Carl Schmitt
DICTATORSHIP

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From the origin of the modern concept of sovereignty to proletarian class struggle

Carl Schmitt

Translated by Michael Hoelzl and Graham Ward

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Love dictates

For
Thilda and Iriyana

Contents

Introduction

Michael Hoelzl and Graham Ward

It's 1919. The Great War is over, Europe is exhausted and monarchy in tatters. Wilhelmine Germany, the epitome of the authoritarian state, lies in ruins. The Weimar Republic, declared on 9 November 1918, is assessing just how great the challenge that it faces is; how volatile the predicament. The young Carl Schmitt (born in 1888), author already of four books and six articles (two of which will be important precursors to *Die Diktatur*), is in Munich. With brief excursions to Strasbourg, he has been in Munich since March 1915, when he joined the general staff of those who were in charge of implementing the Bavarian state of law of 1912 and administering martial law.[1] With the war over the administration becomes increasingly difficult. In particular, the communists (inspired by the revolution in Russia) are posing a radical threat, such that civil war is looming. They take to arms in the streets in Berlin throughout the winter of 1918–19, battling for control against the Reich Defence (Reichswehr), of which Schmitt's administration is a part. In March 1919 Hungary is established as a communist regime; this leads to a bloody conflict in Berlin, with noted atrocities committed by the Free Corps to suppress the uprising. In Munich, closer to home, on 6 April, the socialist radicals proclaim a soviet republic, throwing public order and tranquillity to the winds. Schmitt's office[2] is at the centre of the army and Reichswehr resistance; and, although the revolt is quashed, it is not until the beginning of July 1919 that Schmitt is released from his official duties. Even then, he remains in Munich, finding work eventually as a lecturer in the School of Business Administration, after he successfully finished his postdoctoral thesis

(Habilitationsschrift) in 1916: *Der Wert des Staates und die Bedeutung des Einzelnen*. On 11 August the Weimar Constitution comes into effect. This is the immediate background against which Schmitt starts his groundbreaking *Dictatorship*.

Munich and the Aftermath of the Great War

To some extent, even during the war, Schmitt had found time to reflect upon what was happening around him and upon the work his own office was concerned with. This gave rise, in his mind, to an important distinction between 'law' (*Gesetz*) and the necessary 'measures' (*Maßnahmen*) that had to be taken in times of crisis. In 1916 he published a long essay entitled 'Dikatur und Belagerungszustand: Eine staatsrechtliche Studie',[3] and in 1917 he followed it with another essay: 'Die Einwirkungen des Kriegszustandes auf das ordentliche strafprozessuale Verfahren'.[4] Both essays dealt with the legality of the state of siege in Germany – a topic at the forefront of the final chapter of his book, which was based on the Prussian law of 1851. Both essays discussed the suspension of constitutional law in a time of danger to the security, stability and unity of the nation. The state of exception, if not a political reality, always remained a political possibility in Schmitt's conception of constitutional law. Both essays endorsed a strong notion of the state, distinct from a liberal emphasis upon the individual; and both advocated the need for a strong commander: a commissary dictatorship or a power delegated by a constituted sovereignty. This dictatorship must institute temporary measures that are unconstitutional during normal life and would not lead to its reestablishment. To understand why these essays appeared when they did is to understand how dictatorship was an issue in Germany even before the end of the First World War – and hence to understand why the issue could come to prominence once again with the Weimar Republic.

Under Kaiser Wilhelm II, to all intents and purposes, Germany was governed by an absolute monarch, but the monarchy had increasingly withdrawn from political life, making Wilhelm's position a matter of decoration. The power lay in the hands of the military. Hence, at the end of 1916, the army had appointed the generals Hindenburg and Ludendorff to offices of supreme command. Although the Kaiser

did not formally abdicate until 9 November 1918, his acceptance of the two appointments was in effect an abdication. Hindenburg and Ludendorff were in charge of the war effort, of foreign and domestic policy, and even of the appointment and dismissal of the chancellor. As Helmut Heiber (1993: 3) puts it: 'In this way constitutional monarchy, against which the demand for parliamentary reform was bound to be directed, had turned into a military dictatorship that was virtually unassailable – at least in wartime.' Schmitt, then, as a fledgling constitutional lawyer and a member of the armed forces, was already aware of contemporary forms of commissary dictatorship. Ludendorff, considered the real political intelligence behind the military command, did not step down from office until 26 October 1918, 'resigning as if he were just another general and not the virtual dictator of the Reich' (Heiber 1993: 6; see also Ludendorff 1919). It was only with this resignation that the army capitulated to the Reichstag (making the pursuit of an armistice more possible), so that a parliamentary government could be announced on 28 October, through an amendment to the existing constitution. Dictatorship was not, then, a new idea or practice.

At this point Schmitt was technically still employed by the army; but Munich was the scene of immense chaos. Ludwig III, the king of Bavaria, abdicated even before the Kaiser, on 7 November; and three different governments were wrestling for control. Kurt Eisner, an independent socialist, declared a Bavarian republic and parliament, winning over the majority of the socialists – people who would have been called members of 'Soviets', that is, the bolshevick units of government. Schmitt was certainly part of one – the soldier's council; but he would certainly have opposed the other two – a Bavarian workers' council and a Bavarian peasants' council. In the chaos, the administration was still in the hands of the military, now under the auspices of the soldiers' council. Three modes of government were at loggerheads: the social democracy under Eisner; the old regime of the army, which was strongly anti-democratic and on the whole indifferent to parliament; and a faction seeking a German republic based on the power of the proletariat rather than any parliamentary democracy. Bavaria quickly became not the exception but the rule, particularly because, after the amendment to the constitution made

in the Reichstag and the very announcement of a parliamentary government, the session of the Reichstag was adjourned, leaving a power vacuum in its wake. How much of this chaos Schmitt saw is conjectural, but from 1917 on and throughout this whole period he was feverishly doing research for a book on political romanticism (*Politische Romantik*), which was published early in 1919 and became the immediately predecessor of *Dictatorship*.

Political Romanticism

This book is often seen as the sign of Schmitt's new political viewpoint. As his French biographer David Cumin (2005: 41) puts it, 'the erstwhile aesthete and disputant of the literary café-life society became a political jurist'. Given Schmitt's earlier essays and the fact that the 1919 edition of the new book is very much indebted to his appreciation of literature, this 'conversion' can be overplayed. But the book is important for the way in which certain Schmittian themes are developed. Most notably, *Political Romanticism* marks a turning point in method. Schmitt may reflect more fully upon this method later on, in his *Concept of the Political*, where he frames it in terms of a necessary distinction between friend and foe (as analysed by Schwab 1987 – an influential essay); but the genre of writing correlative with this distinction, the polemic, announces itself here. The enemy is clear: it consists in a certain aesthetic understanding of romanticism, from which both Roman Catholicism and the political counter-revolutionary voices of the French nineteenth century (de Maistre and de Bonald) – and indeed the English eighteenth-century Whig Edmund Burke – must definitely be distinguished. The understanding of romanticism at stake here was centred upon the individual who endlessly composed narratives about the self (*roman*); and this was the main target of Schmitt's critique. The romantic individual, he believed, was incapable of making decisions. This theme was then taken up and developed into a theory of 'decisionism' in *Dictatorship*. The Catholicism that emerges in *Political Romanticism* is quite different from that espoused by the early German romantics, in particular Friedrich Schlegel and Adam Müller, both Catholic converts, or Novalis. Schmitt draws this distinction deftly, by dismissing Schlegel

in a couple of pages as more of an opportunist than political activist; by concentrating on Müller's public career rather than on his private and hidden Catholic beliefs; and by scattering his observations on Novalis, 'who died early'. Thus 'Catholicism is not something that is romantic [. . .] the Church itself was never the subject and the bearer of a romanticism' (Schmitt 1986: 50). Indeed in Germany romanticism is rather a Protestant affair, because it is profoundly associated with the belief in the absolutism of the individual.

But method is not the only point of interest in *Political Romanticism*. There are also Schmitt's concerns with the 'metaphysics' that inescapably informs cultural movements, bourgeois liberalism, Roman Catholic political conservatism, and what, in his 1924 Preface to the second and much amplified edition of *Political Romanticism*, is described as 'a phenomenon that is intrinsically and radically self-contradictory, namely, liberal bourgeois democracy' (Schmitt 1986: 13). Why are these themes important for this Introduction? Principally because *Dictatorship* is not a polemical text: it is historical, sociological and genealogical, but it is unclear whether it has a particular political viewpoint to expound or excoriate (and this is true even of the last and quite scrappy chapter, which deals with the early formation of the Weimar Constitution). We will discuss the complex structure of the book below. Even when the long Appendix detailing the difficulties of Article 48 of the Weimar Constitution was added to *Dictatorship*, the book only implicitly provided its own political opinion. *Political Romanticism* was not a creation of the same genre; nor were the two volumes that followed the publication of *Dictatorship*. Both *Political Theology* (1922) and *The Crisis of Parliamentary Democracy* (1923) are explicitly polemical. In the former, the enemy is the classical liberal tradition of the eighteenth century (so the metaphysics of what might be called the sovereignty of the self prior to romanticism is now extended backwards), and in the latter the enemy is the endless chattering of parliamentarism itself, which emanates both from the self-contradictory nature of liberal democracy and from the romantic aestheticising of the political. It is this chattering that renders political decision making impossible. There is therefore no political position that Schmitt adhered to throughout these early years of the Weimar Republic. But did a political position emerge as he wrote

Dictatorship? If *Political Romanticism*, *Political Theology* and *The Crisis of Parliamentary Democracy* define the enemy, then who is the friend – or who are the friends?

For a moment we need to return to who the enemies are, particularly on the eve of a highly contested and contestable National Assembly, voted in to deal with two most prominent issues: the constitution and the finalisation of the peace treaty. The Assembly began its work on 6 February 1919, when *Political Romanticism* was in press. What is politically interesting about this book is neither Schmitt's dismissal of romanticism as politically feckless and rootless nor his rescue efforts on behalf of a political engaged Catholic conservatism, but rather the way romanticism installed a metaphysics of absolutist individualism. For Schmitt, the engagement with romanticism and the implicitly apolitical nature of its aesthetics raised the issue of sovereignty. He contrasted the concept of divine sovereignty in Malebranche's metaphysics (which, on his interpretation, overplayed God's pre-eminence in worldly matters)[5] with the imperialism of the romantic ego. In his view, this same metaphysics governs German bourgeois liberalism. The 'endless conversation' that characterises the aestheticised politics of romanticism is then institutionalised by parliament. Schmitt comes to see this ever more clearly in *The Crisis of Parliamentary Democracy*, as he explores the metaphysics of liberalism beyond its economic commitment to capitalist *laissez-faire* (this was rather an English concern of the political scientist Harold Laski).[6] In that book he claims that liberalism's 'consistent, comprehensive system' is founded upon 'discussion and openness' (Schmitt 1985: 34–5). He calls this state of affairs 'a new evaluation of rational thought, a new belief in instinct and intuition that lays to rest every belief in discussion' (ibid., p. 66). Nevertheless, the Weimar Reichstag staggered on from day to day and, for Schmitt, its endless discussions must have seemed a more modern manifestation of romanticism's apolitical commitment to 'conversation'. Furthermore, as Schmitt observed, the fact that both election to the Reichstag and election to the office of president of the Reich (*Reichspräsident*) lay in the hands of the people only raised questions as to what the sovereignty of the people actually consisted of and how this 'sovereignty' was to be accessed and assessed so as to avoid private interests. Such problems, and the endless discussions

that followed from them, were fundamental to Schmitt's perception, expressed in *Political Romanticism*, that liberal democracy was a self-contradictory notion.[7]

As *Political Romanticism* appeared and Schmitt was pursing the concept of sovereignty in terms of the evolving nature of political dictatorship, nowhere was sovereignty a matter of the moment more than in Munich. In reconceiving the Reich and the new constitution, the National Assembly had to tackle the older political battles between unitarianism (should the Reich remain a single unit, as it had been created by Bismarck?) and federalism (Bavaria was always most insistent upon its differences from Prussia).[8] In the National Assembly Kurt Eisner proclaimed Bavaria's rights to federal sovereignty most vociferously, and on 21 February 1919 he was murdered by a German nationalist. If this destabilised the situation in that state, where Schmitt was working, it most particularly galvanised the communists with thoughts of revolution. At the beginning of April the new Soviet Republic of Hungary had been declared and, in rapid succession, the Munich Central Council proclaimed and established the Soviet Republic of Munich and Southern Bavaria, which was then taken over by the Munich communists. The Free Corps forces under Johannes Hoffmann (the elected Bavarian minister) and Gustav Noske (the German minister of defence) descended quickly upon Bavaria, and Munich in particular. Munich was only taken in the early days of May. The Soviet Republic had murdered ten Free Corps hostages; the Free Corps retaliated with the summary execution of hundreds of communists. Schmitt was caught up in these struggles and he makes fleeting references to them in *Dictatorship*.[9] Perhaps it is also interesting that, throughout the Bavarian uprising and its suppression, the National Assembly was debating the controversial clauses of the Peace Treaty. These discussions were protracted throughout June, and there was some possibility of their being rejected by the generals. The generals were considering the idea of establishing a military dictatorship with Noske at its head. Would this have been along the lines of Schmitt's commissary dictatorship? The question can be legitimately raised, given the awkward prominence in *Dictatorship* of the long Excursus on Wallenstein as an example of such a dictatorship.

One further theme in *Political Romanticism* needs to be addressed here, in view of both *Dictatorship* and *Political Theology* that will follow it; and that is Schmitt's conception of the relationship between Roman Catholicism and political conservatism. Schmitt was coming from a family committed to the Catholic Centre Party. Whatever his actual position on the Catholic church, there is no doubt that Schmitt's Catholic background, his exposure to the tensions of being part of a Catholic community within the larger Prussian state, whose official religion was Protestantism, and his respect for the Catholic exercise of spiritual authority lie behind his total rejection of a soulless politics rooted in materialism: bourgeois liberalism on the one hand, socialism on the other. Both movements were profoundly anti-clerical. The Weimar Republic put an end to the 'throne and altar' alliance of Wilhelmine Germany; in fact Roman Catholicism underwent a pastoral and liturgical renaissance during the Weimar period, although there are few traces of this within Schmitt's own writings.[10] Although he contributed articles to the newly established Catholic journal *Hochland*, he nowhere embraces the enthusiasm of this Roman Catholic revival. Nevertheless, his interest in political theology is important for his understanding of secularism. We will say more on this subject later. *Political Romanicism*, while rejecting the sovereignty of Malebranche's eighteenth-century God, points to a crisis of sovereignty that this rejection announces – along with the rejection of absolute monarchy, the romantic imperialism of the individual, and even democracy's sovereignty of the people. But the older state religion had forged a very powerful nationalism – an arrogant one, which had sent millions to their death. While only the ardent monarchists wanted to see a return to that old-style nationalism, what the Weimar Republic desperately needed was a sense of German identity and self-esteem after the trauma of defeat – albeit one achieved under republican and democratic rule.[11]

Politically, the Catholic Centre Party did remarkably well in the elections to the National Assembly, sending ninety-one members and forming the coalition government with the social democrats. In the first elections to the Reichstag in June 1920 the Centre Party lost seats, returning only sixty-one members. But this was partly due to events that, once more, Schmitt witnessed – because they took place

in Bavaria. If the problems from the left could be bloodily squashed with the help of the police, the Free Corps, and the newly formed military – the Reichswehr – the problems from the right were socially and culturally more ingrained. In March 1920 came the infamous Kapp Putsch that, for four days, established a military government in Berlin that was recognised in Silesia, Pomerania and East Prussia. Unfortunately Kapp was unable to get the backing of the leadership of the Reichswehr, in particular from General von Seeckt, and it collapsed under troubles in the form of a general strike and a communist revolt in the Ruhr area, which was staged by a Red Army of 50,000 men. The revolt was ruthlessly dealt with, but both actions demonstrated a remarkable rejection of liberal democratic politics; they also demonstrated that the continuing stability of the republic relied upon the conservative *ancien régime* embodied in the Reichswehr, which paid at least lip-service to the idea of a republic. But not so back in Munich, where Hoffmann (who had quelled the Red Army revolt) was now brought down by a coalition of the People's Party in opposition to the Reich. The Bavarian People's Party was an off-shoot of the Centre Party and gained twenty-one seats in the elections to the Reichstag. The Catholic political wing remained strong – in fact it remained one of the stabilising forces through the Weimar period.

Schmitt's restoration, in *Politicial Romanticism*, *Dictatorship* and *Political Theology*, of the conservative Catholic voices opposed to the French Revolution – de Bonald, de Maistre and Cortés – was then timely, to say the very least.

These contemporary events increasingly led Schmitt to embrace political realism and to appreciate the importance of the concrete situation (*Lage der Sache*) through a sociological rather than a positivist or pure conception of law.[12]

Dictatorship

Carl Schmitt's *Dictatorship* is rather complex in its structure. It comprises an historical analysis of the legal concept of dictatorship, which in turn includes a long Excursus on Wallenstein – also called *der Friedländer*, 'the man from Friedland' (in Bohemia) – and an Appendix with a detailed examination of Article 48 of the Weimar

Constitution (as noted already, the Appendix appeared only from the second edition on). Initially, in 1921, *Dictatorship* was published as a book whose author aimed to demonstrate how the concept of dictatorship has changed from its ancient Roman origins to its modern meaning, through integration into a theory of the constitutional state. The main thesis throughout this historical analysis of the transformation of dictatorship is that what was a *commissary* dictatorship has become a *sovereign* dictatorship. As Schmitt writes:

> The contradiction between commissary and sovereign dictatorship, which will be developed in what follows as the fundamental deciding criterion, is here already indicated by the political development itself, and it resides in the nature of the matter. But, because historical judgement is always dependent on the experience of its contemporary context, the sixteenth and seventeenth centuries were less interested in the development that led from democracy to Caesarism: the absolute monarchy that emerged at that time did not find its legitimation in any consensus of the people; it saw itself as legitimised through God's grace, and it placed itself against the estates – which means, in this context, against the people. The linguistic importance of the word 'dictatorship' – which led to its extension to all those cases in which one could say that an order is 'dictated' (*dictator est qui dictat*, 'dictator is the one who dictates') and to a use of language that undoubtedly contributed to the dissemination of the concept – was not evident then.

In this summary of the content of the historical part of the book we can already identify some of the key elements of Schmitt's later theory of law, and in particular of his decisionism. First, a mandate given by a single ruler – commissary dictatorship – has turned into a mandate given by the people (*pouvoir constituant*), becoming sovereign dictatorship (as he calls it). Secondly, this transformation from commissary to sovereign dictatorship is the result of the process of dictatorship itself; thirdly, it is a political matter; and, in the fourth place, Schmitt seems to indicate a process of secularisation that accompanies the new concept of dictatorship. The last feature – the indication of secularisation as an historical process – was famously formulated by Schmitt in his *Political Theology* of 1922, where he

writes: 'All the significant concepts of the modern theory of state are *secularised* theological concepts' (1996: 43). In *Dictatorship* his theory of secularisation is less general; it is in fact narrowed to a very specific area, delimited by the concept of exercising dictatorial power and having two opposite types of legitimation for it: the divine right of kings and the people's right. Nevertheless, in note 23 to Chapter 3 (see p. 271), Schmitt briefly mentions Leibniz within the context of a theory of secularisation that will be outlined later – and, to a certain extent, in his *Political Theology*. In *Political Theology* he also refers to Leibniz, quoting his observation that there is a similarity between jurisprudence and theology (Leibniz 1748: 27–30): they both rely on reason on the one hand, on Scripture on the other. In his comparison, Leibniz creates a number of correlations to indicate how theological ideas became juridical concepts. For example, there is a correspondence between the verdict of excommunication by the church and the legal concept of being outlawed; between infidels in the religious sense and rebels against the state; between doctrines of the holy Scripture and the word of God on the one hand and the law and its interpretation on the other; between eternal damnation and capital punishment (the same concept, secularised in a legal framework); and between the forgiveness of sins and the right to pardon. Leibniz concludes: '*Breviter tota fere theologia magnam partem ex iurisprudentia pendet*' ('In short, almost the whole of theology depends to a large extent on jurisprudence'). For Schmitt, the most significant similarity between jurisprudence and theology is that of the 'double principle', which he takes over from Leibniz. Both disciplines are based (1) on reason – as there is a 'natural' jurisprudence, so too there is a 'natural' theology[13] – and (2) on tradition, which Schmitt limits to Scripture – 'a book containing revelations and instructions'.[14] From that point on, secularisation means for Schmitt the dominance of reason over the authority of Scripture – or, as he will later say in *Political Theology*, divine authority, the position of God, has been replaced by other, mundane and secular principles like humanity, history, life, economy, technology and so on.[15]

Returning now to the list we started – features of Schmitt's later legal conception that surface in the historical part of *Dictatorship* – we can add to them next a subtle critique of legal positivism in the

assertion that legal concepts are always dependent on the experience of contemporaries and therefore are always in flux. Finally, Schmitt finds that the term 'dictatorship' is used very loosely and appears in a wide variety of contexts. The book reflects a certain amount of anger about this from a scholar well versed in the classical tradition (Schmitt came close to studying philology). In this respect *Dictatorship* must also be considered the first systematic, historically based treatise on the concept of dictatorship. In it Schmitt seeks to clarify the very nature of the concept as a legal and constitutional instrument.

The Appendix has a different style and methodology and appeals to a different audience. The analysis of Article 48 of the Weimar Constitution – which regulated the state of emergency and subsequently helped to define extraordinary powers for the president of the Reich in exceptional situations, so as to enable him to take extraordinary measures to restore public security and order in those unpredictable and idiosyncratic situations – is developed from a keynote address given in 1924 at the conference of German Constitutional Jurists, held on 14–15 April in Jena.[16] Here it is sufficient to point out that the historical analysis, in combination with the Appendix of *Dictatorship*, can be seen as the first step towards decisionism as a legal and political theory, as Schmitt advocated and developed it.

In terms of its scholarship and erudition, *Dictatorship* is the key witness for an early phase in the development of decisionism. Schmitt derived decisionism as a legal and political theory from a reading of Machiavelli's *The Prince* and Thomas Hobbes' *Leviathan*. But in that context the origins of his understanding of this notion can be traced back to his book *Gesetz und Urteil* (*Law and Verdict*) of 1912, as Schmitt himself reflected in the Foreword to the 1986 edition of that book (see Reinhard 2009: 39; *Gesetz und Urteil* had also been republished in 1968). The question posed by *Dictatorship* is this: How can Schmitt's decisionism be understood within a juridical and also political context?

In fact decisionism, construed as a coherent legal and political theory, does not exist. Schmitt never published a manifesto that outlined the principles of decisionism, and none of his books contain the word 'decisionism' in its title. Nevertheless, decisionism can be reconstructed if Schmitt's *Law and Verdict*, *Political Romanticism*,

Dictatorship, *Political Theology*, *Concept of the Political* – and even his *Political Theology II*, published in 1970 – can be seen as fragments or building blocks (*Bausteine*) of a decisionist theory.

