products, they do not, except in rare cases, represent at the same time the adequate sphere of the decentralised self-governing body. As the modern state is so complicated and tends to increase its work day by day not merely in the administration of political matters, but also in regard to economic problems, no legislative body can effectively operate except with the help of some scheme of devolution. The national legislative organ should frame the general scheme of laws and leave the details of legislation to the self-governing bodies. Decentralisation in the making and administration of law is the inevitable tendency of the modern state. If the socialist commonwealth is to be the state of the future, the decentralised scheme of state functioning has only to hold the balance between the socialist scheme of collectivity and the natural basis of pluralistic individuality in order to avoid the complexity of the modern state. The system of the Senate does not by any means mitigate the need for decentralisation, but serves on the contrary to increase

the complication of the national government and prevent any unified standard system of national legislation and administration. Many cases in the United States of America and Germany have either shown objectionable political practices on the part of the Senate or alternatively have produced the greatest invention of Bismarckian policy—the Prussian hegemony in federal organisation. Triepel's and Anschütz's claims for the new federal republic of Weimar raise this very question.

The second mistake in the federal state organisation is the distribution of state authority between the collective state and the individual states.

This division of powers is the natural course of political genius when the federal state or the confederation is formed by agreement (contract) between individual states hitherto forming independent state entities. This idea of contract is itself derived from the eighteenth or early nineteenth century's natural law and individualistic legal and political conceptions, which are quite incompatible with the new federal conception based legally on public law and theoretically on the pluralistic or *Genossenschaft* idea.

No state can properly be governed without central standardisation of the general principles of legislation; and no political theory can define properly what kinds of legislation should be local or national of their own nature and without regard to time and place. This is indicated by the gradual increase of the authority of the collective state in various federal states, and by the difference in the amount of the direct control of the collective state between the early-formed United States of America and modern federal states such as the Commonwealth of Australia and the German Republic with the federal increase in direct administration. Therefore there is great need for a reform of the constitution of the federal state on the lines of the substitution of a system of decentralised legislation under the general guidance of the national legislature for the hitherto orthodox method of the distribution of powers by the constitution. In this respect the matter of the first importance in the federal state, especially in that of America, is to reform the method of amendment of the constitution so as to facilitate an adequate change which shall serve to meet this demand.

These are the two main points in which the reform of federal mechanism is an essential of progress towards the decentralised unitary state.

Next, if we consider federal technique, the point of first im-

portance is the renunciation of the absolute notion of legal sovereignty.

The previous history of the federal idea has been occupied to a very large extent by the question of sovereignty, i.e. as to whether "sovereignty" belongs to the union or to the member states.

If the state be regarded independently of the conception of sovereignty, then the theory of federalism can be stripped of much of the polemic involved in that conception and recognised as a general theory of association. Modern sociology, and particularly modern psychology, are factors which are making an attack on the authoritarian state theory which has held its ground for so long. If the state is to be considered from a pluralistic and *Genossenschaft* standpoint as a voluntary corporation, with a collective personality territorially based and legally bound, the members and groups whereof, with their own individual personalities, are divided into rulers and ruled, the federal idea is the formation of harmony between plurality and unity on the basis of pragmatic utilitarianism, or, in Gierke's terminology, "unity in plurality" on the ethical basis.[1]

From the study of the federal idea in the past we may deduce that no federal state is an ideal form of the state, and at the same time that no authoritarian unitary state can successfully carry out the modern complicated tasks of the state either under any forms of dictatorship, as Schmitt has pointed out, or under constitutional responsible government, without decentralisation of decision and administration.[2]

The federal idea is not confined to the political sphere of the state, but is the general basis of human organisation. The federal idea is the spirit of the pragmatic interdependence of the pluralistic universe and its theory is the basis of human association of any kind. I may describe the new federative theory as the applied science of that pluralism which is the guiding principle of the theory on which the harmony between unity and plurality is based, or, in other words, the theory of equilibrium.