Schmitt's conception is both legal and political. The legal aspect of decisionism must be understood as a response to the so-called *Methodenstreit* ('conflict of methods') in jurisprudence, which began in the first years of the twentieth century (Stolleis 1999: 52). Essentially, in that opening decade legal theory in Germany struggled with its neo-Kantian heritage;[17] this struggle can be summarised as a debate around the question whether the system of law guarantees justice or not. In other words, can a system of law cover all concrete circumstances sufficiently? For example, does a judge need to issue a decision that creates a new law so as to cover gaps in the legal system, because a similar case has not occurred before – and therefore no legal norms can be applied in *this* specific situation?

Two answers were formulated. The first answer granted the judge a certain autonomy: if no legal prescriptions were available, the judge should arrive at his decision on the basis of his own understanding and in accordance with existing law *and* custom. This view was advocated by members of the *Freirechtsbewegung* ('free law movement'), whose central figures were Ehrlich, Stampe, Kantorowicz and Fuchs (see Rickert 2008: 1772–7).[18] In an essay based on a series of lectures, Ernst Stampe (1911) outlines this movement's understanding of the law. In general the *Freirechtsbewegung* took place within private law, as a reaction to the problem that a system of norms and regulations can never fully cover all the situations – and also in answer to this problem. It centred around the question of the judge's freedom in passing a judgement. Schmitt's *Dictatorship* can be viewed as taking this question and applying it in particular to public and constitutional law.

The second answer was formulated by Hans Kelsen in his Habilitationsschrift of 1911 (Kelsen 1923): there Kelsen advocated, along neo-Kantian lines, a pure theory of law, where judgements are given following existing laws. He wanted to purify legal practice from all the political, sociological and arbitrary elements that might distort it.

Similarly, the political aspect of decisionism was directed against

legal positivism and against Kelsen's theory of a pure law.[19] The debate culminated in a direct confrontation between Schmitt and Kelsen on the question of the relationship between the sovereign and the constitution. Who should be the guardian of the constitution in times of crisis? Who should be given extra-legal powers to save the constitution and to restore public order and security when the welfare of the people is under threat? In other words, who is the sovereign? For Schmitt, the answer is clear: 'Sovereign is the one who decides on the state of exception' (1996: 13). Here, in the opening sentence of *Political Theology*, it becomes clear that sovereignty is essentially inseparable from the state of emergency.

The best summary of *Dictatorship* was given by Schmitt himself:

> Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on one hand the idea of a normal situation that a dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship. The concept of dictatorship has emerged during the last few centuries in state theory and in politics, but the term has been generally used with great imprecision, in situations where an order is followed or a rule is being exercised. The concept develops from a legal Roman institution called dictatorship. (Schmitt 1926: 1448; see also Schmitt 1995: 33–7 and the comments made by Maschke, his editor, at p. 37)

In the 1926 article Schmitt distinguishes six stages in the historical development of the meaning of the concept of dictatorship. The starting point is Roman law (Part 1); this is followed by a very brief examination of dictatorship during the Renaissance (Part 2); then Schmitt discusses the two main aspects of his own theory of dictatorship: 'dictatorship of the state of emergency' (Part 3) and the transition 'from commissary to sovereign dictatorship' (Part 4). The summary concludes with two further short analyses: the dictatorship of the Reich's president (Part 5) and the dictatorship of the proletariat (Part 6).

As far as the historical analysis of the modern concept of dictatorship is concerned, only Parts 3 and 4 are relevant. In Part 3, which deals with the 'dictatorship of the state of emergency', Schmitt writes: 'During the nineteenth century there emerged a typical institution for a state of emergency as a legally organised instrument. And this instrument was frequently called *dictatorship*' (p. 34). One resorted to this legal instrument for emergency cases in times of war and under siege (ibid.). In Part 4, 'Commissary and Sovereign Dictatorship', Schmitt condenses the principles of decisionism:

> From the historical development of the regulation concerning the state of emergency it is obvious that essentially two types of dictatorship exist: namely a dictatorship that, despite all its extra-legal authorisation, remains within the prescriptions of a constitutional order and in which the dictator is constitutionally mandated (commissary dictatorship); and on the other hand a dictatorship in which the whole existing legal order is rendered obsolete and a completely new order is intended (sovereign dictatorship). This sovereign dictatorship is exercised by a national assembly that has at its disposal state power without legal limitations when the existing constitutional order has been abolished – say, after a revolution – and the new constitution has not yet been implemented. (Ibid., p. 35)

Parts 3 and 4 summarise the main thesis of the historical analysis provided in *Dictatorship*. On the one hand, there is an historical analysis of the development of the transition from commissary to sovereign dictatorship, and, on the other, the preconditions for such a transition. In his summary Schmitt also incorporates the discussions about the difficulty in interpreting Article 48 of the Weimar Constitution. In Part 5 (which deals with the dictatorial powers of the president of the Reich) he outlines his singular interpretation of decisionism, according to which in times of crisis or emergency sovereign power must be bestowed upon one individual and not derived from an abstract and depersonalised set of norms and rules. In Part 6 Schmitt elaborates to a certain extent what was not presented in *Dictatorship*, which does not contain what it promised in its subtitle: a discussion of the 'proletarian class struggle'. In fact Schmitt's own comments on the dictatorship of the proletariat are limited, especially given the

historical context of the communist threat (as mentioned above). Even Part 6 of the summary, which bears the heading 'Dictatorship of the Proletariat', makes only a weak allusion to a link between the French Revolution and the Bolshevik Revolution of 1917.[20]

As we discussed above, in the reconstruction of Schmitt's theory of decisionism, we can distinguish two main influences on him – one positive and one negative. The positive influence comes from the *Freirechtsbewegung*; the negative one from legal positivism and Schmitt's opposition to neo-Kantianism.[21] As we saw, there will always be a gap between a *theoretical* system of norms covering, prescribing and regulating social behaviour and the concrete situation. Schmitt refers to this 'lacuna' in his Appendix by citing Graf Dohna (p. 201) on the question of when a person should be given extra-legal powers to redeem a dangerous situation for the sake of the common good. According to Stampe (1911: 25),

> The *basic conviction is* that the theory of the complete sufficiency of the law is wrong; and that therefore, in states which dictate to the judge an unconditional duty to pass judgement, Montesquieu's doctrine of the separation of powers is not possible, so the judge is entitled to the *autonomous creation of law* by his judgement.

The abolition of Montesquieu's separation of powers – that is, the judicial, legislative and executive – is called into question. This questioning of the strict separation, in particular between the judicial and legislative powers, is central to Schmitt's argument in the Appendix.

Why is it that a legal theory of decisionism can lead to a political situation in which the sovereign has unlimited power and becomes a totalitarian ruler?[22] In the Appendix of 1928 (first published separately in 1924, see above) attention was drawn to this danger with respect to the amalgamation of the legislative and the judicial. Such an amalgamation would mean that the judge, facing a set of unique actual circumstances (*Tatbestand*), would be forced either to extend the law or to act against it. This is captured in legal terminology by saying that the judge is acting *contra legem* or *preter legem* (Stampe 1911: 25–6). Schmitt extends a problem of private law into

constitutional law and transposes it, to find it in the fact that the constitution cannot cover all the concrete circumstances sufficiently, so as to provide rules and guide decisions concerning the public. Any constitution, especially in times of crisis, will disclose a gap similar to the one identified in private law by the *Freirechtsbewegung*: a situation in which a single person has to decide and to suppress guaranteed fundamental rights in order to protect the constitution itself. By so acting, that person combines the legislative and the judicial powers and trespasses Montesquieu's doctrine of their necessary separation.

When does this dictatorial intervention turn into totalitarianism? Answer: whenever the dissolution of the separation of legislative, judicial and executive powers leads to their being taken by a single agent and the duration of a clearly defined period of dictatorship becomes unlimited. The Appendix warns about this possibility by insisting that to postpone formulating a law for the implementation of the state of emergency (Article 48, §2.5) opens the space for it.

The Translation

The translation of this book was a considerable challenge; in all, it has taken just over five years. We found it necessary sometimes to simplify Schmitt's overelaborate syntax, in which the reader can get lost in a forest of sub-clauses. We have preserved numerous German words and expressions in editorial brackets in the main text, because many of the terms Schmitt uses are highly technical (military positions, legal instruments, or names of political offices and units) or just words (especially compounds) for which there are no easy English equivalents. It is obvious that certain words and phrases have a variety of connotations, which we have attempted to render faithfully in the contexts in which they are used. We have also, as far as possible, standardised political and legal terms that were clearly still being forged as Schmitt was writing the book. One of the main difficulties of *Dictatorship* is that it spans a period of over 2,500 years and, in doing so, it covers very different legal systems. These include Roman law, canon law, the legal systems during the Thirty Years War and the French Revolution, and law in the Prussian state and in the Weimar Republic. In preparing an English translation, we needed not only to

standardise – or emphasise – the use of expressions specific to each historical period, but also to relate such expressions intelligibly to the current English and American legal systems (which differ from each other). On the whole, the legal terminology we adopted follows the English legal system. Finally, Schmitt moved with considerable dexterity across Latin, Greek, French and Italian. We have translated all the passages in these languages (extremely few are paraphrased by Schmitt himself).

We want to thank Manuela Tecusan, our copy-editor and intellectual touchstone, for her remarkable patience and philological expertise (without which the translation of highly specialised Greek, Latin, French and German passages would have been impossible). We would also like to thank Alice Schubert from Duncker & Humblot and Sarah Lambert from Polity for their interest in seeing this project through to its conclusion. We would like to thank Dr. Martin Ziegert for his advice on numismatics; and Professor Jeremy Tambling for last-minute corrections and advice. The Österreichsiche Nationalbibliothek in Wien and its friendly and truly helpful members of staff should not be unnoticed. In particular, Mag. Anton Knoll, Mr. Martin Raberger and Mr. Josef Habuster should be mentioned here. This project was graciously supported by the Goethe-Institute.

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Foreword to the Fourth Edition (1978)

Since 1969 efforts to conceptualise the *state of exception in law* have increased most unpredictably. This phenomenon corresponds to the dynamic of a development that has made states of emergency and crises into integrating or disintegrating elements of an *abnormal state, intermediate* between war and peace.

As a result, a monograph on the problem of *dictatorship*, historically documented and conceptually worked out, would be of academic interest. Perhaps some of the chapters in this book will even appear in a completely new light.

February 1978
CS

Foreword to the Third Edition (1964)

The references to the second edition at the end of this Foreword (p. xxv) can be supplemented by a number of essays that have taken the topic of dictatorship still further, especially by addressing its development from the classical – that is, police and military – state of siege of the nineteenth century to the financial, economic and social state of exception of the twentieth. These essays have been published in my collected essays of 1958, *Verfassungsrechtliche Aufsätze*, in the part dealing with the state of exception and civil war (pp. 233–371). The index of subjects of that collection sends the reader to the relevant places (under the entries 'state of exception', 'dictatorship', 'state of emergency', 'emergency provisions' – as well as 'classic concept of the state of emergency').

December 1963
CS

Foreword to the Second Edition (1928)

Attached to this second edition of the book is a discussion of the dictatorship of the president of the Reich according to Article 48 of the Weimar Constitution. Apart from some insignificant changes and a supplementary section on the so-called 'law of implementation' [*Ausführungsgesetz*] of Article 48, this discussion is identical with the report I delivered in April 1924 in Jena at the meeting of the German Constitutional Jurists, side by side with a report given by my esteemed colleague, Professor Ernst Jacobi from Leipzig. W. de Gruyter, who published the proceedings of this meeting (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 1: *Der Deutsche Föderalismus: Die Diktatur des Reichspräsidenten*, Berlin/Leipzig, 1924; keynote presentations by Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi, pp. 60–104), has kindly allowed republication. For technical reasons related to the production of this second edition, the text of the first edition had to remain unchanged; in consequence the appendix had to be incorporated after the index of subjects. Hopefully the detailed table of contents will compensate for the lack of an index of subjects.*

Regrettably, there is no scholarly critique of the first edition, to which the second would have responded. Some general praise, marginal recognition or tacit borrowing of the concepts elaborated there, and a few sardonic comments in the *Zeitschift für öffentliches Recht* – this is all that academic circles have so far contented themselves with. There is, however, an exception, which is of particular interest on account of the academic importance of its author; and it concerns a particular problem raised in this examination, namely the

* Translator's Note: The index of subjects replaces the detailed table of contents in this English translation.

interpretation of the phrase *höchstes Regal* [supreme prerogative] in the agreement between the emperor and Wallenstein at the second general council of 1632 (p. 174] in this volume). Ulrich Stutz has demonstrated in the *Zeitschrift der Savigny Stiftung* (*Kanonistische Abteilung*, 12: 1922, pp. 416ff.) that the *ius reformandi* can be understood as 'supreme prerogative' [*höchstes Regal*]; in the next volume of the same journal Johann Heckel provides even more examples of the linguistic use of that phrase and its meaning (13: 1923, pp. 518–22). I do not deny that, in different contexts, the phrase 'supreme prerogative' can also mean *ius reformandi*, I only claim that it did not have this content always, or exclusively. What matters here is what it meant in the agreement of 1632: '(5) He receives from the conquered lands the highest kind of royal rights in the Reich as an extraordinary compensation.' A phrase like 'supreme prerogative', 'best prerogative', 'most precious and perfect gem [*Kleinod*]', and so on (for which see Heckel, p. 532) was a baroque commonplace bearing no exclusive meaning. Furthermore, as the ecclesiastical sphere was clearly separated from the worldly sphere in the seventeenth century, a 'supreme prerogative' was possible in each. In the agreement with Wallenstein no political interest in *ius reformandi* is in evidence. The perception that the 'supreme prerogative' is identical here with the office of the prince elector [*Kurwürde*] is also an effect of linguistic usage at that time. Furthermore, in the context of the rewards listed, it makes perfect sense to understand the phrase as an 'extra reward', appropriate to the situation of 1632.

My examination of the dictatorship of the Reich's president according to Article 48 of the Weimar Constitution is based entirely on the historical and constitutional investigations presented in this book. I am sceptical about whether it is academically fruitful, or even permissible, to discuss such a difficult and far-reaching problem like the correct interpretation of Article 48 outside the historical and systematic context of a democratic theory of the constitution. In any case, the *rebuttal* of such an established view requires investigating this context. Unlike the book on *Dictatorship*, this discussion of the dictatorship of the Reich's president has been reviewed and critically commented upon more often. But even the two authors who have published extensive counter-arguments – H. Nawiasky in *Archiv für*

öffentliches Recht ', New Series 9.1, and Richard Grau, both in his report at the 33rd meeting of German Jurists [*Deutscher Juristentag*] and in *Gedächtnisschrift für Emil Seckel* (Berlin, 1927, pp. 430ff.) – do not deal with basic principles of constitutional theoory. They concentrate on the meaning of individual concepts, oppose my interpretation of the history of origins,[1] and produce a certain 'atmosphere' rather than sticking to the arguments: they write in a liberal–democratic [*rechtsstaatliche–liberal*] atmosphere that mistrusts dictatorship. *Rumor dictatoris iniucundus bonis* [the news of dictatorship is unpleasant to the good people]. The kernel of their argument remains that the 'constitution is inalienable' [*unantastbar*]; their doctrine calls itself a 'theory of inalienability' [*Unantastbarkeitslehre*]. Such phrases and trains of thoughts presuppose a wholesale ambiguity of the concept of a constitution, under which the current theory of the constitution suffers. The constitution is identified with each of its 181 single articles. It is even identified with the law facilitating amendments to the constitution, which was passed in accordance with Article 76 of the Weimar Constitution. A constitution is each single constitutional statute [*Verfassungsgesetz*]; and a constitutional statute, according to the 'formal' understanding of statute or law [*Gesetz*], is a statute that can only be changed under the restrictive requirements of Article 76! The fact that *the* constitution is inalienable only means that every particular legislation of the constitution is, for the dictator, an unbridgeable obstacle in the fulfilment of his duty. In this way the meaning and purpose of dictatorship – the protection and the defence of the constitution as a whole – will be violated and turned into its opposite. Every single constitutional provision becomes more important than the constitution itself – the sentence 'the German Reich is a republic' (Article 1, §1) and the other sentence, 'the official is permitted to access personal details' [*Personalnachweis*] (Article 129, §3), are both treated as *the* inalienable parts of the constitution. Such absurd consequences resulting from an ambiguous understanding of the constitution demonstrate how necessary and unavoidable it is to discriminate between the numerous 'formal' constitutional legislations. If one attempts to isolate an inalienable 'organisational minimum' within the constitutional regulations, then a few formal hints (such as that Article 48 refers to Article 50) will certainly not clinch it.

Without a thorough examination of the history and theory of the constitution, it is not possible today to treat in scholarly depth either such a problem of interpretation or the general subject of dictatorship. A strange phenomenon, the same under different shapes, occurs in almost every European country. It occurs in the guise of an open dictatorship or as a use of enabling laws [*Ermächtigungsgesetze*]; in seemingly legal breaches of the constitution – that is, breaches that protect the prescribed forms of an amendment to the constitution; in the legislation of a parliamentary majority, and so on. It is not a 'positive' thing simply to ignore it. The study of public law is compelled, like any other, to pay heed to the problems of its time. Hence the present attempt justifies itself by examining the problematic of dictatorship across a few centuries. Sure enough, prognosis is an altogether different matter. I have refrained from attempting one, although some precedents already exist. For instance Erwin von Beckerath, in the conclusion to his clear and prudent book *Wesen und Werden des faschischtischen Staates* (Berlin, 1927, pp. 154–5), asserts that, along with the increasing concentration of economic and political power in the hands of a few people, the ideology of the majority will be dissolved and, if the economic and political tensions in Europe increase ('as can be predicted'), 'it can be assumed that, along with the transformation of political ideology, the concept of the authoritarian state will gain territory again within western culture'. Shorter in form and content, the prophesy about Mussolini made by H. Nawiasky in Munich, on 18 February 1925, runs in the opposite direction: 'Mussolini's downfall is just a question of time' ('Die Stellung der Regierung im modernen Staat', in the collection of essays *Recht und Staat in Geschichte und Gegenwart*, Tübingen, 1925, p. 23). Admittedly anything in our sublunar world is, in the long run, only 'a matter of time', and therefore the risk one runs into by making such prophecies is not very serious. Nevertheless I prefer not to get involved in them.

Concerning the development of the idea of dictatorship, remarks can be found at page 125 (the concept of dictatorship today, in terms of a philosophy of history) and at page 126 (the rationalistic origin of dictatorship in the eighteenth century). An exhaustive examination of this development has not yet been undertaken. But some

decisive moments in the history of ideas in the nineteenth century are mentioned in my book *Die Geistesgeschichtliche Lage des heutigen Parlamentarismus* (particularly in Chapter 3, 'Dictatorship in Marxist Thought', pp. 63ff. in the second edition of 1926), to which I only refer here in passing.

Bonn, 1927
CS

Note to Foreword to the Second Edition

1 I do not wish to gloss over a perfect example of a 'formal' argument. Against my claim that Article 48, §2, sentence 2 originates in the assembly of states [*Staatenausschuß*], R. Grau claims in *Festschrift in memoriam* for Ernst Seckel, pp. 484–5 that this is incorrect 'because this clause can already be found in the draft for the parliamentary government of the Reich (Art. 67)'. But he could have reread the commentary by Giese, in which it is said that the draft emerged through the negotiations of the committee in a conference of the assembly of the states [*Ausschuß der Staatenkonferenz*].

Preliminary Remarks to the First Edition (1921)

If someone just wanted to demonstrate 'how it became what it is', in a prognosis after the event or in a philosophico-historical horoscope, it would be banal to state that not only books, but also expressions can be victims to their own fate. But this is not the concern of the present book, in which a systematic contextualisation of dictatorship is attempted. The task is therefore so much more difficult, because a central concept of the theory of state and constitution should be examined. The concept, if it received any attention at all in the past, appeared, indistinctly and casually at best, in the overlapping areas of political history, politics à la Roscher, and [Jellinek's] *allgemeine Staatslehre* [general political science]; but it remained mainly a political catchword, so confusing that its enormous attraction is as evident as the legal scholars' reluctance to discuss it. In 1793 a Jacobite lamented: *on parle sans cesse de dictature* [one speaks about dictatorship without interruption]. We have not stopped talking about it even today, and providing a complete overview of the different concrete and abstract subjects of a real or factual dictatorship might be an ongoing enterprise. But this would not illuminate our understanding of the concept of dictatorship; it would only bring to attention once more the general confusion that surrounds this idea. Nevertheless, after the concept of dictatorship has been examined in different contexts, it can already be shown which moments important for understanding the real thing are contained in political discourse; how, in the confusing polysemy of the catchword, a provisional orientation that was not purely terminological did obtain; and how it is possible to make a connection with other concepts of the general theory of law and state.

In the political literature of the bourgeoisie – which, until 1917, seems to have ignored the concept of a dictatorship of the proletariat – the political meaning of the idea is best expressed by the fact that initially dictatorship meant a personal rule. But this meaning was necessarily combined with two other ideas. First, this rule was based on a consensus of the people; it does not matter whether the consensus was induced or assumed, the point is that the rule had democratic foundations. Secondly, the dictator employed a strongly centralised governing apparatus, characteristic of the rule and governance of a modern state. Napoleon I was the prototype for such a conception of the modern dictator. In order not to single out one arbitrary example from the numerous political works on this issue, let me refer to Bodley's work on France (London, 1898). In it the word 'dictatorship' is mentioned frequently; in fact it has a place in the index of subjects. But the references in the index are quite peculiar: dictatorship = authoritative regime = Caesarism = Bonapartism = (even) Boulangism. Gambetta pursued 'dictatorship'; his political activity was 'potentially Caesarism' (vol. 2, p. 409); Napoleon I was a 'military dictator' (vol. 1, p. 259); every strong executive with a centralised system of government and autocratic structure is called 'dictatorship' (vol. 1, p. 80); and, finally, any personal appearance of a president, any 'personal rule' (in the widest sense) is sufficient to count as 'dictatorship' (vol. 1, pp. 297–8). It would be the most stupid pedantry to define a political book by a single word, when it offers on the whole many prudent and sensible observations – and in particular by a word like dictatorship, to which ordinary etymology gives unlimited stretch, because anyone who 'dictates' can be called a dictator. The relationship between personal dominion, democracy and centralisation permeates the whole matter, despite the opportunistic terminology – save that the moment of personal rule often takes a back seat as a result of emphasis on the centralised state apparatus; and it does so because it only represents the autocratic peak – necessarily created out of itself, on technical grounds – of the centralised system. This explains the peculiar list of 'dictators' in the nineteenth century: Napoleon I and III, Bismarck, Thiers, Gambetta, Disraeli, and even Pope Pius IX. As far as the German political literature goes, Bruno Bauer's book *Disraelis romantischer und Bismarcks*

sozialistischer Imperialismus (Chemnitz, 1882) is a telling document for that kind of political view. According to it, it makes sense for Ostrogorsky to call 'dictator' the party leader of a certain significance, the one who is in charge of the caucus – that is, the centralised apparatus of the party machine in a modern democracy. The same can be seen in the political literature of the United States, where every single measure taken by a central government that questions the autonomy of the individual states is called 'dictatorial' by the opponents of centralisation. In all these cases, it is characteristic for a dictatorship, in the modern use of the term, that democracy is abolished by democratic means. Therefore in most cases no difference is made any more between dictatorship and Caesarism, and in consequence one overlooks an essential aspect – namely what I, in what follows, develop as the commissarial character of dictatorship.