In order to set up the new federal idea we require philosophy and ethics, but the crucial point is how to free ourselves from

[1] By personality I do not mean the juristic personality of the positivists or Gierke's corporate personality, but a legal unit having rights and duties.

[2] Then what is the ideal theory of the state? I leave this question to my future work on the *Pragmatic Approach to the Theory of the State*, but I am convinced that the decentralised unitary state, with full recognition of international control, will be the state form realised in the twentieth century.

their dogmas and their hypotheses and to place the theory of unity in plurality as the everlasting unchanging basis of human organisation.

In this respect is it necessary to emancipate ourselves from our traditional belief in the definitions of philosophy? By what means can we free ourselves from the existing code of ethics in order to set up a new ethical justification of a new social order? The federal idea in this wider sense is not merely Proudhon's ideal of the harmony of liberty with authority, but should be developed as the basic standard of the community. The future socialist commonwealth in politics should aim at harmonious relationships between rulers and ruled. Relativity is the basis of pluralism on which the relation of authorities and liberty and of organisation and function should be founded.

The efficacy of federalism, as Bryce, a Liberal thinker, pointed out, is not to be judged by "comparison with the ruling of natural or divine order," i.e. by an "invisible hand," nor, as Gierke and Preuss pointed out, be examined by analogy with the organic theory of natural science, but it should be scrutinised by the equilibrium of the forces of plurality and unity, i.e. the scientific rationalisation of the desires of individuals and groups in creative co-ordination with the collectivity of the whole.

If analogical interpretation should be applied to social science, any social or political theory tends to diverge from realism. Realism is the basic conception of the federal idea, where should be based on pragmatic philosophy devoid of any Procrustean principle.

Consequently political federalism in its most modern conception should be the rationalising of the authorities and functions of the state, in a harmony of the distributive and collective systems, in order that there may be continuous exercise of the freedom of individuals and groups within the collectivity of the state.

The new federalism, therefore, should have an important mission politically or economically for the present and future advanced communities as well as for the less advanced.

The future application of federalism will not be confined to the states but will extend also to the world communities. So far as the existing state system continues, though the obsolete conception of sovereignty may disappear in the future international community, the first world community should be on a federal state basis. International law in the future should be codified not on the individualistic law basis of contract, but on the public

law basis of collectivity. International federalism is the new feature which has already manifested itself.

The present actual and theoretical obstacle to the formation of the world community is the continued existence of the conception of absolute state sovereignty. So long as there is unequal distribution of natural resources and of population and wealth in the modern world, the problem of state sovereignty will remain a menace to the creation of the international federal state. Only by means of a world-embracing socialist commonwealth will the possibility of the world state come within the sphere of practical politics.

The philosophic zeal of the Abbé de Saint-Pierre and the political genius of Rousseau with regard to the *Project of Perpetual Peace* in the eighteenth century were not wasted; their project has been partly realised more than a century later by the creation of the League of Nations out of the great drama of the World War. Robert Owen's appeal to the governments of Europe and America on behalf of the working classes in September 1818 at Aix-la-Chapelle, when he concluded by saying: "Yes, the finest opportunity that has ever occurred in history now presents itself to this Congress, to establish a permanent system of peace, conservation, and charity, in its true sense, and effectually to supersede the system of war, destruction, and of almost every evil, arising from uncharitable notions among men, produced solely by the circumstances of birth"—gave birth a century later to the International Labour Organisation.[1]

Not only the League of Nations but present-day international bodies in general cannot, from the political and legal point of view, go beyond the nature of confederation. But the best international organisation in our time is the International Labour Organisation which, though juristically no more than a mere confederation of sovereign states, yet in practical functioning and system is not a mere association of states, but is bound to assume a collective personality in its organisation and an independent legal validity of its conventions, quite different from those of any other international associations, by reason of its representation and its functions and systems. Since international law itself as well as its organisation is based on the individualistic theory, it has not been possible for any international legist, however great his capacity, to make any fresh contribution to the development of the federal idea. But I will not say more on this matter, which will be discussed fully on another occasion.