In the socialist literature on the 'dictatorship of the proletariat' it becomes increasingly obvious, even if only in its broad dimensions, that there is a philosophy of history operating with the notion of entire states and classes. According to the current discussions – in the summer of 1920 – among Marxists, it would seem that, for them, dictatorship is essentially a negation of parliamentary democracy, with the sacrifice of its formal democratic basis. When Kautsky, whose book *Terrorismus und Kommunismus* (1919) is the trigger for this discussion, wants to oppose a dictatorship of the proletariat by defining dictatorship as the necessary personal rule of an individual, and when he regards collective dictatorship as a contradiction in terms, he offers only a terminological argument. Especially in Marxism, where the agent of all real political activity is not an individual but a whole class, it is not difficult to define the proletariat as a collective entity – that is, the genuine agent – and therefore to see it as the subject of a dictatorship. The content of its dictatorial action can, of course, be interpreted in different ways. According to debates over Kautsky's thesis, it seems that at stake is the abolition of democracy, since the rejection or dissolution of a parliament elected on democratic principles and of a constitutional national assembly expresses this idea most clearly. But its does not necessarily follow from here that, for Marxists, the dictatorship of the proletariat is the rule of a minority over the majority. So far, the answers given by Lenin, Trotsky and Radek to Kautsky's

treatise allow, on the contrary, no doubt about the fact that objections of principle cannot be raised against the recourse to democratic forms, but that this question – like any other, and particularly like questions about what is legal and what is illegal – has to be answered separately by each country, according to its own affairs, and this is just one moment in the strategic and tactical measures of the communist plan. Depending on the given circumstances, it might be appropriate to work with one method or another, but it is important to manage the transition to the communist's final goal, to which the dictatorship of the proletariat is just a technical means. Even the state is called a dictatorship, in which the proletariat, be it a majority or a minority, is the dominant class. In the end the state appears as a 'centralised machine' or as state apparatus. Now this proletarian state does not want to be something definitive, but rather something *transitional*. That way the essential circumstances, marginalised in the bourgeois literature, regain their own significance. Dictatorship is just a means to reach a certain goal, because its content is only determined by the interest of the intended outcome; in other words it is only determined by a set of specific circumstances. Therefore dictatorship cannot be genuinely defined as the suspension [*Aufhebung*] of democracy. Nevertheless, even the communist argumentation shows that dictatorship should only occur exceptionally, and through the force of concrete circumstances, because it is, by definition, only a matter of transition. This, too, is implicit in the concept of dictatorship and it depends upon *that from which* an exception is made.

If dictatorship is necessarily a 'state of exception', then a list of all that counts as normal enables us to see the different meanings of the concept: in terms of constitutional law [*staatsrechtlich*], dictatorship can refer to the suspension of the 'constitutional' or 'lawful' state [*Rechtsstaat*] – while this phrase itself can designate various things: a way of exercising state power such that infringements of fundamental citizen rights, of individual freedom and of private property are only permitted on the basis of a particular law; or a constitutional guarantee, itself situated above legal encroachments, that rights to freedom that are negated in a dictatorship are absolutely certain. If the constitution of a state is democratic, every exceptional suspension of democratic principles, every exercise of power autonomously from the

consent of the majority of those governed can be called dictatorship. When the democratic exercise of power comes into effect as a universally valid political ideal, every state is a dictatorship that ignores these democratic principles. When the liberal principle of inalienable human rights and of the rights of freedom is taken to be the norm, the violation of these rights must count as dictatorship even if it rests on majority will. Thus dictatorship can be an exception [*Ausnahme*] to democratic as well as to liberal principles, without the two having to coincide. What is seen as the norm can positively be defined either by an existing constitution or by a political ideal. Thus the state of siege can be called a dictatorship on account of the suspension of the positive regulations of the constitution, whereas, from a revolutionary standpoint, the entire existing order can be called a dictatorship. If you allow the latter, you have transferred the concept of dictatorship from the sphere of constitutional law to the political sphere. Another change in the meaning of dictatorship occurs when not only the contested political order, but also the intended government is called a dictatorship, as happens in the communist literature. This genuine state is called dictatorship in its entirety, because it is a tool in the transformation into a real state, and its justification is based on a norm that is no longer purely political or grounded in simple legal positivism; rather this state is founded in the philosophy of history. In the same way dictatorship – as an exception that remains in functional dependence upon that which it negates – has also become a category in the philosophy of history. The development towards the final communist state has to happen according to an understanding of history in terms of Marxist economy – 'organically' (in the Hegelian sense). The economic conditions must be ripe for their own transformation [*Umwälzung*]. The development (also according to Hegel) is 'immanent'; the conditions cannot be 'ripened' by force. Any artificial, mechanical interference in this organic development would be meaningless to a Marxist. But the Bolshevik argument sees in the work of the bourgeoisie – which fights by other means to secure a place that evolution has abolished long ago – an external interference with an immanent development, a mechanical hindrance in the way of organic development, something that has to be eliminated through a similar kind of means, mechanical and exterior. This is the

meaning of a dictatorship of the proletariat, which is an exception to the norms of organic development and to their central question, while at the same time it is as historical–philosophical as the argument that justifies it. This becomes more evident than usual in the last writings of Lenin on radicalism (1920) and in Trotsky's *Anti-Kautsky* (1920): the bourgeoisie is a 'class that is thought will perish *through history*', so the proletariat, by virtue of being 'historically the ascendant class' and for the sake of the unfolding of history, has a right to use force by any means that seem appropriate against the historically descending class. Whoever is on the side of the things to come is allowed to push against what is already collapsing.

If dictatorship designates the exception to a norm, it does not mean any arbitrary negation of a random norm. The immanent dialectic of this concept is essentially that what is negated is the norm, whose authority should be guaranteed by dictatorship throughout its historical–political existence. There might be a difference between the rule of law in its making and the method of its exercise. In terms of philosophy of law, this is the essence of dictatorship: the general possibility of a separation between the norms of justice and the implementation of law [*Rechtsverwirklichung*]. Any dictatorship that does not make itself dependent on pursuing a concrete result, even if one that corresponds to a normative ideal (and hence does not aim to make itself redundant) is an arbitrary despotism. In order to achieve a concrete result, one has to interfere in the causal order of things using means whose justification is given by their degree of appropriateness and depends exclusively on the actual contexts of this causal pattern. Paradoxically, dictatorship becomes an exception to the state of law by doing what it needs to justify; because dictatorship means a form of government that is genuinely designed to resolve a very particular problem. That problem is the successful defence of a case to which the opponent's will is diametrically opposed. Thus there is an unfettering of the means from the law itself. But whoever regards the core of law as just another means is unable to understand the concept of dictatorship because, for that person, every legal order is simply a latent or an intermediate dictatorship. As Rudolf Jhering says (*Der Zweck im Recht*, 2nd edn, Leipzig, 1886, vol. 2, p. 251), the law is a means to an end, and the end is the maintenance of society. If the law is not

capable of saving society, then force intervenes, and thus whatever is necessary. This, then, is the 'rescuing force of government' [*die rettende Tat der Staatsgewalt*] and the point in which the law coincides with politics and history. To be honest, it is rather a point in which the law reveals its true nature and its purely pragmatic understatement, based on its servile character, comes to an end. War against the external enemy and suppression of internal rebellion would not then be states of exception, only the norm in which the law and the state would exercise their inner purpose with direct force.

The justification for dictatorship consists in the fact that, although it ignores the existing law, it is only doing so in order to save it. This is, of course, not a formally accurate deduction, and therefore it cannot be a justification in the legal sense, because neither the really nor the seemingly purposeful goal can justify a breech of law; and the creation of a situation that conforms to the principles of normative correctness does not constitute any legal authority. The formal characteristic is the empowerment of a supreme authority, legally capable of suspending the law and of authorising a dictatorship. This means to permit a concrete exception whose content, by comparison with another instance of a concrete exception – amnesty [*Begnadigung*] – is outrageous. Speaking abstractly, the problem of dictatorship that has not been examined sufficiently so far in the theory of law is a problem of the concrete exception. In this book I am not discussing this problem in detail, but for the understanding of dictatorship I had to examine which highest authorities have the power to grant such exceptions, from which the concept of dictatorship has appeared. Next, another characteristic of dictatorship is this: because everything is determined from the perspective of the intended success, the content of the measures deemed necessary in a dictatorship is unconditionally and exclusively determined by the actual situation. In consequence, there is an absolute balance between the task and the authorisation, discretion and empowerment, commission and authority. Given these identitifications, every dictator is necessarily a commissar – in a very specific sense. On a closer examination of this important concept, looking into its history appeared to be inevitable. This has generated the composition of this book: each discussion of the general theory of state and constitution is followed by an historical examination of the

commissarial exercise of power. In the middle lies the crucial distinction (presented in Part IV), which contains the conclusion of this book in that it points to the first problem to be resolved and makes it possible for the first time to approach the concept of dictatorship through scholarly legal analysis: the distinction between commissary and sovereign dictatorship. In this book I wish to give a theoretical account of the transition from the older 'dictatorship of reformations' to the 'dictatorship of revolutions', on the basis of the *pouvoir constitutant* of the people. An understanding of dictatorship appears for the first time in the history of the Christian west in the eighteenth century. In this understanding, the dictator still remains a commissar. But, as a consequence of the constituted, and not the constitutive, nature of the people's power, he remains a direct commissar of the people [*Volkskommissar*] – a dictator who also dictates to his superior, without ceasing to legitimise himself through that superior.

The subsequent development, in terms of a history of ideas reaching into the nineteenth century, can only be alluded to, in an extensive footnote (p. 126). Since 1848, at least in Germany, general state theory has been separated completely from positive constitutional law, and we can see the emergence of a multitude of different schools. As far as this book is concerned, a discussion of this development must take place elsewhere. The concept of sovereignty, known for centuries, has been essentially changed, politically speaking, through the concept of class, and constitutionally and state-theoretically though the modern freedom of coalition; and the sovereignty of various subjects, as opposed to the concept of the sovereignty of the 'state', is in many ways just another word for a *tergiversatio* [evasion] before the real problem. The difficulty with this problem arises from the subject itself but also from the examination of the historical, juridical and philosophical material through which the investigation had to find a somewhat level way. The sources are not as dated as it might seem at first. For example, the controversy as to whether the dictator is a sovereign, which begins with Bodin and is introduced in Chapter 1 of this book, has at least been mentioned by a legal scholar like James Bryce. Having said that, the material has not been gathered as an end in itself, but rather in order to document the development of a concept that has systematically proved to be essential. Moreover,

I might say that the intention of this book has not been ignited by the current discussions on dictatorship, violence and terror. The legal value of the decision as such, irrespective of its material content in justice or equity, has already been made the basis of an investigation into legal practice, in my book *Gesetz und Urteil* of 1912. There I have explicitly named Bentham, whose teachings on the definition of law [*Rechtsbestimmtheit*] have instantly become significant for the theory of the state, via Austin's concept of sovereignty. Paradoxically, Austin finds here in Hobbes an unexpected precursor and in de Maistre an even less plausible supporter. The continuation of this idea finally resulted in the opposition between the norm of law [*Rechtsnorm*] and the norm of its implementation [*Rechtsverwirklichungsnorm*]. This opposition has been examined in its principal context in my treatise *Der Wert des Staates* (1914); I only regret that I did not know then H. Krabbes' theory of the sovereignty of the law. This book was received with mixed feelings from opposing parties: a scholar like Weyrs identified without hesitation its concept of the law with Kelsen's positivistic 'form', which in my view contains a *contradictio in adiecto* [contradiction in terms]. For Kelsen, dictatorship cannot be a problem of legislation any more than a brain operation can be a problem of logic. True to his relativistic formalism, Kelsen does not realise that we are dealing here with something completely different: the authority of the state cannot be separated from its value. It is rather as L. Waldecker realised in his treatise *Naturrecht alten Angedenkens* – that the authority of the state was over (at least in 1916). That treatise showed clearly that it was necessary to examine the critical concept of law implementation [*Rechtsverwirklichung*], hence dictatorship, and to demonstrate through a description of its historical development in modern state theory that it is impossible to deal with dictatorship ad hoc, like before, just through casual struggles over isolated articles of the constitution, and basically to ignore the rest. The exposition here could be pursued up to its present conclusion, sure enough, in the unfavourable external circumstances of our time, *cum desertis Aganippes / vallibus esuriens migraret in atria Clio* ['as Clio, driven by hunger, abandons the valleys of Aganippe (in Boeotia) and moves into the courtyards (of the rich)': Juvenal, *Satires*, vii, 6–7].

1

Commissary Dictatorship and State Theory

State Theory Based on Technical Aspects [staatstechnische] and Constitutional State Theory [rechtstaatliche]

For the humanists of the Renaissance, the concept of dictatorship was something they encountered in the study of Roman history and in their classical authors. The great philologists who were so familiar with Roman antiquity made their compilations from Cicero, Livy, Tacitus, Plutarch, Dionysius of Halicarnassus, Suetonius, and so on. In their various statements they were only interested in this form of government as a topic in the study of classics; they made no attempt to explore its meaning in terms of a theory of constitutional law.[1] They began a tradition of interpretation that, broadly speaking, remained unchanged until the nineteenth century: according to it, dictatorship was a wise invention of the Roman Republic and the dictator was an extraordinary Roman magistrate, introduced after the expulsion of the kings, so that a strong *imperium* [military power] may still be possible in times of insecurity. This *imperium* was not impaired, like the official power of the consuls, by their collegiality, by the right of the people's tribunes to veto, or by the right of appeal to the people [*provocatio ad populum*, i.e. a citizen's right, in the archaic period, to appeal to the popular assembly against certain civil sentences]. The dictator, who was appointed by the consul at the Senate's request, had the task of dissolving the dangerous situation by reason of which he had been nominated either by waging war (*dictatura rei gerendae*) or by squashing an uproar from within (*dictatura seditionis sedandae*). In later times he could also be installed for some specific purpose:

organising a people's assembly (*comitiorum habendorum*); driving in a nail which, for religious reasons, had to be carried out by the *praetor maximus* (*clavi figendi*); chairing an investigation; determining the public feasts – and the like. The dictator was nominated for six months, but, whenever he had accomplished his mission, he stepped down before his official time of resignation – at least according to a commendable custom in early republican times. He was not bound by the law; he was a kind of king with absolute power over life and death. There are divergent answers to the question whether or not the official power of the remaining magistrates came to an end through the appointment of the dictator. Usually dictatorship was seen as a political instrument by which the patrician aristocracy sought to save its dominion against democratic claims made by the plebeians. An historical critique of the surviving sources is not available.[2] The later dictatorships of Sulla and Caesar, although politically different from all previous dictatorships (*in effectu tyrannis*, as Besold says), were understood as identical in terms of a theory of the state.

In particular, the obvious difference between the older republican dictatorships and the later ones of Sulla and Caesar might have suggested a much closer examination of the concept of dictatorship. The contradiction between commissary and sovereign dictatorship, which will be developed in what follows as the fundamental deciding criterion, is here already indicated by the political development itself, and it resides in the nature of the matter. But, because historical judgement is always dependent on the experience of its contemporary context,[3] the sixteenth and seventeenth centuries were less interested in the development that led from democracy to Caesarism: the absolute monarchy that emerged at that time did not find its legitimation in any consensus of the people; it saw itself as legitimised through God's grace [*Gottesgnadentum*], and it placed itself against the estates – which means, in this context, against the people. The linguistic importance of the word 'dictatorship' – which led to its extension to all those cases in which one could say that an order is 'dictated' (*dictator est qui dictat*, 'dictator is the one who dictates')[4] and to a use of language that undoubtedly contributed to the dissemination of the concept – was not evident then.[5] Whenever, in Germany, the Roman juridical institution is compared to the national and political

circumstances of the sixteenth-century state, this is not – in contrast to the examination that compares the legal status of the German king with that of the Roman Caesar, or in contrast to any arguments in canon law[6] – an exploitation of the concept of Roman institution for the judicial development of concepts; rather it is, in the first instance, just a reinterpretation that, in its naïvety, reminds us of the biblical and mythological images in which events of the past reappear in a contemporary costume. Nevertheless, their historical interpretation bears some fundamental significance. Accordingly, in the Strasbourg translation of Livy of 1507, the consuls are called 'mayors', the Senate is called sometimes 'Council', and the dictator, if the word is translated at all, is called a 'superior official' [*obristen gewaltigen*], one who 'is the chief commander in war'.[7] In his *Chronicle*, Sebastian Franck [1499–1542] emphasises, as a main characteristic of the dictator, that he was nominated in times of greatest peril; that he had 'supreme authority' over life and death, without anyone being able to appeal against his judgement; and that he was 'the superior of the Roman regiment', someone whose 'force and power was above the will of the council of senators' [*Widrigkeit des Rattsherrlichen Pfleg*].[8] But in the scholars of political and constitutional theory of this century we already have some parallels between the Roman understanding of dictatorship and its subsequent institutionalisation in other states, which attempt, with different degrees of awareness, to develop dictatorship as a concept of the general theory of the state. First of all this is true of Machiavelli, who has to be mentioned here, although it can be said quite rightly that he never developed a theory of the state.[9]

Discussing the concept of dictatorship in general was imminent after the publication of [Machiavelli's] *Discorsi sopra la prima deca di Titto Livio* (which appeared five years after Machiavelli's death in 1532), because Livy' history, which was summarised in the *Discorsi*, mentioned numerous cases of dictatorship from the first centuries of the Republic. It has often been denied that there is any originality in Machiavelli, and his writings have been described as an imitation of antique models, a compilation of the 'best bits' taken from Aristotle and Polybius, or even 'humanist dissertations'.[10] Nevertheless, his remarks on dictatorship display a profound and genuine interest in politics and a remarkable capacity for discernment. It is an old saying,

reiterated many times, that extraordinary conditions require extraordinary measures. But in Machiavelli's work, beside these common wisdoms – for example his examination of the virtues, popular right up to the nineteenth century, of Republican Romans who stepped down from dictatorship before the end of their mandate (*The Prince*, I, chs 30, 34) – we also find remarks about the business of the ordinary office, whose complexity and dual mode of consulting could become dangerous in urgent cases and could make a quick decision impossible. This is especially true for the Republic: dictatorship had to be a matter of survival, because the dictator was not a tyrant and dictatorship was not a form of absolute government but rather an instrument to guarantee freedom, which was in the spirit of the Republican constitution. Consequently, in the Venetian Republic, which Machiavelli calls the best modern republic, we can find a similar institution (ch. 34). Everything depends upon how dictatorship was embedded in constitutional guarantees. The dictator was defined as a man who, being independent of the influence of any other institution, was able to issue orders and to execute them immediately, that is, without having to obey other legal remedies ('*un huomo che senza alcuna consulta potesse deliberare et senza alcuna appelaggione eseguire le sue deliberazioni*', 'a man who could deliberate without consultation and who could act on his deliberations without appeal', ch. 33). Machiavelli employs the distinction, which goes back to Aristotle, between coming to a decision and its execution, *deliberatio* and *executio*, to define dictatorship: the dictator can '*deliberare per se stesso*' ['deliberate on his own'], he can take all measures without having to consult any advisory or executive body ('*fare ogni cosa senza consulta*' ['do anything without consultation']), and he can immediately implement legal sanctions [*rechtskräftige Strafen*]. But all these powers have to be distinguished from the legislative activity of government. The dictator cannot change the laws; neither can he suspend the constitution or the organisation of office; and he cannot 'make new laws' ('*fare nuove leggi*'). In a dictatorship, according to Machiavelli, the official administration subsists as a kind of control (*guardia*). Therefore dictatorship was a constitutional instrument for the Republic. The Decemviri, on the other hand, endangered the Republic through their unlimited legislative powers (ch. 35).

For Machiavelli and the age that followed his own, dictatorship seemed to be an institution congenial to the free Roman Republic, so that people did not distinguish between two different types of dictatorship, the commissary and the sovereign. Therefore they never regarded the absolutist prince as a dictator. Later writers have sometimes labelled the prince portrayed by Machiavelli 'dictator', and the method of government illustrated in *The Prince* 'dictatorship'. This, however, runs entirely against Machiavelli's conception. The dictator is always – admittedly, by extraordinary appointment, yet constitutionally – a republican organ of the state; he is a '*capitano*', like the consul and other '*chefs*' (*Discorsi*, II, ch. 33). On the contrary, the prince is always sovereign, and Machiavelli's book of the same title tells us, basically by presenting us with political recipes decorated with erudite historical insights, how one can effectively remain in power as a prince. The tremendous success of the book rests on the fact that it corresponds to the concept of state predominant in the sixteenth and seventeenth centuries – that is, the emerging modern state – and, more precisely, to a particular interest arising out of it, which leads directly to the question of the nature of dictatorship. The many discussions about 'the riddle of the prince' are partly based on contradictions in Machiavelli – who in the *Discorsi* appears to be a liberal-minded republican, but in *The Prince* appears to be an advisor for the absolutist monarch – and partly on the immoralities of the book. Neither the contradictions nor the immoralities can be explained away by identifying them as a hidden attack against tyranny[11] or by understanding them as the suggestions of a desperate nationalist.[12] Nor can they be explained through discourses about the interest of power and pragmatic utility, which puts egoism above morality.[13] Moreover, these accusations are completely void because a purely technical interest was dominant – which was, by the way, characteristic of the Renaissance, and consequently a number of Renaissance artists pursued the technical rather than the aesthetic problems of their business. Even Machiavelli loved to preoccupy himself with technical problems such as military and strategic ones.[14] This is evident in the passages where he discusses diplomatic and political issues: for example how one can be successful, or how one 'does' certain things. The most telling passages in *The Prince* are those

where Machiavelli shows his true colours – that is, his hatred and dismissal of the dilettante, that inept character in political life who does things half-heartedly, with half-baked cruelty and half-baked virtue (ch. 8). The consequence of absolute 'technicity'[15] is an indifference that stands opposed to the further political purpose in the same way in which a technical engineer can have a purely technical interest in producing a thing without having any interest in its use; the thing produced does not need to be of any interest for him. Any political result – be it the absolute government of one single person or a democratic republic, the political power of a prince or the political freedom of the people – is just a task. The political organisation of power and the technique for its maintenance and expansion differ according to the actual form of government. But the former always implies something that can be managed technically, just as the artist produces a piece of art according to his rational understanding. Depending on the concrete circumstances – geography, the character of the people, religious worldview, social power relations and traditions – the method differs and a different construction emerges. In the republican *Discorsi* Machiavelli praises the good instincts of the people. In the *Prince* he reiterates that human beings are by nature evil: beasts, a mob. This attitude has been classified as anthropological pessimism,[16] but theoretically it has a completely different meaning. In every discussion that seeks to justify political or statal absolutism, the natural human inclination towards evil is postulated as an axiom, in order to justify the authority of the state. And, however different the theoretical interests of Luther, Hobbes, Bossuet, de Maistre and Stahl may have been, this argument appears significantly in all of them. Nevertheless, in *The Prince*, neither the moral nor the juridical justification is examined, but rather the rational technique of political absolutism. Following a certain principle of construction, this view assumed that a human being had particular moral deficiencies, which subjected him to this form of governance, on the grounds that people who are endowed, in their make-up, with a republican principle aiming for the common good and who possess *virtù* could not bear a monarchy. The kind of political energy expressed in *virtù* cannot be reconciled with forms of absolute government, but only with a republic. The human material that the technical procedure must reckon

with must differ according to whether an absolutist government or a republic has to be established. It must differ, or else the intended outcome could not be achieved.