[1] Robert Owen: *The Life of Robert Owen*, Appendix O, p. 222.

As Proudhon predicted, federalism in our century extends to economic organisation as well as various social institutions. Proudhon regarded federalism as the ideal compromise between liberty and authority, the highest achievement of political genius. He believed also that the true problem to be solved, unless humanity was to recommence "a purgatory of a million years," was not a political but an economic one.

He projected the creation of an agricultural-industrial federation as the ideal means of preventing the misery resulting from the existing economic structure of society. He defined it as tending "to approximate more and more to equality by the organisation, at a lower price and in different hands to those of the state, of all public services, by mutual credit and insurances, by the guarantee of work and instruction, by a combination of works which permit each worker to become, from being a simple industrial worker, a salaried master." This is the application, on the highest scale, of the principle of mutuality, of the division of work, and of economic solidarity.

Such a revolution could not be the work of a bourgeois monarchy or of a democratic unity, but could only be made in a federation; it could not be brought about by a unilateral or beneficent grant, but only by what Proudhon called a federal contract. His economic ideas, as he said, can be expressed in the three words: Agricultural—Industrial—Federation; and his political views can be reduced to the formula: "political federalism or decentralisation."

J. Paul Boncour's economic federalism, in 1901, is simply his view on this matter from the group theory standpoint. Syndicalist pluralism is a mere reflection of this economic federalism on the producer's side. Moreover, the practically important thing for economic federalism is at the present time the functional federalism which has as its objective trade union federalism. Not only nationally but also internationally this is exemplified by the organisation of the British Trade Union Congress, the Allgemeiner Deutscher Gewerkschaftsbund, the International Federation of Trade Unions and the International Transportworkers' Federation, the last of which is probably at the present time the best organised international trade union organisation.[1]

This subject offers an interesting study in the growth of the trust and cartel and trade union movements and the introduction of rationalisation into the economic system, not merely in the

[1] The Stockholm resolution provided for regionalism in territorial federalism by means of functional representation at the International Transport workers' Federation Congress, 1928.

sense of *laissez-faire* economic federalism, but also in the federative organism of the transitory system of the capitalist combination, and especially in the future system of planned economics.

No matter what economic system may prevail in the future economic community, the theory of equilibrium, i.e. what a Japanese economist calls the theory of allotment equilibrium, should be its basic conception, and this will, no doubt, proceed from the new pragmatic federalism.

In the modern state, where the fallacious system of dictatorship does not exist, political liberty has already been secured, but owing to the inequality of the distribution of wealth and the resultant social evils economic liberty has not yet been attained in the communities of to-day. The modern community is still deeply rooted in the capitalist economic system.

No proper and adequate political theory can be adopted without a transformation of the social basis of economic inequality into a new system in which real economic toleration will cause true democracy to come into being.

The remarkable phrase of Laski: "After all political systems must be judged not merely by the ends they serve, but also by the way in which they serve those ends" is of equal importance in the investigation of the new federal idea. In this respect it is quite true, as he points out, that "we are in the midst of a new movement for the conquest of self-government."

The mission of political thinkers in our time is to find out what Maitland calls "something that contract cannot explain" in response to Laski's ideal of "creative co-ordination," which is to some extent outlined from the legal point of view by Gierke in his lifelong efforts to establish the theory of harmonious co-ordination between unity and plurality in all human associations.

I sincerely believe that the decay of orthodox federalism marks the last phase of the existing régime, but the true federal idea will shine in the future as the guiding star of truth, pointing the way to the attainment of that real democratic community which mankind is endeavouring to secure without the misery of dictatorship or the catastrophe of anarchy in this age of transition to a new social order.

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