Such a technical understanding was of immediate significance, both for the origins of the modern state and for the problem of dictatorship. The rationality of this technology implied, first of all, that the constructing artists of the state viewed the mass of people that needed to be organised into a state as an object that had to be shaped, like a material, by their will. According to humanist belief, in people – the uneducated masses, the variegated animals, the θηρίον ποικίλον καί πολυκέφαλον ('many-coloured beast with many heads'), as Plato calls it (*Republic* IX, 588c, *Sophist* 226a) – there was something irrational that needed to be governed and led by reason. But, if people are irrational, then one cannot negotiate with them or forge contracts; rather they must be mastered through cunning or violence. In this case reason cannot make itself evident, it does not argue; it dictates. The irrational is only the instrument of the rational, because only the rational can really lead and act. This is in accordance not only with Aristotelian scholasticism,[17] but also with Renaissance Platonism, with the Stoic classical tradition, as well as with all moral understandings that dominated until the end of the eighteenth century and whose ideal was the *homo liber et sapiens* ('the free and wise man'). This was a man like Cato or Seneca: the wise, who is in charge of his drives and instincts through his rationality and thus masters his affections – a sophisticated concept, directly opposed to three representatives of the mastery of affections: the great mass, women and children. Rationality dictates. From scholasticism on, the phrase *dictamen rationis* ('dictate/judgement of reason') has been integrated with natural law, and this has also impacted on punishment and on any other statute with legal consequences.[18] If the idea of a dictate was successful on the grounds of its rational superiority, at the same time it was, independently, the consequence of a purely technical interest. In the analysis that follows, it will always be apparent that the content of the actions [*Tätigkeit*] of a dictator consists in this: achieving a certain goal, 'accomplishing' ['*ins Werk zu richten*']: the enemies should be defeated, the political opponent nullified or destroyed. This always depends on 'specific circumstances' [*der* '*Lage der Sache*' *gemäß*]. Because a concrete goal

should be accomplished, the dictator has to intervene in the course of action through concrete means – and has to do it directly. He acts: he is, to anticipate the definition, the commissar of action; he is the executive, in contrast to a merely decision-making process or judicial verdict – in contrast to *deliberare* and *consultare*. Hence, in an extreme case, he has the capacity not to obey general norms. But, if the concrete means of achieving a concrete goal can, under normal circumstances, be predicted with regularity – for instance when the police is entitled to maintain public security – in cases of emergency we can only say this much: the dictator is entitled to do everything that is appropriate in the actual circumstances [*nach Lage der Sache*]. Here we can no longer ask about legal considerations, only about the appropriate means that would lead to a concrete result in a concrete case. Of course, the decision and the proceedings may be right or wrong, but the way to judge these matters is only related to the question whether the means, in a very technical sense, are appropriate or not – that is, whether they have achieved their goal. Considerations of opposing rights, the agreement concerning an obstructing third party, rights acquired through the normal channel or by hierarchical legal proceedings can hinder the 'matter'; in other words, in a technical sense, they can be obnoxious and wrong. Therefore, especially in a dictatorship, only the goal governs, which is freed from restrictions imposed by the law and is only determined by the need to create a concrete situation. In principle, whenever there is an exclusively technical interest in the state and in political matters, legal restriction can be a hindrance and something inappropriate – in exactly the same way. From the position of a purely technical understanding of the state, it does not make sense to have an unconditional value that is independent from the intrinsic value of law. Such a value has no interest in the law, but only in the expediency of the function of the state – that is, in the sheer executive, which is not conditioned in advance by any norm in the legal sense. Apart from rationalism and pure technicality, we can find here the third connection with dictatorship: within the executive, the organs of execution must bow unconditionally to the interest of what is a technically flawless process. One has to obey – even if not blindly, nevertheless immediately – not only what is pre-eminently executive, namely the military; the same goes for the execution of a judicial

judgement. And this is because carrying out the execution cannot depend on the agreement of the executive officer, in the sense that he may be entitled to revise the objective accuracy of a legally binding judgement. And outside the sphere of authoritative actions, too, any well-functioning organisation becomes impossible if the executives claim an autonomous right to contribute or to control, on the basis of whatever interests are created by different standpoints from those of the technical functioning. The simplest business of transport becomes impossible if the one who has to do the transportation takes any interest in what has to be transported apart from the fact that it just has to be transported. If a postal worker checked the contents of the letters, then that would mean that the technical organisation of mail is used to achieve ends that are external to this organisation. Such an action would necessarily contradict the technical perfection of the organisation. In other words, within a well-functioning executive, once the conditions of the process have been given, there is no longer any communication, any arrangement, or any consultation with the executive organs.

This orientation towards dictatorship – an orientation consisting of the three elements of rationalism, technicality and the executive – is at the origins of the modern state. The word 'dictatorship' is used here to designate a kind of commandment that, by definition, is not dependent upon any agreement or insight of the party being addressed and does not wait for his/her acceptance. Historically, the modern state emerged from some kind of political technology or expertise [*aus einer politischer Sachtechnik*]. With it begins, as its theoretical reflex, the doctrine related to *raison d'état* [*Staatsraison*, reason of state] – that is, to a socio-political maxim that stands above the dualism legality/illegality and is derived only from the necessities of the assertion and extension of political power. The military and bureaucratically trained officialdom, the 'executive', are the kernel of this state, which is essentially executive. From a technical point of view, the executive can be indifferent as to the authority in whose service it is employed – the trained functionaries could easily offer their services from one state to another, and particularly useful commissars of the German princes were foreigners – because the rules of efficient functioning are independent of the legal peculiarities of the employer; they are

based on a socio-practical expertise [*Sachtechnik*]. The vast literature on *raison d'état*[19] – ranging from Machiavelli and Guicciardini to Paruta, Botero, Scioppius, Boccalini, and right up to the climax achieved by Paulo Sarpi, who reveals the pure consequences of the political practice of power in its technicality – demonstrates in reality only the factually valid conception of law (which could become a real power, because it is part of the concrete situation), even if the sacrality of the law is revered. At least German authors are clear about the methodological difference and talk about different points of view. Scioppius [1576–1649] has clearly separated morality from politics in his 1613 *Paedia politices*: the former provides *principia* [principles] for what ought to be, whereas the latter provides *praecepta* [precepts] that are based on the laws of concrete existence, just as medicine does. But of greater significance than the vague ideas of *raison d'état* and *salus publica* [public health], which can be easily moralised from the position of a certain understanding of the state, is the concept of the political *arcanum* ['secret'], which we find at the centre of this kind of political literature. A scholar who has analysed the social and administrative constellations and understandings of absolutism with unusual meticulousness and clarity observed that, by the end of the fifteenth century, when the power of theology was exhausted and the patriarchal understanding of the origin of kingship no longer satisfied people's appetite for science, politics started to develop as a science that built a kind of secret teaching around the almost mystical *ratio status* [reason of state, *raison d'état*].[20] But the concept of the political and diplomatic *arcanum*, when this word means 'state secret',[21] is neither more nor less mystical than the modern concept of the secret 'know-how' of a business [*Geschäftsgeheimnisses*], which eventually transcends the sphere of sober utility whenever the struggle for control over the committee governing that business has been inflamed by it. Then the concept steps out of the sphere of plain utility and is seen in many ways as a matter of worldview [*Weltanschauung*]. The simple, technical meaning of the word *arcanum* is illustrated by Michael Breuner from Gotha,[22] who during the Thirty Years' War [1618–48] sent Lord Maximilian von Bayern a list of '*arcana* of war' ['*Kriegsarcana*'] he claimed to be able to 'implement' ['*ins Werk richten*'] – for example an instrument by which one could shoot bullets

without gunpowder, and other useful *stratagemata belli* ['stratagems of war'] and '*waß deren Kriegspracticken mehr*' ['any more military tricks']. This example, taken from the practice of political and military life, shows the technical sense of *arcanum* in its simplicity: it is a secret of fabrication.

The most important example of the *arcana* literature is the book by Arnold Clapmar [1574–1604],[23] which has been cited in the seventeenth century as the standard work. In it the issue is analysed with care and in detail, by its methodological aspects. With reference to the phrase '*arcana imperii*' ['secrets of power/secrets of state'], which Tacitus uses in the *Annales* (1.2) to describe the clever politics of Tiberius – a passage that was highlighted especially by the Tacitus expert and devotee Justus Lipsius – this authority says, to begin with, that every scientific discipline – theology, jurisprudence, business, fine art, the art of war, or medicine – has its arcane. In all these disciplines we find certain tricks; they employ even cunning and betrayal in order to achieve their goal. But in the state certain events are always necessary that conjure the impression of freedom, simulacra or decorative occasions designed to pacify the population.[24] *Arcana reipublicae* [secrets of the republic] are, in contrast to the obvious motives that appear from the outside, the inner forces of the state. According to the understanding that was common at the time, these are not some social and economic forces above the person; no, the motor of global history [*Weltgeschichte*] is the interest of the prince and of his secret council, a carefully prepared plan of those who govern and seek to maintain both themselves and the state – a plan whereby the power of the governors, the common good, and public order and security are one and the same, in a natural way (*De arcanis*, I, ch. 5). In the *arcana* there is a distinction between *arcana imperii* and *arcana dominationis* [secrets of rulership], and the latter concerns the state as such – that is, the actual and factual existing conditions of powers in normal times. Implicit in *arcana imperii* are different methods of keeping people pacified, in conformity with the different forms of political government (monarchy, aristocracy and democracy). For example, under monarchy or aristocracy a certain participation in political institutions was granted, namely freedom of speech and of the press (VI, 11), which allowed some noise but was a

politically insignificant form of participation in affairs; furthermore a very wise tolerance towards human vanity was allowed, and the like. The entire catalogue, inspired by Machiavelli, of recipes of what you have to do to stay and remain in political power was not absent; nor was the imagination of the people, conceived of as the large colourful beast that needs to be handled through various techniques. On the other hand, the *arcana dominationis* are concerned with the security and defence of rulers in extraordinary events, rebellions and revolutions, and with the means by which these events can be dealt with.[25] It is explicitly stated, however, that there cannot be a great difference between the two types of *arcana*, as long as the state cannot be in good order if the prince or the ruling party is not in good order as well (III, ch. 1). Dictatorship, in particular, is described as a specific *arcanum dominationis* of the aristocracy. Its purpose is to create an institution that frightens the people into believing that it constitutes an authority against which there is no possibility of provocation. Nevertheless, in the interest of the aristocracy, one has to be careful that dictatorship is not transformed into principate.[26] But there are more distinctions that can be found. In some instances the *arcana dominationis*, understood as the necessary means of any government of state, are to be distinguished from the *flagitia dominationis* [curses of rulership], from the *consilia Machiavellistica* [Machiavellian devices], from the abuse of power, from tyrannies, from the *cattiva ragion di stato* [bad reason of state] (V, ch. 1). Moreover, the two types of *arcana* are conceptually opposed to the *iura imperii* [rights/legal prerogatives of power/of the state] and the *iura dominationis* [rights/legal prerogatives of rulership].[27] The *iura imperii* are the distinct rights of sovereignty to pass laws – a characteristic of the *summum imperium*, as they have been listed since Bodin. They are the very basis (*fundamenta*) of the *arcana*; and they are the same in every state. The *arcana* have to change according to the actual situation; but *the iura* cannot be delegated in the way the *arcana* can. The *iura* are finite – this is the crucial difference: right, *fas* [proper] and *in conspicuo* [in full view], whereas the *arcana* are the secret plans and practices with the help of which the *iura imperii* should be maintained (iii, ch. 1). By *iura dominationis* Clapmar means the public right of exception, which basically should be that whoever is in

command is allowed to deviate from the *ius commune* [common law] in a case of emergency, in the interests of the maintenance of the state and of public tranquillity and security (*tranquilitas, pax et quies*). War and uproar are two most significant cases where this right is put into practice. It is a right of exception, a *ius speciale* [special right], in contrast to the normal right of sovereignty, which is a *ius generale* [general right]. Here dictatorship is just mentioned in a general reference, without being explicitly named.[28] The difference between the ordinary and extraordinary right of sovereignty, which Besold has also adopted,[29] rests on the understanding that the sovereign is bound by the rules of the universal human and natural law. The right of exception should only be subject to *ius divinum* [divine right]; it is superior to all other legal limitations. In it is the plenitude of the power of the state best revealed. Clapmar does not discuss the concept of *plenitudo potestatis*, omnipotence [*Machtvollkommenheit*]. He calls the state of exception 'something of a legitimate tyranny' (IV, ch. 2). In fact this is a matter of *plenitudo potestatis*. This concept does not designate a register of rights reserved for the Kaiser, as it was understood in the later constitutional law of the German Reich, where it was simply a *simulacrum maiestatis* [semblance of sovereignty];[30] it refers in principle to the legally unlimited exercise of power that was entitled to intervene in the existing order of law and in the existing functions and acquired rights. It is above the ordinary constituted forces [*Gewalten*] – it, the constituting force [*Gewalt*] that contains in itself the power [*Macht*] – and it operates in most cases like the omnipotence of the *pouvoir constutitant* in the modern state. That it is limited to the state of exception has no positive meaning, because this is only a limitation derived from legally grounded principles of justice. From a juridical point of view, it is only relevant that, whenever a state of exception arises, the one who is in full command has to decide for himself. That was the constitutional [*staatsrechtliche*] concept with the help of which it was possible to abolish the lawful medieval state [*Rechtsstaat*] and its hierarchy of offices based upon acquired law. This concept was used especially by Karl V and Ferdinand II in enforcing claims upon the German estates. Whenever *iura dominationis* are mentioned, an attempt is made to apply unlimited omnipotence to separate relations.

Nevertheless they remain, even for Clapmar, the same general entitlement to do whatever is demanded by the concrete situation [*Lage der Sache*]; in other words something by definition unlimited. Seemingly the right of exception is still lawful, because it appears to have a limitation in the exception itself. But in truth the question of sovereignty is exactly the same as the one of *iura extraordinaria*. The state, shattered as it is by its estates and class struggles, is its constitution, by reason of the continuous state of exception in it, and its law is, to the core, the law of exception. Whoever rules over the state of exception therefore rules over the state, because he decides when this state should emerge and what means are necessary.[31] In the end the nature of the law leads finally to the question of what the concrete situation [*Lage der Sache*] is. For private law, it would be possible to create some room for negotiation, provisional and precarious as it may be. But in the *arcana* literature it is self-evident that private law has to be treated differently from public law. It would be an unworldly naïveté to apply considerations such as of *aequitas* [equity] and *iustitia* [justice], which we can find in private law, to public law, where *salus publica* prevails. What is decisive in public affairs like martial law, diplomatic law [*Gesandtschaftsrecht*], the law of offices [*Magistrats-*] or constitutional law is not *aequitas*, but rather *vis dominationis* [the power of rulership] – in other words alliances, soldiers and money.[32] If everything depends upon the concrete situation and upon the target that ought to be achieved, then the distinction between just and unjust becomes a useless formality – when it is not taken as a byword for expediency or as an expression of the common understanding of justice and injustice. It would be impossible not to refer, in this instance, to *clausula rebus sic stantibus* [the conclusion 'these being the circumstances'], which ought to be essential to public law.[33]

As a defender of the existing order of the estates [*ständischen Rechte*], the monarchomachs [opponents of monarchy] opposed the absolutist reason of state by employing constitutional arguments. They wanted, as they said, to fight the Machiavellian spirit. Iulius Brutus'[34] *Vindiciae contra tyrannos* [*Vindications against the Tyrants*], like all other literature stemming from the Eve of St Batholemew, identifies the *pestifera doctrina* [pestilential doctrine] as the genuine enemy. It is interesting, though, that dictatorship is barely named

in the monarchomachic literature of the sixteenth century, although it appears frequently in the writers of *arcana*. In Julius Brutus, who is closest to the classical tradition,[35] the absolutist prince is called 'tyrant' despite the fact that this term was frequently used to refer to Caesar and, as is known, his tyranny took the form of a permanent dictatorship, even though the *Vindiciae* does not speak of it as such; it only praises Caesar for the fact that at least he asked the people and preserved the legal formalities, *iuris praetextum* [the pretence of law].[36] What a tyrant is is defined by the criterion of what justice is: the tyrant is either one who appropriates power by force or evil machinations (*tyrannus absque titulo*) or one who abuses the legally transferred dominion by violating the law and his own promises, made under oath (*tyrannus ab exercitio*: *Vindiciae*, p. 170). The rightful exercise of office consists in the fact that the prince only obeys laws sanctioned by the people – that is, the estates. The question is, *rex a lege an lex a rege pendebit*: should the king depend upon the law, or should the law depend upon the king? (p. 113). Thus a very simple separation of powers into legislative and executive follows, whereby the law is the will of the people, the people are represented by the estates, and the prince – in his capacity as *executor* [executor], *gubernator* [pilot], *curator* [caretaker], *minister legis* [servant of the law] and first minister of the state [*supremus regni officiarius*, p. 89] – governs as an *organum* (instrument) of the law, but only as the body, not as the soul of the law (pp. 115, 116). Even the decision to wage war or make peace is due to the people, whereas the administration of war is the prince's business. Apart from the prince with the mandate to rule there are other officers of the government [*officiarii regni*], who are not just subjects but *consortes* (colleagues) of the prince. Moreover, all actions of the prince should be under the control of the senate, which is elected to oversee the king's interpretation of the laws and their implementation (*examinare*, p. 128). That is, all those people who are mandated by the estates (*officiarii regni*), taken together, represent more than the mandated king, who is just the first among equals. The illegitimate extension of the princes' power usually starts with the fact that they marginalise those who have a mandate from the estates and only summon them now to extraordinary committees (p. 89). In the *Vindicae* another key element in the struggle reveals itself: the

contradiction between the absolutist bureaucracy and those mandated by the estates. According to this text the prince should also have *officiarii*, but their mandate ceases with the death of the king, whereas the *officiarii regni* remain in function. The king's mandatees are merely servants, *servi ad obsequium tantummodi instituti* [servants in the allegiance of precisely this institution]. With this the *Vindiciae* has in fact made a crucial point, but without being aware of it: because, as it will be shown in the next chapter, these *servi*, as princely commissars, have abolished the lawful state of the estates [*Rechtsstaat*].

Moreover, even the theoretical rationale of the *Vindiciae* fails to realise a difficult problem that was present then and through which it would have been possible for absolutism to justify itself anew. In the *Vindiciae* the king is portrayed as the *officiarius* [officer] and the people as the *dominus* [master]. The king should govern, *imperare*; but this means that he should care for the common good (and here Iunius Brutus makes a reference to Augustine). The sole task of the king is the *utilitas populi* [welfare of the people] (p. 108) or *reipublicae* [of the republic] (p. 140). It is tacitly assumed, as something self-evident, that any form of public interest, such as law, is unequivocal and subject neither to doubt nor to common sense. It is exactly here that a split occurred that separates the natural law of the seventeenth century, which was usually treated as a unified complex, into two different systems. It is possible to phrase the opposition between them in terms of an opposition between the natural law of justice and the natural law of exact science.[37] The natural law of justice, as it occurs in the monarchomachs, was developed by Grotius. It assumes that a law with a certain content exists as a law prior to the state, whereas the scientific system of Hobbes is based, with absolute clarity, on the axiom that there is no law prior to the state and outside of it, and that the value of the state resides precisely in the fact that it creates the law by settling the dispute over what right is. Therefore the opposition between right and wrong exists only in and through the state. The state cannot do any wrong, because any regulation can only become law if the state makes it the content of an official [*staatlichen*] command, and not because it corresponds to any ideal understanding of justice. '*Auctoritas, non veritas facit legem*' ['It is authority, not truth, that creates the law'] (Hobbes, *Leviathan*, ch. 26). The law is not a

norm of justice but a command, a mandate from the one who holds supreme power and therefore wants to command the future actions of the members of the state (Hobbes, *De cive*, VI, ch. 9). A person is not guilty if the official judge has discharged him/her. The sovereign decides about what is mine and what is yours, what constitutes advantage and disadvantage, decency and indecency, right and wrong, good and evil (ibid.). He is the one to grant all honours and distinctions; before him all are equal, be it as individuals, like in a monarchy, or as a crowd, like in a democracy (Hobbes, *Leviathian*, ch. 19). Hence no private conscience exists in a state. One ought to obey the official law; for everyone, the official law must be the highest moral obligation. It is repeatedly said that all private property only comes from the state (*De cive*, VI, ch. 19; *Leviathan*, ch. 29). The difference between the two schools of natural law is best illustrated by saying that one system takes its start from interest in certain understandings of justice, and therefore from a certain *content* of the decision, whereas for the other the interest only consists in the fact that a *decision* as such has been made at all.

According to Hobbes, the sovereign defines what is beneficial and what is harmful for the state and, because human beings are motivated by their ideas of what is good and evil or what constitutes an advantage and a disadvantage, the sovereign must also have the decisive power about the opinion of the people; otherwise there would be no cessation to the struggle of everyone against everyone else, which it is the very purpose of the state to put to an end to (*De cive*, VI, ch. 11). This is why, for Hobbes, the state is, by constitution, essentially a dictatorship – since, arising as it does from a situation of *bellum omnium contra omnes* [war of all against all], it has the goal of permanently to suppress this war, which would immediately ensue whenever the pressure of the state on the people were released. The law, which is essentially a command, is based upon a decision related to the public interest; but the public interest only comes into being through the fact that the order has been given. The decision contained in a law is, from a normative perspective, borne out of nothing. It is, by definition, 'dictated'. But the final consequences of this idea were only discovered by de Maistre, when rationalism was shattered. For Hobbes, the power of the sovereign still rests on a more or less tacit

– and hence sociological no less than real – agreement with the convictions of the citizens, even if these convictions should be initiated by the state. Sovereignty emerges from a constitutive act of absolute power, made through the people. This calls to mind the system of Caesar and of a sovereign dictatorship based on absolute delegation.[38]

The fact that public interest does not depend on any public interest with respect to content but rather on the decision as to what should be regarded as the public interest is also clearly marked in Pufendorf, under the influence in Hobbes. Pufendorf knows that everyone claims, of course, to support only what is best for all – only public welfare, rights and justice. But the question is: whose decision carries the day in the end, and by what authority? The matter does not depend on the ends, but rather on the decision about the means to achieve these ends. The question is, who judges here? Who has the *iudicium statuendi de mediis ad salutem societatis spectantibus* [power of judgement to determine the essentials pertaining to a healthy society]?[39] A state does cease to be an absolute monarchy when, at the moment of coming to power, the prince promises to look after the welfare of the people and to support the good and punish the evil. For such a promise does not exclude the possibility of him being the one who decides on the means by which to achieve this end. A particular promise can, nevertheless, have different meanings, depending on whether it is a condition (in terms of the conscience of the king) or a legal requirement. From the point of view of conscience, he is always bound when he promises, for example, not to mandate any office to foreigners, not to raise new taxes, or anything like that. But at the same time he is not bound by that promise if an institution is formed that the king has to consult whenever the concrete situation [*Lage der Sache*] makes necessary a deviation from his promises. In consequence everything depends upon this state of exception. According to Pufendorf, each of the promises that are at stake in this discussion implies a tacit reservation that, depending on the concrete situation, an exception must be made in the public interest. So, when this happens, if the king remains the only one to decide, then he is, despite all agreements, an absolute master.[40]

The theory of the state that comes from the opposite camp of the estates denies interest in a decision as such and sees the 'people' as an

institution within which there can be no doubt about what is right and what is in the public interest. It believes in a common, equal and unmediated conviction of all citizens. This becomes immediately evident in its English formulation. Locke, for whom all concrete powers are utterly irrelevant where right is concerned and who therefore advocates an unconditional right of resistance, has asked himself: 'Who shall be judge?' His answer is: 'The people shall be judge' (*Civil Government*, XIX, p. 240). When, in order to ground this answer, he says that the people is the commissioner and that what is self-evident in private life should also be valid when the welfare of millions is at stake, this sounds as radical as a sentence by Rousseau. Nevertheless, the radicalism of the opposition that comes from the estates must not be confused with that of Rousseau. The two parties only share the radicalism of justice – the separation of right from power, which has existed at all times. When it comes to political practice, their radicalisms are different. When the monarchomachs, and also Locke, talk about the people, whose rights they defend against the prince, it is beyond question that they do not mean either the *plebs* or the *incondita et confusa turba* [the confused and disordered crowd], but only the people who are represented by the organisation of the estates.[41] Despite the radical tone of some of the statements of the *Vindiciae*, a phrase like *populus populive optimates* [the people or the people's best class/representatives] proves that this work does not distinguish the people from their representation. Only when a people appeared in its unmediated and unorganised mass, rejecting representation, did the new radicalism come into being. At the same time this means that, with Rousseau, another side of this new radicalism becomes apparent: the concept of 'commission' radicalises what the government was given by the people, so that the government becomes the commissar of the people and can both be dismissed at any point in time and be subject to the people's discretion in an absolute way. But this theoretical development presupposes an historical genesis according to which the 'commissar' plays an important role. The concept of the commissar has been introduced in the modern theory of the state by Bodin.

The Definition of Commissary Dictatorship in Bodin

Bodin is a moderate figure, in other words a *politicien* who stands between Machiavellian technicity and the monarchomachic lawful state. The difficult problem for public law, which can be summarised as the problem of the concept of sovereignty and of its relationship to supreme right and supreme power, could not be resolved by means of a politico-technical theory. Nor can it be it solved by ignoring it, as the monarchomachs did. The problem always relates back to the concept of dictatorship; a concept that appears as a devious tactic in the technologies of politics alongside many other devious tactics. Moreover, Bodin does not only have the merit of founding the concept of sovereignty for the modern theory of the state; he also realised the connection between the problem of sovereignty and dictatorship – of course, only through a limitation to commissary dictatorship. And he gave a definition of sovereignty that must still be considered as fundamental today. After he formulated, in chapter 8 of Book I of his *Six livres de la République*, the definition of sovereignty that became so popular – '*la souveraineté est la puissance absolue et perpétuelle d'une République que les latins appellant maiestatem*' ['sovereignty is the absolute and permanent kind of power of a republic that the Latins called majesty'], and so on – he illustrates it with numerous examples. The prince's deputy is not the sovereign, however great the entrusted power might be. By definition the sovereign remains master over any subject who is given an official duty – even if this duty is entrusted to a regular officer or to a commissar. For the sovereign can recall the entrusted power at any time and can interfere with the actions of the mandatee. Therefore it follows, for Bodin, that the Roman dictator was not a sovereign in the same way as the Spartan harmost [*harmostēs* = military governor], the aesymnet [*aisumnētēs* = elected tyrant] in Thessalonike [in Macedon], the archus [*archos* = leader] of Malta, the Balìa [ruling committee] in Florence,[42] '*ny autre Commissaire ou Magistrat qui eust puissance absolute à certain temps pour disposer de la République*' ['or any other commissar or magistrate who, at any time, had absolute power to do with the republic as he pleased']. The dictator only had one mandate [*Kommission*], such as to wage war, to suppress uproar, to reform the state or to manage the new organisation of offices. Not even the

Decemviri – the *dix Commissaires* ['ten commissars'], as Bodin calls them – who had complete authority to introduce a new constitution while the authority of the other offices was in suspension, can be called 'sovereign' in the proper sense, because their power ceased with the completion of the mandate [*Auftrag*]. That was also true in the case of the dictator. What is known as Sulla's dictatorship was, according to Bodin, 'a gruesome tyranny', which, by the way, the tyrant did not claim for himself after the end of the civil wars. Caesar was murdered after four years of dictatorship. During this dictatorship, and during that of Sulla, the tribunes' right of veto formally still existed. Even if a state, a single man or a single office is given unlimited power and no legal means can be levelled against its measures, that power is not sovereign when it is not permanent, because in that case it is derived or taken from someone else, whereas the true sovereign does not recognise anyone above him but God. Whatever the power of an officer or commissar of a democratic republic, or of a prince, this power has only a derivative authority; the sovereign is the people or, as in a monarchy, the prince.[43]

Bodin does not distinguish between the sovereignty of the state and the sovereignty of the bearer of the power of the state [*Staatsgewalt*]. He does not oppose diametrically the state as an independent subject to a supreme organ of the state.[44] Whoever has absolute power is therefore the sovereign, and who that is must be defined case by case – but not just on the basis of a factual investigation of the political influence (although this is of importance too, as can be gathered from Bodin's discussion of tyranny). A legal construction, namely the ability to derive no matter how much actual power, is the decisive factor. With this, the question of dictatorship is answered, so far as Bodin is concerned. But the separation of dictatorship from sovereignty soon led to a controversy as to whether dictatorship, in its very concept, is not really a case of sovereignty. In Roman sources it is stated that the dignity of the dictator is very similar to that of royal power (Livy, 8.32.3; Cicero, *De republica*, 2.56). All the same, for a theorist of constitutional law in a monarchy of the sixteenth and seventeenth century, the sovereign could not be a commissar. Furthermore, for Bodin, distinguishing a sovereign dictatorship from sovereign monarchy was unthinkable. In the monarchic theory of the

state it was always popular to mention dictatorship in order to demonstrate that the absolute dominion of one single person is inevitable in a case of emergency. But, from the standpoint of legitimate absolutism, which in political practice continually employed commissarial functionaries with far-reaching authorities, the contrast with the commissar was too marked for it to be possible to speak in any way of a '*commissio*' ['act of delegating'] moving from the sovereign to the commissar. Hence Albericus Gentilis emphasises that a dictator was a magistrate and not a prince.[45] Arumäus, following mainly Bodin, points out[46] the same contradiction. By contrast, Grotius, who knew the political conditions of his country – a republic torn apart by civil wars – and who had experienced the dictatorship of the Prince Moriz von Orange,[47] held a different opinion. He saw no essential difference between dictatorship and sovereignty. The growing interest in the reign of Augustus, which was current at the time, is also evident in Grotius[48] (the title of Lentulus' work referred to in note 11 was *Augustus sive de convertenda in monarchiam republica* [*Augustus or the Need to Turn the Republic into a Monarchy*]). Upon the fact that the people's sovereignty is transferred to a prince through the people, Grotius refers to the *lex regia* in order to ground his statement that the people have no inalienable and untransferable sovereignty. He asks why the people should not be able to transfer its sovereignty, since, to that time, no democratic state of any form had ever existed in which truly everybody governed – even the poor (*inopes*), the women and the children – as opposed to government being simply handed over to a few. Since such a transference occurs in a dictatorship, it should not matter how long it lasts. The parallel with property, which is also used by Bodin, and which should distinguish sovereignty from other types of possession of stately power – types that can be called usufruct – also occurs in Grotius, but with a difference: here an analogy with property is made because, during the period of dictatorship, the dictator truly holds *summum imperium* [supreme power] and in the case of *res morales* [ethical matters], as legal concepts are, what matters is their *effectus* [what they achieve] and not their duration, which is meaningless considering the nature of the thing. For the period of his tenure the dictator would therefore be a sovereign – and not just a magistrate, as Bodin thinks.[49] Nevertheless, Grotius

postulated that, during the time of his appointment, the dictator was not in the least to be made to resign (*revocabilis*). This already unravels a kernel of controversy in constitutional law: it is questionable to what extent the dictator has a right to that office, even if only for the duration of his holding it. If that is so, then the dictator can no longer be arbitrarily forced to resign, like a commissar (as opposed to a regular office holder); therefore equality with the sovereign becomes arguable – which, to be sure, normally it is not.[50]

The question of a temporary devolution of the full political power has been raised by Hobbes with a rigour that is profoundly characteristic of him, and it has been answered. If the whole people, the *populus*, entrusts a single person with absolute dominion, then by that [act] a monarchy is created. If the dominion is transferred only for a certain period, then the legal character of the political power that has been created in this way depends upon whether the *populus* – that is, all the citizens, acting together as a constitutional subject (which Hobbes calls a *persona* and always distinguishes strictly from the 'shapeless multitude', the *multitudo dissoluta*) – is granted the right of assembly or not during that temporary dominion. If the *populus* can assemble without, or even against, the will of the temporary ruler [*Gewaltinhaber*], then this person is not a monarch, but rather just a *primus populi minister* ['first servant of the people']. According to the treatise *De cive* (1642), this is also true for the Roman dictator, who in Hobbes' view can be forced by an assembly of the people – the *coetus populi* – to resign at any time before the end of his term of office, because here the people always remains the sovereign.[51] But the impression that the experience of the English Revolution and of its development into Cromwell's Protectorate made on Hobbes can also be recognised in his judgement on dictatorship. In the *Leviathan* (1651) he calls the dictator – a title he places next to that of protector, in allusion to Cromwell – a temporary monarch, on the grounds that in this case there is a power that must be seen to be equal to that of the monarch. But the character of a whole treatise like the *Leviathan* is political rather than devoted to constitutional law; dictatorship is mentioned mainly in order to demonstrate that during a civil war even a democracy needs some monarchic institutions and that, in republics, the unavoidable dictator or protector was most

often disempowered by the assembly of the people, the *coetus*, rather than by the representative or the vicarious steward of an under-aged king, or one unable to govern. Therefore Hobbes immediately and explicitly remarks that even the dictator is just a *minister* [servant] of the governing democracy or aristocracy, if he himself cannot appoint his successor – in which case he would be a monarch, to be sure.[52] As mentioned before, Hobbes' construction hints at the problem of sovereign dictatorship. But Hobbes distinguishes between sovereignty itself and its exercise, and thereby he evades the final consequence of his theory. He realises that in a democracy a minister or an official is quite often assigned the kind of sovereignty in which people have only the authority but not its *ministerium*, and so he is contented with the appointment of the bearers of the offices.[53] In particular, during war, an absolute form of the exercise of power would always be necessary from which, at least according to the arguments presented in *De cive* (ch. 10, §17), the superiority of the monarchic form of state can be deduced; since, following Hobbes, states are living with each other in a permanent natural condition, namely the condition of war. As Tönnies has correctly observed, this argument does not lead, according to its inner logic, to the traditional understanding of monarchy, but rather to Caesarism, the most rational form of enlightened absolutism. In the German loyalist theory of the state during the seventeenth century – an absolutist century, which was, at heart, irrational and regarded the monarch as a quasi-divine being ordained by God, and sometimes even as a creature physically different from other people – the disturbing character of Hobbes' theory had been fully registered.[54] Compared with this, Pufendorf's exposition, which is heavily influenced by Hobbes, does not seem to recognise Hobbes' topicality. This exposition mentions the controversy between Bodin and Grotius on the matter of whether the dictator is just a temporary governor or a monarch. Pufendorf comes to the conclusion that the dictator cannot be a sovereign monarch, like a regent or a representative (who are just entrusted with someone else's power). Moreover, he [the dictator] should be just a magistrate, because he is not commissioned (*commissum*) to govern the *imperium* arbitrarily (*pro arbitrio suo*) for the period of his appointment. The situation ought to be governed by the same legal procedures as the ones implemented

whenever a magistrate is commissioned with a jurisdiction endowed with the power of suspending legal means. According to this view, dictatorship has become, once more, a mere commissarial execution of stately functions.[55] After the consolidation of the monarchy in the seventeenth century, the interest in this controversy declines. Thomasius mentions it within the context of the question of temporary sovereignty and dismisses it by stating that whether the dictator has *maiestas* is a question that can only be answered according to the circumstances of Roman history.[56] Christian Wolff returns to the subject only to gloss over it in a few words.[57]

In fact the controversy was essentially about the contradiction between commissary and sovereign dictatorship. Bodin limited himself to commissary dictatorship, for which he provided, however, an extraordinarily clear and detailed juridical foundation. He discusses it in chapter 2 of Book III of his *Republic*, as a case of commissarial fulfilment of public duties. Advancing towards a general concept in constitutional law, he employs a distinction that has already been discussed in detail in canon law and by commentators [*Glossatoren*] on the doctrine of the commissarial judge;[58] and in it he contrasts the regular officer (*officier*) with the commissar (*commissaire*). The regular officer is a 'public person' who has a legally circumscribed remit: '*l'officier est la personne publique qui a charge ordinaire limitée par edict*' ['the officer is the public person invested with a regular charge, limited by edict']. The commissar is a public person too, but he has an extraordinary duty, defined by a specific mandate: '*le commissaire est la personne publique qui a charge extraordinaire, limitée par simple commission*' ['the commissar is the public person invested with an extraordinary charge, limited by simple commission']. Both have a public function, a *charge publique*, a *munus publicum*, in contrast to the private person, although for Bodin the commissar is no magistrate; he always calls the latter *officier* (*Republic*, III, ch. 3). It is self-evident that even a regular official can be, by mandate, a commissarial duty, and this is usually the case; but then he is no longer a regular official to this extent, but a commissar (p. 380). The extraordinary judges who are mandated by the prince are, similarly, not magistrates like the Roman *quaestores parricidii* [public accusers], although they have the power to command, the power to make judicial decisions and the

power of execution. Bodin explicitly argues, against Cujacius, that the definition of the concept should not be limited to judicial activity (pp. 373–4). According to Bodin, Cujacius has neglected its most essential aspect, namely the *puissance de commander* ['power of command'], and he only talks about jurisdiction. In other words there are, generally, two different ways of exercising stately power, which can be distinguished by the different constitutional character of the arrangement on the grounds of which the person is acting on behalf of the state. That person is either acting as a regular official or as a commissar. If we were to place Bodin's thoughts, which are interlaced with various historical examples, into a clear schema, then we would obtain the following characteristics:

The official (*officier*; Latin: *officialis*; *charge ordinaire*)

1 Basis: law (*édict, loy expresse, publiée, vérifiée, enregistrée* (p. 375)); therefore
2 permanent character of the office: it exists even if the bearer of the office changes frequently (for example the annual consuls); as such, it is *à perpétuité* [for life], it has *traict perpétuel* (p. 377), and it can only be cancelled through law; therefore
3 there is a kind of right to the office, in virtue of which the official bears his office like something that has been lent to him for a period of time and the owner cannot claim back arbitrarily (p. 378); therefore
4 the contents of the official duty are legally defined in terms of place and time, so that the official has a certain discretion, according to his judgement (p. 388).

The commissar (*commissaire*; Latin: *curator*; *charge extraordinaire*)

1 Basis: *ordinance*; therefore
2 no permanent character of the duty: it is only '*selon l'occasion*' ['occasional'] (p. 375) and ends with the accomplishment of the business (p. 377); therefore
3 no right to the office: the commissar holds his function only as a *precarium* [something uncertain, granted by entreaty] (p. 378), and is permanently dependent upon his commissioner (p. 378); a cancellation is possible at any time (pp. 376–7); therefore

4 the contents of the commissar's duty are strictly bound by his instructions; his discretion (*discrétion*) is strictly limited; he is always and in every detail directly dependent upon the will of the commissioner, although the latter can grant him greater freedoms (p. 388).

The significance of Bodin's elaborations on this matter does not lie so much in the political understanding of the meaning of the commissar for the new edifice of the state's organisation. Bodin has not realised that the commissar was a tool in the process by which princely absolutism had accommodated itself. That could be explained historically by the fact that royal commissars with far-reaching powers gained greater political importance only under Henry IV.[59] On this point Machiavelli had a sharper and more practical view, when in the last paragraph (*Il Principe*, ch. 9) he recommended to the prince, who wanted to introduce an unlimited power, that he should always govern by himself and never through *magistrati*, because then he would always be dependent on the will of the bearers of those offices; they could easily seize power (*lo stato*) and refuse to obey. Characteristically for Machiavelli's discussion, which is only vaguely suggestive, he does not analyse this issue any further, nor does he talk about commissars. The opposition between commissars and magistrates as regular bearers of an office was only developed systematically by Bodin, who synthesised the vast material on this issue under the general ideas of a theory of the state. He puts so much emphasis upon the formal division of the legal basis – law on one side, command on the other (he even talks about formalities in issuing a law and a command, for instance that the preambles are different, or that the commissar only has a yellow sealed and not a green sealed *lettre patente*) – that one is inclined to think that, in terms of the modern theory of the state, a formal concept had been already established that could recall the division between law in a formal sense and law in a materialistic sense (as used in the positive theory of the state). But this is not the case, since Bodin does not subscribe to this juridical positivism and is not aware of a conception of law as something separated from the idea of justice. His notion of the state is, despite his understanding of sovereignty, that of a lawful state [*Rechtsstaat*], whose laws are not

just expressions of power that can be issued arbitrarily and cancelled arbitrarily, like any other regulations [*Reglements*]. Despite fighting the monarchomachs, he simultaneously viewed the technologisation of law undertaken by Machiavelli as something despicable – a ruthless and unworthy atheism from which he distances himself. Accordingly he would never be able to admit that the will of the sovereign can turn any sentence into law. That, for him, would no longer characterise a state but a tyranny. Hence the difference between the official and the commissar cannot reside exclusively in arbitrary command. Moreover, a lawful monarchic state is a prerequisite that fundamentally respects the existing organisation of offices, and therefore it constitutes a hierarchy of established offices with a predefined remit. This is also the basis upon which Bodin draws his further distinctive characteristics: regular and extraordinary, permanent and temporary. The distinction between '*trait perpétuel*' ['permanent feature'] and '*occasion*' ['circumstance'] demonstrates this; because, for Bodin, Grotius' argument according to which duration, *tempus*, cannot be a conceptual criterium in law should have been obvious. The content of the commissar's duty should, according to Bodin, be different according to the concrete situation [*Lage der Sache*], '*selon l'occasion quie se présente*'.[60] Therefore a dictator was nominated *si res ita postularent* ['if the situation demanded so']. One may wonder whether it is from this that Bodin draws his conclusion that the commissar, in contrast to the regular official, should have less freedom and no discretion.

Although here Bodin is dependent, first and foremost, upon the view of the French monarchy that prevailed in his time, he nevertheless lists a number of commissarial duties without distinguishing between different types of commissars, because, for him, anything the commissar is doing is based, without distinction, on the revocable command of the commission. It makes sense to develop Bodin's view – and in greater detail, as he has done – in order to distinguish between the official remit of a functionary employed by the state and the content of his official duty. That this distinction is not alien to Bodin is evident simply from his mentioning that even an official can be mandated, as a commissar, with any issue. The difference between the regular duty of the official and *commission* is that the former has a legally circumscribed content, and therefore (generally

speaking) a restricted one, by which it is disconnected from any place or time – from the *occasion*, in other words from the particular or special circumstances of the case at stake. As a result, though, the regular official is bound to the law, and the decision he makes, in each individual case, is just the concretisation of a decision already entailed by the law. The way he will decide, in contrast to that of the commissar, will depend entirely upon the concrete case. It seems that the commissar is less bound, and therefore freer than the regular official, who is circumscribed by the framework of a normative and legislative remit. The reason why Bodin nevertheless portrays the official as being free and the commissar as being dependent is that awareness of an objective content is intermingled with the understanding of an official mandate of the functionary of the state. Since the law is the basis of the duty of a regular official, the latter is more independent from the sovereign, who cannot change anything in terms of the remit of the mandate without suspending the law; whereas the commissar, like a privately hired executive, remains dependent, in every particular instance, upon the one who commissions. The commissar lacks the automatic self-empowerment that lies in the legal definition of responsibility, whereas the office holder may not directly obtain it by law, but he obtains it at least indirectly, through his actual role [*Reflexwirkung*]. From an outsider's perspective, however great the power of the commissar may be, he remains nevertheless a direct tool of the concrete and alien will of someone else. One might even say that the legal restriction guarantees the official's independence, and this independence will increase if he is doing nothing but applying the law to the concrete case.[61]

The commissar does not have only a conventional mandate but, simply by virtue of being a 'public person', he is also inevitably empowered to do business abroad, because he does not use his stately authority against the one who commissions him, to whom he cannot appeal and insist on the right of his duty. He can only use his authority against a third party, be that citizens of his own state or foreigners. The analogies taken from private law, which played such a significant role for Bodin and up to the nineteenth century, are referring not only to the mandate but also to the authority – the representation. This makes it evident that Bodin discusses different

kinds of commissarial activity without distinguishing between them. The meat inspector, the numerous commissars of the police and administration – even the commander in chief, the envoy, the dictator – all are, for Bodin, commissars in the same way. Their duty is always based on an order given by the sovereign and not on a general legal prescription, but the content of their duty, as well as their powers, essentially differ from each other. The meat inspector and the numerous administrative commissars fulfil their duty, as long as the reason for their appointment is that they are truly commissars. Normally, in the course of history, they become regular officials and maintain their titles simply for historical reasons. The official's mandate can also be delegated to a commissar. These kinds of commissar, who are empowered by a special authority, are best called commissars of duty [*Dienstkommissar*] whenever the content of their mandate is circumscribed by official policy. If it is the case that they are to sort out one or more specific businesses, a commissar, called commissar of a specific business [*Geschäftskommissar*], is especially appointed whose authority in each individual case is dependent upon the commissioner's will. The diplomatic commissar [*Verhandlungskommissar*], who has to take part in negotiations, is just one example of this commissarial duty. Interestingly, Bodin makes an exception for the envoy (who is a commissar of business, insofar as he should not be called commissar of duty against the nature of his duties): whereas his doctrine states that the commissar's *discrétion* [freedom of action] is limited, in this case he says that everything is different '*selon les personnes*' ['from person to person'] (p. 388). By contrast, the dictator is a commissar afforded an authority that is substantially different from that of the commissar of a certain business or duty. Here the desire for success can become so strong that legal barriers, which might otherwise be stumbling blocks in the projected course of events, can be removed if necessary (and the dictator is the one to decide on that). In the interests of the desired ends and by the means established by the dictator, dictatorship gains an authority whose essential significance consists in the rights of suspending legal restrictions and of interfering with the sovereign rights of third parties, depending on the concrete situation. It is not the case that laws are suspended on which the rights of a third party rest. It is only permitted to act against the rights of third-party people

when the concrete situation makes it compulsory to do so if a certain action is to be accomplished. Nor will any positive law be passed that may define in advance the authority and powers of a dictator in a concrete manner. Moreover, '*Ausnahmen nach Lage der Sache*' ['exception depending on the concrete situation'], a concept that is completely contradictory to the logic of law, will be tolerated. For this kind of commissar I will use the description 'commissar of action' [*Aktionskommissar*]. The dictator would be an absolute commissar of action. In the circumstances, the formal theory of the new positivist state collapses, and so does Bodin's formal distinction between laws and commands, too. The dictator, according to Bodin, is by definition a commissar whose duty, seen from a legal point of view, is essentially nothing but a commissarial duty. In this case, therefore, it is no longer up to the arbitrary will of the sovereign to issue a law or a command. The law, which according to Bodin forms the basis of the authority of the regular official, must in general give at least the content of his authority. A law defining a content that allows everything demanded by the concrete situation would be exactly the opposite of a concrete definition of authority and of its legal limitations. The dictatorship cannot be a regular office; and it cannot be a *munus perpetuum* [permanent office], either. If dictatorship is granted the *trait perpétuel*, then not only would the dictator be entitled to his office, he would also become the sovereign and would no longer be a dictator; for Bodin does not recognise sovereign dictatorship as such. Even when a new organisation of the state is being founded, he always assumes that [the function of] the sovereign is already formed. He points out that all states in the origin of their development are employing not just regular officials but also commissars, and that every reorganisation of a state, every *reformatio*, has to return to extraordinary mandated persons *reipublicae constituendae causa* [for the sake of forming the republic]. It does this in order to convert the commissar, in due course, into a regular official (pp. 378–9, 392–3). Bodin does not distinguish even commissars of this kind, who contribute to the reforming of the state, from all the others.

His distinction between two kinds of activities of the state presupposes a clear contrast between law and command. This distinction had to be rendered obsolete by the further development of absolutism.

This is because, according to the absolutist theory of the state, every state's expression of power is, essentially and indiscriminately, based on the will of the prince. As a result, an important insight of Bodin's was neglected, despite the well-known success of his concept of sovereignty. Not even the brand of literature that was pitted against absolutism and against Bodin's understanding of commissions refers to it. In the seventeenth century, when Algernon Sidney mentions dictatorship, he is not doing so in order to claim that his political enemy, absolutism, is a dictatorship. He refers to dictatorship because, for him, it had the traditional classical meaning: it was an institution characteristic of the free Roman Republic.[62] When it comes to Locke, he – maybe like no one else – takes the exclusive significance of the law and an indifference towards sheer force as the basis of his deductions, and thus the concept of dictatorship seems to have no place in a system where everything is founded upon a simple either/or: right or wrong, law or despotism, public consensus or force. The power of the facts is meaningless to Locke. What is sheer power, or a mere fact, has nothing to do with law. What is not amenable to law, not as an actual force, is the beastly principle, 'the way of beasts'. Here, in this sphere, not even the king can change anything through dictates or commissions. In this context Locke makes a statement that is still recognised in English law and that can be explained, historically, by appealing to the notion of a struggle against the commissar as an instrument of absolutism: no action of a subordinate can be redeemed through the commission of the king; only a law based on the consensus of the people can justify it. Not the commission, then, but the law guarantees state authority: 'the law gives authority'.[63] When Locke wrote this, at the end of the seventeenth century, English absolutism was already dead and the question of royal commissions had become obsolete as a result of the Bill of Rights.[64] Nevertheless, the concept of commission reappears in another passage by Locke, and this fact shows that his seemingly plausible system was not that simple. He acknowledges a royal prerogative that should consist in the recognition of the public interest 'without a rule' (*Civil Government*, §166). The lawmaker, he says, cannot foresee everything (this statement is shared with the old doctrine of *aequitas*, ἐπιείκεια). Therefore the one who is entitled by the actual power of the state to execute the laws

should, according to the general axioms of natural law, have the right (although initially he only has the power) to make use of his power in unpredicted cases, until the Legislative Assembly convenes as normal. The lawmaker himself should make provision for the possibility that he may not be able to foresee everything (§159). Locke does not seem to see a problem of particular political relevance here; in spite of this, he continues to discuss the relevance of the concrete situation [*Lage der Sache*]. The simple division of stately functions into law and its execution, as it corresponds to the monarchomachist opposition between people – in other words estates – and king, is supplemented in Locke by a third power: 'the federative power'. The executive, which can be summed up in the simple formula the law plus the execution of the law, only concerns domestic issues. The federative power, by contrast, refers to what has to be done against 'foreigners': war and peace, international treatises, and the like. In this case, however, a guidance by previous and general laws ('by antecedent standing positive laws') is less possible according to Locke. Everything depends upon the different interests and plans of the foe. Consequently everything must be entrusted to the prudence of a few people, so that they may be able to act on behalf of the common good. Therefore the word *committere* [to entrust] reappears here once more with its characteristic meaning.[65] The mandate to do, in an appropriate manner, what the concrete situation [*Lage der Sache*] requires, combined with the corresponding authorisation to represent the authority of the state, is nevertheless the characteristic substance of a *commissio*.

2

The Practice of Royal Commissars until the Eighteenth Century

Ecclesiastic and Royal Commissars

In the history of constitutional law, the transition from the medieval to the modern concept of state could be marked by the fact that the notion of papal *plenitudo potestatis* [full power, omnipotence] became the base of a great reformation [*reformatio*], which restructured the entire organisation of the church. The legal expression of this concept was the fact that the centralised power of the sovereign established a new form of organising, without respecting the vested privileges and the rights to office that were characteristic of the medieval state, and that it offered the exceptional example of a legitimate revolution, which was in principle recognised even by those who were worried about it – a revolution that was executed by an organ formed according to the law (and not one that came into existence through the revolution itself). As early as in the thirteenth century, the pope's sovereignty inside the church had abandoned the medieval feudal state. Quintessential to papal power of office since Innocent III was that the pope was more than the supreme lord [*Lehnsherr*] of the church:

> he has unlimited power to decide upon the income of the church, he distributes offices and benefices arbitrarily and by pure grace; he is not simply the supreme, he is the sole head of the church [. . .] The prelates are not his vassals any more, but his officials; the feudal oath [*Lehnseid*] has become the oath of office [*Amtseid*] without changing the text, and it remains essentially the same no matter whether an archbishop, a papal auditor or a notary swears that oath.[1]

Whether or not, with respect to the secular estate (the *regnum*), the pope merely remained the supreme feudal lord and did not intend to overthrow the secular government, as Hauck claims,[2] these inner restructurings of the ecclesial organism are, by comparison, of little interest here. What was perceived as revolutionary in *plenitudo potestatis* was the termination of the medieval idea of an unconditional hierarchy of function. This hierarchy could not have been changed, not even by the highest authority, and every function holder could lay claim to it. For Marsilius of Padua, *plenitudo potestatis* is already the concept against which he struggles, and the pope's delegated commissars appear as the instruments of this papal omnipotence, of this 'tyranny'. According to Marsilius, their characteristic is to interfere directly and *immediately* in the authority of functions, thereby transforming the well-designed ecclesial organism into a chaotic and formless monster.[3] But even great scholars like Gerson raised the same objection – they who otherwise still respected the primacy of the pope and the monarchic character of the church, just like the radicals Wycliffe and Hus, who continued the tradition of Marsilius. By a logical–legal necessity, these scholars – just like the nineteenth-century constitutional theory of the state – arrived at the distinction between the substance of legal omnipotence and its execution. They wanted to make the execution subject to the control of the council.[4] They could not escape the abstract consequence, which was implicit there, that the essence of the power of the supreme authority implies that he can do everything that normally is in the sphere of responsibility of the subordinate. But the traditional medieval understanding of the vested office contested that. Of course, at the end of his treatise *De potestate ecclesiae*, Gerson says that *plenitudo potestatis* – in other words *plenitudo ordinis et iurisdictionis* ['fullness of order and jurisdiction'] – has to be vested in one person; but, he continues, this should not be understood as if the pope had any arbitrary jurisdiction over each and every Christian *immediate* ['without mediation'] and could exercise it arbitrarily, *per se vel alios extraordinarios* ['by himself or through others with extraordinary functions']. This is because, by doing so, he would prejudge the *ordinarios*, who had a direct right of action (*actus*) by virtue of their mandate. The pope stands at the top (*praesidet*), but not in the sense of being entitled to annihilate

the members (*non ita ut caput gravidum membra reliquae obruat mole suo* ['not so that the heavy head may overpower the other parts with its weight']). He should not take away *contra naturam* [unnaturally] the functions (*officia*) of any single member. Only in a case of *necessitas* [need] and *evidens utilitas ecclesiae* [obvious advantage for the church] is a direct intervention permitted. That the extraordinary and direct interventions of the supreme power have been viewed as a truly revolutionary act – although a legitimate *reformatio* [reform] cannot be carried out without transforming the existing organisation and without violating vested claims or entitlements – is evident from the sense of outrage that is still vivid in Hauck's treatise. Hauck examined the practice of Innocent III in detail: the pope sent officers with a special mandate, as had already happened occasionally under Coelestine, to act as judges in a case in order to prove and decide the issue on the spot. Usually the commissars were members of orders, abbots, provosts or clerics of a lower rank. In most cases they had to judge other clerics, who were hierarchically of a higher rank. There are cases in which the subordinate was mandated with an investigation against a superior. 'Was it Innocent's intention', asks Hauck, 'to convince the world that not the function but the papal mandate defines everyone's hierarchical position within the church? He never said this explicitly, but his behaviour shows that this is another matter in which he did not have great respect for historical rights.' In the face of such *plenitudo potestatis*, all the responsibilities and authorities – as well as the *ius quaesitum* [special third-party right] of function – had to vanish. Wherever he was, the papal legate was in charge of functions, he ordained bishops, he visited and reformed churches and dioceses, he made decisions in matters of belief and discipline, and he issued general statues.[5] The legal basis of his universal authority was constructed in such a way that everything the legate did was seen as being done by the pope himself, except for the papal veto. The statement *legatus vices gerit domini papae* ['the legate acts vicariously in the name of our master, the pope'] can already be found in Durandus' *Speculum iuris* (published around 1272) – a handbook on canonical practice that was well known at the time. The legate had a mission he had to fulfil, and if he was prevented from fulfilling it he was entitled to punish all those who hindered him or did not obey

him, since his *potestas* would of course be '*delusoria*' ['imaginary'] if he did not have *coercitio* [the right to impose it by coercion]. As he could not be present in person everywhere at the same time, he exercised this *coercio* through his instruments, who acted in the same way as he himself was the instrument of the pope. Through his legates, the pope was everywhere. Rome was the everybody's shared fatherland. On this principle rested the universal authority of the pope.[6] The opposition did not deny the pope this right; the opposition only attacked its abuse and sought to limit the generally accepted right to cases of genuine *necessitas*.[7]

According to the medieval understanding that authoritative power was at the same time judicial power, the legate was first of all a *iudex delagatus* [delegated judge]; nevertheless, his authority exceeded by far the judicial investigation and decision. Therefore one cannot equate every delegated and extraordinary judicial duty with that of the legate. Of course the duty of both is based on a commission – a *commissio*. The word *committere* is already a *terminus technicus* in canon law: it designates, in opposition to *remittere*, the transferral of authority of jurisdiction to someone who normally would not have it, in other words to someone other than the regular judge. We can see here most clearly the principle at the basis of Bodin's theory – that is, the opposition between an authoritative function resting on law (*lex*, *constitutio*) and one resting on commission (*commissio*).[8] Normal cases, such as that of being subpoenaed or of taking evidence through the commissarial judge (*commissio citationis testium vel iusjurandi receptio*) are listed as examples alongside the *executio* ['power of carrying out a duty']. Here, however, the concrete situation [*Lage der Sache*] comes into play once more, because the commissarial executor acts not only as a judge who proves and decides – in other words not only by exercising the law [*rechtverwirklichend*] – but also by creating it [*rechtsprechend*], and therefore he goes beyond the scope of a purely jurisdictional function. What will become apparent many times in the course of historical development is already evident here: *executio* belongs in the sphere of jurisdiction. Intervention is causal, because *executio* must intervene in the concrete procedure of an actual case. Therefore, by its nature, *executio* goes beyond the weighing of factual evidence [*Erkenntnisverfahren*]. It might lead to further hearings and,

depending on the concrete situation – for example the resistance of the *exequendus* ['prosecuted' in Prussian eighteenth- and nineteenth-century law] – to measures whose scope and size are unpredictable. Here the characteristic phrase appears that the exact *discretio* of the executive commissar entrusted with carrying out a concrete case is left to him to establish.[9]

But, putting all this to the side, great deviations from the conventional legal procedure appeared, because there existed powerful commissions without a clearly defined limitation of their remit and because, when a transition of responsibilities occurred, the content of the judicial duty changed too. An example of a far-reaching delegation is the right of papal auditors to order commissions everywhere, on the grounds that they were authorised by the pope to be in charge of all lawsuits throughout the world and on the basis of a general commission to decide on all the appeals, as *quasi-ordinarii*.[10] Furthermore, the *princeps* is entitled to devolve to an extraordinary judge cases for a definitive decision without appeal or revocation (*remota appellatione*), or without the admittance of summary procedure. Commissions like the authority to visit accorded to mendicants, who were not just revealing and reporting irregularities but also seeking to reinstall order, were out of the ambit of jurisdiction: the mendicants could make even organisational changes, and hence they could interfere with the authority of bishops.[11] In general, the legate could be entrusted with a province in order to restore public tranquillity and peace among the people (*pax*, *quies populorum*) and to wipe out the evil elements (*pugare malis hominibus*). In his allotted province, whenever he liked, he placed himself in charge of any case that was brought before the ecclesial court; and he was not seen as an extraordinary judge because he represented (*vices gerit*) the pope, who was a [*iudex*] *ordinarius singulorum*. He demonstrated his authority through *literae legationis* [letters of attorney], which were usually published when he entered his province, so that no one could claim that they had not been informed. His power of attorney usually also embraced the *plena potestas* that allowed him to exact the contributions needed for his maintenance and expenses. Depending on the concrete situation, he issued general regulations. He mediated between contending parties in his province and gave judgement in the

struggles between lords. The powers of the different types of legates were diverse. What is interesting here is that they had organisational and administrative powers beyond the regular jurisdiction. As a *missus vices gerens* [envoy acting vicariously] and a representative, the legate must be distinguished from the regular judge and from the commissarial judge – a function that evolved from that of regular judge: the same thing, that he '*vices gerit*' ['acts vicariously'], was said of him and of the *missus* in different senses. Nevertheless, the basis of the legal construction of any authoritative function remained the idea of personal representation and stewardship, which went in a coherent lineage of personal representation culminating in the supreme person. The pope himself is the *vicarius Christi* [Christ's representative], and he is also called Christ's commissar.[12] The idea of Christ's personhood is therefore the ultimate pinnacle of this conception of the law.

As long as the commissar was just a judge and only exercised judicial powers in a strict sense, formally no change occurred in the content of the official duty as a result of the exercise of the commissar's function. Even if the commission entailed a suspension of legal means and a summary procedure, the judicial commissar was doing – at least in theory – only what a conventional judge would have done in the end. It was an entirely different matter if he acted beyond the application of a particular law, if this required interventions needed for the achievement of a concrete goal, and if he did it on behalf of a superior authority. All this was already common practice among legates and some commissars of execution, which was even more evident when worldly princes sent out representatives with particular tasks and responsibilities – to banish disorder, to put an end to the abuse of functions or to exact taxes. As Bodin had realised, such *missi* were at the beginning of any new statal order; they were likely to be found in all the states that emerged in Europe during the Middle Ages. The function of the Frankish *missi regii* [royal envoys], which Bodin and Delamare regarded as a case of execution of commissarial authority, did not last long. Of course, even the German emperor delegated judges; and extraordinary judges were known everywhere. Circuit judges, *itinerarii, discussores* and *inquisitores* could be found in all kinds of different countries throughout the medieval period. The title of commissar was so general that it was used for any type of

commission and for the execution of the most diverse sorts of state affairs; not only princes, but also the estates employed commissars. In particular, in England, alongside circuit judges appointed in the name of his majesty and officers mandated on a royal commission, there were estates 'commissioners' entrusted with duties of local governance. In France there usually was in the first place the great *enquête* of Saint Louis (Louis IX, the Capetian King sanctified after his death in 1270): this was issued in 1247 in order to listen to the complaints of 'poor subjects' against the local government and to 'resolve those that could be resolved' (*corrigere quae corrigenda*). Not only was it granted responsibility to oversee the situation for this purpose; it had judical power and power of coercion as well. Later such *enquêteurs* and *réformateurs* were sent out to achieve all sorts of different purposes. The typical development, which Bodin has already brought to our attention, was that the *missus* [envoy] became locally established *ambulante* [in the course of his travels] and the commission became a permanent position.[13] In countries like Germany and England, where the power of the estates prevailed, the (country) commissars acted independently from the royal commissars, even if the king appointed them. In the same way, the commissar could therefore be an instrument of the estates, which were concerned with the protection of their rights, as well as being the instrument of princely absolutism, which wanted to establish itself at the expense of the privileges of the estates. Overall we find lamentations about the extraordinary princely commissars, who interfered with the positions as well as with the vested rights and referred to their commission by way of justification.[14] The commissars delegated their authority to subordinates with the help of whom they could fulfil their tasks; and so, by this further sub-delegation, new commissars were continually created. But the principle was uncontested that supreme jurisprudence, *merum imperium* or *ius gladii* were impossible to sub-delegate. The decisions of the princely commissar emanated from the prince; hence the decision counted as the king's, and it stripped the person affected of all the conventional legal remedies. In most cases the local government knew that it had to strike a deal with the commissars. This was even more strongly the case as the commissars themselves were eventually rewarded with hereditary functions, according to feudal ideas – in

particular the commissars of finance, who leased the taxes they had to collect and in this way performed their job very well. On occasions the estates bought from the prince a so-called commission of reformation [*Reformationskommission*].

In the Italian states of the fourteenth century there were, besides these *missi* of the princes, other commissars, whose duties consisted in acting as representatives of the government in the army, in controlling the commander in chief – the *capitaneus* – and in fulfilling stately functions that were not entrusted to the leader of the mercenaries. The remit of these military commissars was diverse. In part they were commissars of service [*Dienstkommissare*] for the administration of the army, and they concerned themselves with issues related to the quartermaster (*provveditori*); in part they fulfilled political duties, namely negotiations with the enemy, and therefore they were also commissars of business [*Geschäftskommissare*] – *governatore*, *consiliarius*, *officialis*, *deputatus*; in part they were, finally, leading the action, for instance in order to quell a rebellion, and for this reason they had military power in the army of which they were commissars and in this capacity they were called commissars of action [*Aktionskommissare*] in the terminology employed here. The exercise of papal rule provided very clear examples for these different types of commissars – and particularly during the Schism, when counter-Pope Boniface IX (1389–1404), successor to the schismatic Pope Urban VI, governed the papal states and was forced to take extraordinary measures in an extraordinary situation.[15] Very interesting mandates and authorisations can be found here as a result. For example in 1391, in view of the financial crisis of the papal treasury and with reference to *necessitas* [the state of necessity], the pope empowered both 'commissars' Bartolomeus and Marinus to sell up to a certain sum of money a *castrum* that belonged to a monastery, or to lease it, or to do with it whatever they thought fit, *etiam iuris solemnitatibus non servatis* ['even if the proper legal formalities had not been observed'], without consultation of the abbot or of the monastery. Yes, even against their will and without any consideration for the guaranteed and confirmed privileges.[16] The extraordinary character of this commissariat consisted in the fact that rights granted in individual cases could be neglected and legal procedures could be suspended for the

sake of achieving a certain goal (to raise a certain sum of money). A completely different mandate was given to Johannes Holand, *comes Huntingdensis Confalonierius* [Earl of Huntingdon], in 1397. He was appointed papal *capitaneus generalis* and given the power, in the interests of the church's dignity, justice, public tranquillity and the common good, to do whatever he thought was necessary (*que expedientia cognoverit* [whatever expediency dictated]), as long as it was in accordance with the right and custom of the function of a *confaloniere*, a *vicarius* or a *capitaneus*, and to employ all legal means against the rebels. All official bodies were advised to follow his commands; all his judgements and decisions made *rite* ['according to custom'] against the rebels were ratified in advance, and legal appeals were nullified.[17] Here we can detect a transition in judicial power. In 1398 even more far-reaching powers were given to senator Malatesta de Malatestis, who was nominated *vicarius in temporalibus et capitaneus generalis Urbis* [deputy in lay matters and general captain of Rome], as well as *reformator* ['reformer']. For the execution of his task – namely to establish the unity of the faith; obedience and peace; and *obediencie promptitudo* [readiness in submission] – he was 'given' ['*komittiert*'] by the pope the following powers:

1 the government, administration, protection and reorganisation of the city (*regimen, gubernacio, libera custodia ac reformacio*), including the authority to delegate these powers;
2 the power to appoint marshals, notaries and other suitable officials (*officiales*), who should judge in civil and criminal law cases according to his recommendations;
3 the power to guarantee the tranquillity and security of the city within the limits of his senatorial powers;[18]
4 the power to decide freely in civil matters that did not exceed 150 German pounds in Roman coins, and to do so through summary procedures, according to his judgement (*summarie et de plano ac sine strepitu et figura iudicii prout tibi videbitur*);
5 the power to impose or to pardon corporal punishments without taking into account the existing statutes of the city;
6 the power to determine the punishment in individual cases where the crime was legitimately proven, and to do so through a

summary procedure, without paying heed to the observance of the city's statutes;

7 the power to arrest and execute all those who disturbed public tranquillity and incited to hatred; to reestablish public order; and to sanction and give penance to those disturbers of the peace;

8 the power to grant safe conduct;

9 the power to exile someone from the city even if the city's statutes would not allow it;

10 the power to appoint judges, notaries and officials with the normal salary.

In the end, he was given the general authority to use all the concrete measures that seemed necessary for the reformation and reestablishment of public tranquillity (*eciam via facti exequendi* [indeed the way of the act to be accomplished]). Obviously this general authorisation signals a caesura in the list of forms of authority, because the ten ones specified above were connected to a few more. Whereas the forms of authority just mentioned concerned all citizens, the next ones concerned the rebels – that is, the enemies of the Roman people and the invaders (*invasores*). The mandatary could refer to these people through a general edict against rebels and invaders, and he could *via regia procedere* [take the royal highway] against them; he could acquire their personal freedom and private goods; he could destroy their fortifications and suppress them through all the punishments and legal measures permitted by a summary procedure. The conclusion contained an exhortation to all official bodies and subordinates to follow the mandatary in all matters concerning his office. The city treasurer was requested to pay all the salaries, for him and for his auxiliary officers, according to the agreement with the pope and the statutes of the city, without any deductions. Finally all the decisions, punishments and penances that the *capitano* or his auxiliaries issued against delinquents and rebels should be accepted. Here the commission of judicial and administrative powers combined with a mandate to take measures that were called plainly concrete and were based upon a legal construction according to which the people upset by such measures were enemies of the Roman people and rebels.

The reason why the mandatary was not called a commissar was

very likely to be that not every arbitrary transferral of the administrative business of the state was called a commissarial mandate, even if juridical powers were involved in the process. Neither were the *Podestà* and *Capitaneus populi* of Italian city-states called commissars. What was commissioned was always the supreme power alone, on the idea that the commissar appeared as a personal representative of his commissioner – *vices gerit* – and did what this commissioner would himself have done, had time and place allowed him to be present. But the concrete measure that was taken *via facti* was not a matter of commissarial mandate, insofar as it was not part of a judicial execution. That this distinction was clear to the practitioners of canon law in their extraordinarily lucid and sober understanding of the law was evident in Malatesta's separation of powers – the caesura mentioned above. What was done *via facti* against enemies and rebels who were declared enemies had in practice to be done by auxiliary people and was not open to legal conformity in the same way the actual act of execution was – where the hangman, for instance, was not a commissar of any kind. Hence the commander in chief as such, the *condottiere*, was not a commissar either. He was the head (*caput, capitaneus*) of a venture that was only undertaken in order to achieve a concrete goal and did not involve any powers stemming from the supreme authority. The power of command over his people – the mercenaries – rested upon a free contract. The duty towards the governing lord in whose service he entered was also based on a free contract. He promised loyalty and obedience to his commander and his commander's deputies, who were called commissars, because the latter were an extension of the supreme authority. Those commissars gave him orders, controlled him, oversaw the equipment of the troops and their arsenal, and overall they were in charge of checking the fulfilment of contractual obligations. It was they who were negotiating with the enemy and represented, in the occupied territory, the authority of the governing lord. The *condottiere*, the *capitaneus* who was ordered by his employer or by the employer's commissar to undertake an *executio* had to obey the order. In such a case the commissar of execution [*Exekutionskommissar*] would be the commanding commissar, not the *condottiere*.[19] It was also possible, of course, that the commander in chief had been appointed commissar, and therefore that purely

military tasks were combined with jurisdiction and with powers of government.[20] The basic idea, though, was the separation between the civilian powers of government and military action, which in the end prevented the military commander from interfering in any genuine actions of government: these were the privilege of the commissar of government. An example of this idea is the appointment of the bishop of Spoleto as commissar of the army in the counties [*Marken*] of Anconia by Pope Eugene IV, in 1444.[21] Someone should be with the army, it was said, in order to settle more satisfactorily matters related to the comfort of subordinates. Because the cardinal legate, who was based in the counties, could not always be present with the army, the bishop of Spoleto should be appointed as special *commissarius*. He was given *plena facultas, arbitrium et potestas*

1 to advise the papal troops and its leaders (*consulendi*) and to give them directions (*dirigendi*) in the interest of the papal status;
2 to readmit cities that wished to return to papal supremacy, and to define the conditions for this readmission;
3 to command the officials and wardens of castles (*constituendi et deputandi*);
4 to ensure that loyal countries remained faithful (*servandi*);
5 to negotiate with the enemies and, if necessary, to grant exemption from punishment;
6 to command the troops (*castramentationis et obsidionis statuendi et firmandi*) in areas where there was uproar, and to win over, by peaceful means, the leaders of the rebellion as long as they were inclined to peace but divided among themselves;
7 to suppress looters and instigators of uproar by legal punishments, by punishments according to customary law, by penances, or by promises and concessions – as he thought most appropriate (*prout tuae discretioni videbitur*);
8 to protect the peaceful citizens of the country against violence and oppression.

The final general clause states: to do – or to command other people to do – anything that seemed to be necessary for the status or the glory of the church or for the welfare of the subordinates. All offi-

cials, commissars of the army (*commissarii armorum*), ministries and subordinates in the counties at stake were requested to follow the commands of the commissar, to support and to aid him. The treasurer of the province had to pay him the '*provisio*' [anticipatory money]. All the sentences and measures against rebellion leaders had to be ratified in advance.

Next to the directing civilian commissar of the government [*Regierungszivilkommissar*], this document mentions a *commissarius armorum* ['commissar of the army'] in charge of the administration of the army, of equipping the troops, and of acquiring weapons and ammunition. This indicates that the term 'commissar' was already in regular use for a relatively specific task. This commissar of the army was identical to the earlier *provveditore* ['provider'], whose duty was to inspect fortifications and garrisons and who appeared from the time of Friedrich II in 1239.[22] But the name [*commissarius armorum*] did not yet replace the title of commissar for jurisdictional and governmental duties. There was no need to commission a particular commissar for every extraordinary measure. Normally if a *rector* [ruler] or *gubenator* [pilot/leader] who was in charge of a province was given extended authorities in the interest of maintaining public tranquillity and order, so that exemptions, immunities or privileged courts of justice were abolished, then he was not called a commissar on account of that. Moreover, such provisions, based as they were on the law of reformation and correction, were intended for the reestablishment of the previous order. On the other hand the commissar of the army very often had no other authorities than to oversee the commander in chief, to look after the discipline of the soldiers and to negotiate with them. The authority of monitoring easily became an authority to stabilise the situation that was to be guaranteed through surveillance, through direct commands, and if necessary through punishment.[23] Besides that, there were particular authorities of commissars who only negotiated with rebellion leaders, or only sealed contracts, or were in a position to grant pardon, and so on.

Here too, the characteristic phrase used in connection to the empowerment of the commissar stated that he had to be obeyed, just like the pope himself (*pareant tamquam nobis* [they should obey him just as much as us]). Theoretically, no new legal situation had been

created through the commissarial execution of an issue, because the commissar was only doing what his commissioner, whom he represented, would have done – and in the same way – had he been present. With respect to the *condottiere*, the rights of the pope exercised by the commissar were based on a free contract with the *condottiere*; with respect to the subordinates, they were was based on a superior power, through which privileges and vested rights were abolished under certain circumstances, according to the right of reformation. From the outside, the force of government appeared as one that stood in opposition to another – equal – force of government. The remit of the duty of a commissar was usually defined in such a way that he could do everything that was needed to achieve a particular goal. The legal means he could employ to accomplish his duty were diverse and could be based on the transition of regular powers and on the granting of extraordinary powers. Thus, once again, we find here different types of commissars: the commissar of service [*Dienstkommissar*], who, due to his specific mandate, dealt with matters in the sphere of conventional authority; the commissar of business [*Geschäftskommissar*], who was appointed for specific tasks; and, finally, the commissar of action [*Aktionskommissar*], whose empowerment derived from the goal he had to reach; and this could be defined more or less by listing his particular powers and his general authorisation to do, in case of need, what was necessary in the concrete situation. The end that the commissar was serving could be diverse in its content and could lead to a combination of the types of commissar mentioned above. A commissar of inspection [*Aufsichtskommissar*], for example, was a commissar of service [*Dienstkommissar*] if the inspection was related to routine service and, from the point of view of its content, it only accompanied the service to be inspected. The inspection could also be, in a particular case, a means to achieve a certain goal; then it became a service in terms of the typology suggested here. Finally, it could become the starting point for further interfering activities on the part of the commissar, and therefore it was, in its content, a part of the duty of the commissar of action. The status of the commissars of security [*Sicherheitskommissars*] could be defined in the same way: in this case there was a combination of regular and extraordinary authorities concerning public security. Such people were commissars

of execution [*Exekutionskommissare*], and therefore also commissars of action, only insofar as they had to give a judicial verdict in order to provide the basis for legal measures of proceeding – for example in summary procedures. The name commissar was never used for diplomatic delegates. Nor was it used for permanent delegations, which started taking place from the middle of the fifteenth century on, or for the older more or less permanent diplomatic delegates of the different royal courts that emerged from the thirteenth century. Within the papal curia, for diplomats of different countries, the title *procurator* became common, which was also borrowed from procedural law.[24] And this title, just like that of commissar, entailed a mandate that exceeded by far the remit defined by the normal judicial procedure, although the difference between the delegate and the commissar should not be overlooked. The delegate – someone who was dealing with another force of government – had no jurisdiction except over his own entourage, the so-called *comites* [companions]. On the other hand, the concept of commissar in the strict sense was connected to the exercise of the superior authority of the person from whom the commission emanated against the person who was subject to the superior power of the commissioner. Therefore the estates sent out commissars insofar as they had the right of government. This clear concept [of a commissar] was blurred by the fact that all kinds of commissar were also called, more generally, delegates, deputies, stewards and so on.[25] Occasionally, we can also find a confusion between the commissar and the legate of international law.[26] Finally, in order to accomplish the revolution that turned the estates into the absolutist state, only commissars of action could be used. The legal form in which the action was dressed up differed. Because jurisdiction was traditionally seen as the genuine content of the authority of the state, the commissar of execution was a first priority. Next after him, the commissar of reformation was important. In Prussia, another important figure was the commissar of reformation, who had been a plain commissar of business to begin with and became a commissar of service due to regular use. This happened in spite of the expansive nature of pragmatism (the central objective in this case being the army), which erased historical rights and customs that stood in its way. In the following discussion I will limit myself to the history of Germany.

The legal basis of an execution was the judicial decision, which was legally binding. The execution could be determined through regulations of procedure, and therefore its effective impact could be limited. And so it was not permanently controlled by the end – used to create, by all the means available in the given circumstances, an outcome that conformed to the judgement. So much so that the registration [*Erfassung*] could never effect the formalisation, properly and legally, of an individual enforcement action, for instance the confiscation of a mortgaged object by the bailiff or the imprisonment of a criminal by the warden. Where legal constructs like the declaration of an enemy [*hostis-Erklärung*] appeared (see above, p. 231, and n. 2), the intention was to eliminate the most important restrictions on the action that served legal order – namely the respect for the legal person of the *exequendus* – and to allow the action as much freedom as possible. When it reached its most extreme form, the proclamation of the state of being outlawed also meant a complete absence of peace and the abolition of the legal person of the one outlawed.[27] The execution, insofar as it was an effective action, depended in its scope and intensity upon the concrete situation – that is, in a case of this sort, first and foremost on the resistance of the *exequendus*. If the outlawed and his allies, who were also outlawed qua friends and followers, joined together to oppose the execution and yet the execution was followed through, it could take such proportions that it became a war and gained such a concrete significance that the legal basis, procedure and verdict seemed to be only a meaningless side issue and an empty formality. In such a case, literally, a war had evolved from a legal procedure. By contrast, the executors' position in criminal cases – particularly in the breaching of public peace – was quite open about the execution of a simple disobedient, because he 'was simply appointed to enforce the state of being outlawed [*Acht*]'.[28] The property of the outlawed person was confiscated in order to pay for the trial. If the execution developed in a manner disproportionate to the significance of the event, then it became a military action and lost its legal basis; hence it was not controlled by legal discussions but conducted on pragmatic grounds. Because of its autonomous self-development, it could be used to serve other ends than those originally intended, namely the legal execution. Thus it became an appropriate means for extending political power,

and the commissar of execution became an instrument for princely absolutism, which aimed to abolish the privileges of the estates. The political meaning of this method was openly expressed by the most significant and most stringent representative of the modern idea of the state in seventeenth-century Germany, Wallenstein, when he said that he would welcome 'from the bottom of his heart' the estates causing trouble ['*difficultaten*'], because then 'they would lose all their *privilegia*' [*den dadurch verliehreten sie alle ihre privilegia*].[29] The commissar pursued his duty and nothing else. The instruction that was given to his subordinate commissars by Duke Maximilian of Bavaria as an imperial commissar in the war against the Bohemian rebels, on 17 November 1620, stated, in connection with the estates that insisted on the confirmation of their privileges and on the royal edict, or did not wish to pay tribute to the emperor in any other way, 'that the subordinate commissars should subtly indicate that it is neither the time nor the right place to discuss the confirmation of privileges. Furthermore, it is inappropriate that the commission in this matter is accused of having misunderstood what is at stake in this confirmation' ['*glimpflich anzudeuten*, *daß jetzt nit die Zeit vil weniger die gelegenhait gebe dieses orthes sich wegen confirmation der privilegien aufzuhalten. Dann neben dem daß wir precise der commission, in dero besagter commission halber nichts begriffen, Zu inseriren*']. The estates should appeal to the emperor, and not to us 'as a subordinate commissariate who, in principle, is not dealing with this issue' ['*und nicht an uns alß nachgesetzten Commißarium, den die Sache principaliter nit angehet*'].[30]

Imperial commissars were involved in legal proceedings by carrying out different duties. Usually the court of the Imperial Chamber did not interrogate the witnesses; they were summoned and interrogated by a judicial commissar. If a whole community was accused of breaching the peace of the land or of supporting the instigators of such a breach, commissars demanded an oath of penance [R*einigungseid*] from half the members of the council or from the citizens accused.[31] In all the cases that concerned the *imperii utilitas et tranquilitas* [the advantage and peace of the empire] – and not just in cases to which he was entitled in the first instance – the emperor claimed for himself the right of jurisdiction over his subordinates – something similar to

the juridical power of the lord; the right to publish, file or announce mandates across the whole empire; and the right of jurisdiction, through his commissars, in the territories of the subordinates. The last mentioned right, of course, could only be exercised according to law and custom. But Reinkingk, who outlined these principles, made a distinction between cities and princes. In the cities imperial heralds announced the mandates and imperial edicts designed to promote the public interest, whereas to the prince these mandates and edicts were suggested, so that he could announce them through his officials. The imperial commissar could interrogate as witnesses not only direct or indirect subordinates, but also commissars of the imperial court. But the estates protested against this situation as early as in the first half of the seventeenth century. The legal construction of the exceptional status of these commissars was based, once again, on the idea of personal representation. As in canon law, the sentence was true that the commissar of the prince was ranked above the regular magistrate, on the grounds that '*prinicipis vice fungitur eiusque personam representat*' ['he acts for the prince and represents his person'].[32] In particular, as far as the act of execution was concerned, this implied that the condition of being an outlaw had been properly declared before the imperial state, as part of the legal procedure. The right to declare someone an outlaw was claimed by the emperor for himself. The act of proscribing someone was either preceded by a legal procedure or it came into effect *ipso facto*. The emperor was quick to refer to this tradition, particularly in cases where the peace of the land was breached. It is interesting here that, except for the period of election of a prince, the procedure was regulated throughout, mainly by the reformed legal order of the chambers [*Kammergerichtsordnung*] and by the regulation of 1555 concerning execution [*Exekutionsordnung*].[33]

The imperial mandates issued during the procedure were in most cases suggested and announced to the parties through imperial commissars (as opposed to heralds, who only functioned as messengers). As is known, the legal procedure of the imperial court of chambers needed a huge amount of time, and appeals were permitted even after the sentence and during its execution.[34] The state of outlaw as such had 'lost its awe'[35] since the end of the thirteenth century, and the emperor always used to grant new suspensions – 'out of his innate

humility and beneficence', as it was regularly stated in his mandates. Therefore the duty of the imperial commissars consisted mainly of negotiations, especially when important political issues and influential parties were at stake, and it took a very long time for the commissar of business to be replaced by the commissar of action. Particularly interesting examples illustrating the activity of the commissars can be found in the *Grumbachischen Händeln*[36] and in the numerous disputes of the seventeenth century. For example, in the struggle between the city of Braunschweig and Duke Heinrich Julius zu Braunschweig and Lündburg, who was assigned to the imperial court of chambers by the imperial decree of 12 November 1604, the emperor's own commissars had suggested, in March 1609, an imperial *mandatum avocatorium* [summoning mandate] by which the parties were ordered to put down their weapons and to dismiss the hired mercenaries. After that, negotiations took place in front of the imperial commissars, who managed to agree on a written settlement according to which the city agreed to put down its weapons. When the city, despite this agreement, allowed its soldiers [*Knechte*] to attack the duke and to pillage and loot his estate once more through a number of imperial privy councillors who acted as imperial commissars, a further order was issued to the city to put down its weapons. This order was a combined moratorium in which the emperor declared the state of outlaw on conditional grounds. The emperor saw himself entitled, despite the vacillating legal procedure, to make such 'interventions' ['*Interpositionen*'] because he, 'as the governing Roman emperor', could not 'be prevented by any court or any *litis pendens* [pending suit]' [*als regierenden römischen Keyser zur Handhabung gemeiner Ruhe und Friedens im Reich keines Gerichts praevention oder litispendenz verhindern könne*] from maintaining tranquillity and peace.[37]

The imperial commissars were strictly bound by their instructions. Their effectiveness was weakened by the complaints of the estates, which were respected by the emperor even at the time when his power was greatest.[38] Even when the imperial commissars were active during the executive procedure, they remained only commissars of business. They lacked the legal, and also the concrete means for direct action. According to the regulation of execution [*Exekutionsordnung*], the suppression of a rebellion was in the sphere

of authority of county districts [*Kreise*] and estates, as was also the declaration of imperial outlawry [*Reichsacht*]. The military action therefore was not undertaken directly by imperial commissars in the service of the emperor. The emperor had to delegate the execution to country rulers, who announced it and owned the rebellious estate. The action's commander in chief also had a *commissio*, but he remained independent and obeyed the rules of execution; and this enabled him to pursue his own politics, to give allowances to his enemies, and to follow his own interests in the estates. In fact he lacked what would have made him a commissar, and therefore a useful instrument. The regulation of the execution wisely emphasised the older principle that a jurisdiction was useless without the force to carry out; yet it was no less keen to establish guarantees for the estates, because the execution opened up the possibility to expand imperial power. If the imperial commissar was successful in persuading the interested counties and the estates to undertake a certain action, then the imperial commissar left with the army the 'management' of this army, but the military action itself was never delegated by the prince in charge – that is, by the commander in chief. Only when Wallenstein had mobilised an army for the emperor himself was it possible, on the formal basis of an execution of the declaration of imperial outlawry, to establish the sovereignty of the emperor within the Reich. The estates realised this danger, and they knew how to deal with it. In retaliation, the emperor demonstrated his absolute power in his inherited terrority – Bohemia and Austria – by means of an execution. Of course the military means were supplied by the free cities of the German Empire [*Reichsstände*]. The prince elector of Saxony and the Duke Maximilian of Bavaria were appointed to be imperial commissars of execution during the Bohemian rebellion. Their commissions are good examples of the legal relations between the local lord [*Landesherr*] and the rebellious estates, as well as between the emperor and the commissar of execution.[39]

The first precondition of the execution – the declaration of outlawry – implied numerous legal arguments, because the authority of the emperor was challenged – in particular, his right to declare the Elector Friedrich von der Pflaz an outlaw without the agreement of the other electors. According to Articles 26 and 39 of the

Wahlkapitulation [Election Regulations] of 28 August 1619, the emperor was not allowed to decide on an 'important issue' without consulting the prince electors; moreover, he was not allowed to put an imperial estate [*Reichsstand*] outside the law 'without a hearing' and without a regular legal procedure. According to the regulation of execution of 1555, an execution against an imperial estate was only permitted after the declaration of outlaw status had been legitimately recognised. The elector palatine was neither summoned nor heard. Those loyal to the emperor argued that the elector palatine's breach of the peace of the empire through his acceptance of the Bohemian crown was notorious and the state of being an outlaw *ipso facto* came into effect. The elector challenged the declaration of outlawry through open letters [*Patente*] within and beyond the empire, and in doing so he did not mention the Roman Empire at all and referred to the emperor only as the archduke of Austria.[40] The commission entitled the commissars of execution first of all to discipline the disobedient and rebellious and to order them to obey, and, in case they did not follow this order, to employ all means ['*mit der scherpfe und allen Zu erlangung des gehorsambs gehörigen Zangsmitteln*'], even radical ones, to secure, defend, safeguard and guarantee protection to those who remained loyal ['*den Gehorsamen aber Protektion, Schutz und Schirm zu gewähren*']. The commissar of execution was also entitled to accept, on behalf of the one who had commissioned him, the acclamations of the estates and cities of the country, which were supposed to be subjugated. The country's subjects and inhabitants were ordered to follow without hesitation the imperial commissar who had promulgated orders in the name of the emperor. So no one could appeal and refer to another 'duty or agreement or obligation or whatever it might be called' ['*Verbindnuß adherenz Zusage oder Pflicht wie dieselbe namen haben möge*']; each and every 'obligation of this kind is cancelled, suspended through imperial and royal authority, and the interested people are effectively declared free and unbound by these obligations'; their dignities, privileges and rights were granted in case they demonstrated obedience. The commissar of execution took action and executed his commission whenever the request for a friendly submission was ineffective. After Prague was seized, he sent from there his sub-delegated auxiliary commissars (they were called

both 'commissars' and 'deputies') to receive obedience from all the estates, if this had not happened yet. These commissars were issued a document containing the same oath that the cities of Bohemia had already sworn to Prague; furthermore, they were equipped with a copy of the imperial commission that they had to hand over to the estates, or at least to read out to them; and they had to act against the non-compliant using all the means of coercion that were necessary to bring them into obedience. The obedient would be protected, where necessary – which was mainly in border areas – in that the commissar ordered a garrison of twenty, thirty or more soldiers [*Knechte*]. The commissar of execution had to be informed about all this in detail.

To the extent that this action against the 'county' [*Land*] was seen as a 'dictatorial', the internal relation between the commissar of execution and the imperial commissioner did not correspond to Bodin's concept of the commissioner. The lord did not appear as an independent functionary. He demanded a guarantee for his 'war allowances' and a re-instalment secured by a deposit taken from the imperial goods; and whatever he liberated in the Austrian provinces from the enemy was to remain his, as a deposit, together with each and all the 'benefits, administrations of justice, rights and appurtenances' (*emolumentis, iurisidictionibus, iuribus et pertinentiis*), until his expenditures were covered. He only had to recognise the personal jurisdiction of the emperor over these provinces. Moreover, the imperial *salinae fodinae et telonia* [salt-pits, quarries and customs points] were not to be mortgaged if the other goods were sufficient. This was regulated in detail in the well-known and much discussed 'Obligation und Verbindnuß' between Ferdinand II and Duke Maximillian of Bavaria 'on the matter of the war expenses in the campaign against protestant rebellions in Bohemia in the Reich' ['*von wegen der Khriegs Expedition wieder* [sic] *die Behaim-Protestierende Rebellen im Reich*']. Above all, it is significant that the commissar of execution explicitly reserved the right to be unconditionally independent in all military actions and to perform every action 'according to the nature of things, times and circumstances' (*pro rerum, temporum et circumstantiarum qualitatae*), in the manner he deemed suitable and necessary and insofar as he judged that 'the occasion and the circumstances' (*occasio et circumstantia*) allowed it. Neither the emperor himself nor anyone

from his court was permitted, in any way or anywhere, to hinder (or to allow another to hinder) the 'full, absolute and free leadership' (*plenarium absolutum et liberum Directorium*) of the mission that was the sole duty of the lord or duke as the commissar of execution. After his victory over the Elector Palatine [*Pfalzgrafen*] Friedrich, the duke was granted the electoral dignity that had been taken away from the proscribed palsgrave and returned to the emperor; moreover, the emperor, again in his imperial power and plenitude, was to decide in favour of the duke 'the disposal of the lands; their electoral status was nullified *per sententiam* [by vote] and subsequently they befell to the emperor'. The sentence '*und iure belli iustissimi eroberten*' was inserted before '*per sententiam*' in the original copy of the document at a later date, through a marginal note.[41]

It is evident, especially from the agreement of 1619, that the decisive part of the action did not depend on orders from the emperor. It was commonly accepted that the emperor was not obliged to be the commander in chief of the army when the latter was used for the execution of affairs of state [*Reichsexekutive*]. In the 'Grumbachischen Händeln' the prince elector of Saxony, who was in charge of the military operation, was called in most cases 'commander in chief', and therefore he was distinguished from the imperial commissars. Only once did he act as a commissar, and without being called it; the occasion was the 'commission' [*Überweisung*] of the estates to the new lord of the county [*Landesherr*], a business that was normally reserved for commissars only.[42] The Archduke Maximilian of Bavaria was recognised as an imperial commissar during the campaign against Bohemia mainly because he accepted, in the name of the emperor, the declaration of obedience from the subjected estates or cities, or he received it through sub-delegated commissars. The commissar of submission [*Huldigungskommissar*], who appeared frequently during the Thirty Years War, was a typical commissar of business as long as he was not vested with the powers to enforce obedience. The supreme military command, the directorate [*Direktorium*], was distinguished very sharply from political powers. In the negotiations of the league, Duke Maximilian emphasised the fact that he was the military leader, the commander in chief and the *capo* [head] of the league's army. This of course did not mean that he was superior to, or above, the other

estates, or that he was given new rights.[43] Here again, one comes across the view that a military action, including its directorate, is only a *via facti*, a concrete action [*Tathandlung*]. The military commander did not exercise any sovereign rights and was not a commissar because he had no external authority over subordinates or foreign governments; he only had the internal delegated authority of military jurisdiction over his own soldiers. The legal framework for a mercenary army must have led to this view. The colonel who commanded a regiment acted in the service of the prince who employed him. As a bearer of the authority of the state, he was given the power of a commissar for control over the public, and later also for the execution of the authority of the state. When the commander in chief was at the same time a commissar, as happened for instance in the case of the commissar of execution against Bohemia, the two functions could be clearly distinguished. Subsequently the commander in chief as such was no longer called a commissar, despite the fact that the military action makes the typical content of a commission of action [*Aktionskommission*]. This separation of military command from government, understood as an exercise of the authority of the state, became evident in Germany only in the seventeenth century. In the constitution for soldiers and mercenaries [*Artikelbrief*] issued by Emperor Maximilian I in 1508, soldiers still had to take the oath 'that they would obey, in the place and in the name of his imperial majesty, the honourable prince, and so on, designated as the most reverend *commissario* and commander following his orders, and execute his will' ['*daß sie an statt und im Namen dero Kayserlichen Majestät dem namhafften Fürsten usw. als ihrem fürnehmsten Commissario und Heerführer zu Gebote und Dienste leben*'].[44] Despite the fact that this constitution for soldiers and mercenaries made a distinction between war-waging princes [*Kriegsfürsten*] and officers of war [*Kriegsbeamten*], the prince was still called commissar and the commissar was not yet distinguished from his superior in the army. In various delegated services (like those of Wallenstein from 21 April 1628, which will be discussed in greater detail below), the commissarial character of the commander in chief was clearly evident in the recurring warning that whatever he commanded should be done as if the emperor himself had ordered it. But, with an army of mercenaries, there was no relationship between authority over soldiers and

authority over subordinates. This explains why the title of commissar was used later, more likely to describe functions related to the administration of the army such as maintenance, catering, the allocation of equipment, the examination of fitness and suchlike, in contrast to the military power of command. The soldier took an oath of obedience to the prince and the ordered generals, chiefs, commanding officers and so on. In some constitutions for soldiers and mercenaries it was further mentioned that the soldier had to pay respect and be obedient to the commissar within the limit of the latter's commission. Such a commissar was not seen as a superior in the army, but as a commissar for its administration.[45]

The commissars of the army were organs of control in the service of the government and had political functions, they delivered instructions to the commander of a troupe, they negotiated with the enemy, they exercised political control over the general and so on; or they had duties related to the proper administration of the army – and this is where the title of commissar was used most frequently. Initially those princely commissars who were mandated with it were commissars of business who became commissars of service during the development of the administration of the army. At the end of the century a systematic organisation made of commissars, senior commissars and a central office had already been established.[46] An 'organised' apparatus of official authorities had substituted the occasionally mandated commissars of business. The commissars of the army were commissars for physical examination, for pay, for quartering or for provision, and during the Thirty Years War they were dependent on their superior for the most part. Nevertheless, even during that war, they appeared as functionaries of the government, in other words they, together with the prince, seemed to be relatively independent of the commander of the troops; they even had functions of control, as is evident from the instructions for commissars issued by Tilly. Those commissars have to be distinguished from the commissars of the army, who were appointed partly by the duke and partly by the estates of the realm that had to take care of the marching through and maintenance of a foreign army, and who had to manage the logistics of supplies and to protect their own subjects from the soldiers. The task of these commissars of the army could have the following content: stock-taking –

that is, controlling the number and quality of the soldiers who had to be supplied by the supreme by contact; overall surveillance of the state of discipline; overlooking the relationship between officers and troops and monitoring the means of punishment; the visitation of quarters and the surveillance of those of the rank of *Furir* [*Fourier*], *impedimenta* [*Troß*] and servants [*Gesinde*] in the army; frequent physical examinations; and, when a regiment was taken over, maintaining an accurate register of soldiers and deciding in cases of sickness and vacation during that and the subsequent period. Insofar as the activity of the commissar meant supervision and control of the army, he could employ the following means of control: suggestions and recommendations to the commanders of the troops – though these had to be made discreetly, as the instructions for commissars in Tilly's army specified; reports to the superior office of the commissariat and to the prince; and reprimands directed at those of the rank of *Furir*, quartermasters and commissaries of stores, with the retention of their wages as a compensation for the damage created, if that was necessary. The wages were delivered by the commissar in charge of those parts of the troops. The acquisition of money or natural goods, as well as the problem of finding quarters, was usually the task of commissars in charge of maintenance and quartering, who were subordinate to a specific administrative body. That was a duty by virtue of which they were in immediate and permanent contact with the country involved – that is, its princely administration or the administration of the estates and their commissars, through which the march had to be organised and the problem of quartering had to be solved. They negotiated with the county councils or county commissars responsible for the maintenance of the army; they distributed the mandatory contributions (which, later on, were further distributed by the county councils); they decided on quarters, on march routes and all the rest of it. In every individual case it depended on personal energy whether the military leader allowed himself to be supervised and influenced by the commissar involved in his military operation or whether he knew how to use that commissar as a means of warfare. Wallenstein called Tilly, disdainfully, the slave of the Bavarian commissars. Wallenstein, of course, was independent of the imperial financial office [*Hofkammer*], which did not give him direct instructions concerning the provisions

for his army. But, at least during the first generalship, that office appealed to the emperor whenever Wallenstein's soldiers went too far, for instance when they looted the chuck wagon: it did so in order to urge the emperor to send, through the imperial war council, a 'serious reminder' of better discipline.[47] Individual commissars were often treated fairly badly by the soldiers, and in the Bavarian constitution for the army [*Artikelbrief*] of 1717 soldiers were explicitly forbidden to insult them verbally or to offend them through 'their behaviour'.[48] The acquisition of the Reich's war contributions and the supervision of contributions to the Reich's army [*Reichskontingentbeiträge*] were also in the hands of commissars of war. In territories over which the emperor had hereditary rights, the commissar, in his capacity as delegate of the ruler of the land [*Landesfürst*], encountered the federal state officials with greater authority than the imperial commissar did in the Reich. But even in hereditary territories they still negotiated with the 'county' ['*Land*']. The commissar collected only those contributions that the 'land' was obliged to make – by law, by custom or by the consensus of the county council [*Landtag*]. If the subordinate could not deliver or pay them, the commissar contacted the superior in the 'land' [*Landesobrigkeit*]; if the subordinate *refused*, or was reluctant, the commissar asked for military execution. That was the normal legal situation even during the Thirty Years' War, although the real picture was quite different at that time, given the countless confiscations and the actual behaviour of the soldiers, which was unauthorised; in consequence, the army normally did not care much for its own commissars or for those of the land.[49] After the supply with rations from magazines was introduced, it was explicitly stated that only the commissariat of the general war was entitled to supply the rations. In case of complaints or arguments between the landlord providing quarter and the soldiers, the landlord had to file a charge with the supreme authorities of the land, who reported the charge to the soldiers' superior and to the commissar of war stationed in that district. Later it was explicitly emphasised that, in cases of dispute between a soldier and the landlord, the jurisdiction rested with the commanding officer, the commissar of war and the supreme authority of the land. The distribution of the quarters had to be done by the county [*Land*]; the provision of the horses was managed by the general commissariat

of war, which, in the lands of the Habsburgs, was in charge of the supply as well as of prices, 'in the name and on behalf of our treasurer'. The guiding principle was always the cooperation between the leader of the troops, the commissar of war and the authority in the county [(*Landes-*)*Obrigkeit*]. That caused great complexities, especially when the march routes and the planned quarters were changed.[50]

The princely commissars became commissars of service from being previously commissars of business, and they were incorporated into a bureaucratic organisation. The commissar became a dependent functionary with a definite authority, but he was no longer (as in the medieval period) a direct personal representative. He became a 'servant of the state' [*Staatsdiener*].[51] Therefore the concept was reified [*versachlicht*]. Nevertheless, the character of directness remained, and therefore also the character of the commissariat (in the sense of Bodin), as long as a legal norm did not stand between the commissioner and the commissioned, as it did in the case of the judge. Because of the functional dependence it was no longer possible, as in Bodin, to compare the status of a dictator with that of a commissar. Ultimately the whole system could be called dictatorship, on account of the central significance of a practical and technical end [*sachtechnischen Zweckes*]. This is best illustrated by its development in Prussia. The Prussian commissar was given the same mandate as the Austrian, the Bavarian or the Saxonian commissar – namely to be in charge of the equipment and maintenance of the army. But because this end was taken seriously, his powers were extended primarily to the administration of the tax system, since the maintenance of the troops depended upon the correct and accurate collecting of taxes. For this end – once more, the correct and accurate collecting of taxes – it was necessary to do everything to increase the county's capacity to pay its taxes. This involved no less than the whole of the domestic administration, trade and commerce, welfare police [*Wohlfahrtspolizei*], and the like. Otto Hintze has summarised this development lucidly:

> the same offices that have to guarantee the maintenance of the army and the collection of taxes are now responsible for the maintenance, development and welfare of the people and for their capacity to pay taxes, first and foremost for the maintenance of those in the city and in trade. The

> military administration is therefore intrinsically connected to the civilian police; the whole domestic 'police' that is gradually derived from this has a design that is similar to that of the army.[52]

The extension of powers could not be hindered by the rights of the estates. The absolute prince obliterated these rights if they stood in his way and if they were contrary to the overall goal. 'For that he was not legally authorised' (Prince August Wilhelm of Prussia, *Die Entwicklung der Kommissariatsbehörden in Brandenburg-Preussen bis zum Regierungs-Antritt Friedrich Wilhelms I*, unpublished disseration, Berlin, 1908, p. 17). In such cases the single commissar was only the instrument of a system governed by a practical and technical end, in which of course this instrument did not raise to its full potential: the sovereign could only establish his absolutism by consolidating and shaping his apparatus of civil servants. In this way the commissar became an ordinary civil servant. The sovereignty of the prince also stabilised his bureaucracy.

In opposition to the commissar of execution, whose business was, in substance, action in the sense in which the word is used here, the commissar of the army, even in Prussia, did not appear to be the instrument of a single action designed to lead to a well-defined goal, but rather a means towards the gradual extension of a body of administration that only pursued the immanent expansion of its in-built end. In contrast to that, the commissar of reformation was an example of a commissar of action who, as a dependent functionary in the service of the prince, represented and implemented the central power of the state and eliminated local self-government. According to the reports of the commissars of Styria, Carinthia and Krain, the typical procedure followed by one of the numerous commissions of reformation was as follows:[53] when the Protestant movements in these countries became more active, decrees were initially issued, 'under the authority of the land's leader' ['*aus landesfürstlicher Macht*'], against Protestant preachers [*Praedikanten*], asking them, under threat of capital punishment, to leave the land. Most people obeyed this order, and its effectiveness was enhanced by the fact that the officer appointed to be commander of the city of Graz occupied with his ensign flag the palace that dominates the city. But in 1599, shortly after that, new

uproars occurred and the Protestants claimed for themselves the abbey church [*Stitfskirche*] in Graz. The landlord [*Landesherr*] ordered the church, whose keys were not handed over despite multiple requests from 'orderly commissariats' (two doctors and one senior official of the regiment), to be opened by force and returned to Catholic service. The later commissariats of the reformation were established in different countries to fulfil their task ('the separation of the sheep from the goats', as it was later called).[54] The commission consisted of several commissars, normally a cleric and imperial representatives. Usually they were accompanied by a '*guardia*', that is, a small troop of guards [*Fähnlein Knechte*] commanded by a captain – because in previous years commissars had been frequently abused. The commissars were given 'orders and full powers' ['*Befelch und vollmächtige Gewalt*'] to combat the unruliness of the rioting Lutheran villages (mainly in the mining communities) with 'rigorous dexterity', to round up the leaders of the riot, to substitute the city councils with qualified people, to hand over the keys to churches and cemeteries to the Catholic priest in charge and, overall, 'to do whatever is necessary and required' ['*was sonst mehrers die Notthdurfft über Erfordern ins Werck zu richten*']. For example, they moved with their small troop to Leoben. Initially the 'miners' [*die 'Eisenärzter'*] wanted to resist and to rebel against the princely commission. They even took up arms. But the commissars managed to recruit more than 300 princely guards and, when facing them, 'the *Eisenärzter* gave up immediately', 'they gave up their arms, they handed over to the commissariats the two doors they had occupied, together with the key to the church' ['*sie legten hinweg ihre Waffen, sie übergaben den Commissarien die in ihrem Gewalt gehabte zween Thüren sambt dem Kirchenschlüssel*']. Now 'the commissars turned against the reformation and handed over to the Catholic priest both his church and his rectory' ['*griffen die Herren Commissarien zu der Reformation und ward dem Catholischen Pfarrer die Kirche und Pfarrhof angeantwortet*']. Then they conducted an examination in order to find out who the leaders of the rebellion were. In order to prevent further rebellion, the *Eisenärzter* were stripped of all their weapons; 'at the same time their privileges and freedoms are taken away'. They were not allowed to assemble or call a council without the princely representative; many leaders of the riot

fled, some of those who were caught were sent to the castle in Graz, others were exiled from the county, and others still received various punishments. Although nobody's life was taken, the sectarian books were collected and publicly burnt and, in order to frighten the perpetrators, a gibbet was erected. The commissariats of the reformation left instructions for the mayor, the judge and the city council, which they had reformed, advising them on how they should act in matters of faith; they also left instructions on Sunday rest, on the combat of secret heresy, on the monitoring of education through priests and on the exclusion of Lutheran citizens (not one of them was to be granted citizenship without the knowledge of the priest). After the reformation, the prince appointed a city councillor [*Stadt-Anwalt*] whose duty was to prevent the occurrence of anything that may be against the Catholic religion, against the reputation and supremacy of the prince and against the instructions of the commissariats. He was in charge of the maintenance of good policing and had to look after the common good '*in genere* and *in specie*'. Subsequent commissions of reformation were designed along similar principles. Frequently the commissars were negotiating directly with the rioters, and from time to time they decided upon far-reaching and general regulations. For example they issued curfews after the city had been occupied; they denied civilians the rights of visiting each other without permission from the commissars; and they summoned the judges, the council and all citizens to declare their submission. They forbade the priest, by decree, to live with a concubine (Lundorp, p. 275): concubines were declared '*infames*' ['of ill repute'] and were exiled. In one instance, in Radkerspurg [Austria], the commissars said that they wanted to give further instructions on the following day, claiming that they had not received them themselves. In reality they were playing for time to gather more soldiers, 'so that they might make the act of [counter-] reformation more sustainable' ['*um den actum Reformationis desto sicherer verrichten zu können*']. So they did what was necessary in the concrete situation and, wherever the [counter-]reformation was not successful, they 'managed it' themselves. They gave verdicts, removed privileges, purified offices and forced the previous officials, council and entire citizenships to hand over their offices, in the presence of the commissars, to the new people in charge; they forced the citizens

who had fled to return, confiscated their property and demilitarised the citizenship in the rebellious regions. *Et facta est tranquilitas magna* [and great tranquillity was established] – that was what the second commission of reformation reported to its princely commissioner.

Excursus on Wallenstein as Dictator[55]

As chief of a huge army – as *capo*, as one called him at that time – and as one who ignored the rights of the estates, knowing on the other hand how to be absolutely independent of his imperial superior, Wallenstein was frequently referred to as 'dictator', by his contemporaries no less than by the later historical tradition.[56] Here we have not come across one of the numerous cases in which the term was used as a political catchword; the question is, rather, to what extent the military and political powers of Wallenstein justify such a classification. The use of language had already shifted towards sovereign dictatorship: what sprang upon the outside world in the form of dictatorial power was a very special kind of autonomy from the commissioner – one that contradicted the commissarial character as Bodin conceived of it. In the state theory of the time, the word was used for the highest military command, which was independent of interventions from other authorities. This is why, as mentioned previously, Arumäus calls Prince Moriz von Orange a dictator; Cromwell is often called the same in his capacity as Lord General; and, come to Wallenstein, Pufendorf refers to him as a dictator too.[57]

For Wallenstein's first generalship there was, first of all, an imperial *Intimax ex consilio bellico* dating from 17 April 1625, by which Wallenstein was appointed *capo* 'above all his imperial majesty's people who are living at this time in the Holy Roman Empire and the Netherlands' ['*über alle dero* (*Kaiserl. Majestät*) *Volk so diser Zeit im heiligen römischen Reich und Niederlanden vorhanden*'].[58] The title *capo* was unusual for the imperial commander in chief, although it was not in general as unusual as Hallwich[59] seems to suggest: any commanding leader could be called *capo*.[60] It only meant that Wallenstein was given the military directive over the imperial troops. According to the general patents of 25 June 1625,[61] Wallenstein was not appointed as commander of the whole imperial army, but only as commander 'of

the troops stationed in the Holy Roman Empire' [*nach dem heiligen römischen Reich abgeordneten Sukkurs*]; the troops stationed in the lands of the crown were not under his command. According to Hallwich (*Geschichte Wallensteins*, Leipzig, 1910, vol. 1, p. 493), his appointment as commander in chief [*Obrist-Feldhauptmann*] in July 1626 (the exact date is unknown) meant that he became the supreme general of the whole imperial army of the German Reich, in the lands of the crown and in Hungary. There was no doubt that the army of the [Catholic] League was not under his command. He had to consult with Tilly; he had to liaise with the army of the prince electors and of the princes if circumstances required it; but he had 'to serve unconditionally our imperial pre-eminence with respect, with obedience to our needs' ['*Unabbrüchlich Unserer Kaiserlichen Praeminenz und Respekts auch Nutzens und Frommens*'], as was stated in the imperial instructions of 27 June 1625.[62] The imperial appointment of 21 April 1628[63] clearly illustrates Wallenstein's status and its commissarial character. In it Wallenstein was appointed *General-Obersten-Feldhauptmann* of all troops that belonged in the imperial army and were on the payroll, 'in such a way that he is given full authority, pre-eminence and prerogatives for that supreme command' ['*auf solchen hohen General-Bevelch gehöriger authoritet, praeminenz und praerogativen*']. He had authority to muster the army, to revise it, to authorise payment through his own signature as the situation and occasion demanded and to re-appoint senior officials [*Obersten- und Hauptmannstellen*] for himself or, occasionally, to cancel appointments and make new ones. Only for the *General-Bevelchen* [supreme order] did he need his majesty's gracious resolution, and therefore he had to suggest it to the emperor beforehand. Besides, he had authority to administer and command the army both in civil and in criminal cases, as a person in his own right or through mandated officials [*ge*[*v*]*olmechtigte*], in all the relevant circumstances and occasions 'involved in this business' ['*diesem werckh anhengig*'] – but he had to do so only 'in accordance with law' ['*denen Rechten gemäß*']. He was made *Generalobrister*, in charge of provisions and ammunitions that he had to procure as needed, according to [the formula] 'as we ourselves would do if we were present and decided, procured and managed in person' ['*alß wie Wier seblst thuen wurden, da Wier zur stöhl wären und selbst in der*

Persohn allens herbey brechten, procurierten und bestelleten'] (here the old formula of the empowerment of commissars reappears). Therefore all the employees, senior officials, colonels and officers, and even all the commissars, junior officers, sergeants, administrators of support and accountants were encouraged to obey the 'true' commander in chief ['*würrcklichen*' *General-Obristen*] and to show him respect; and they had to carry out all his orders, written or oral, general or particular, 'as if we ordered and commanded that thing ourselves' ['*Wier in aigener Persohn solches ordinieren und be*[*v*]*elchen thäten*'] (here again we encounter the commissarial formula). Wallenstein was given absolute power, authority and sovereignty over all the matters listed here; any form of resistance was threatened with 'inevitable' ['*unableßlichen*'] imperial capital punishment.

Wallenstein's authority was therefore of a purely military nature. He had command over the imperial 'Armada'. There is no doubt that, even as a commander in chief, he had no 'absolute authority' in the sense of a 'total command' over military operations, as if the emperor had ceased to be commander in chief. That was always emphasised by the emperor when the estates of the Reich complained. Furthermore, Wallenstein frequently appealed to the emperor, who granted orders directly; and, without the emperor's 'particular ordinance' ['*particular-Ordinanz*'] for the instructions of 1625, Wallenstein was not allowed to penetrate into any territory other than the one that Ernst von Mansfeld.[64] Despite the fact that Wallenstein enjoyed the same rights that were usually given to a military commander – protection, letters of reference, the right to pardon, to be merciful and to release prisoners for a ransom – he was not permitted to release noble prisoners, commanders, princes and members of the estate, or engineers and people with the experience of war without a specific imperial decree (commission). Contributions for the maintenance of the army had to be levied in strict conformity to the local measure and custom of the area in which the army happened to have encamped and everything had to be meticulously documented and deducted from the soldiers' pay. The commissars for mustering, payment and quartering were imperial commissars, subject to the imperial court of war [*Hofkriegsrat*]. According to the instructions of 27 June 1625 Johann von Aldringen, member of the council of war, was appointed

commissar in charge of mustering, payment and quartering [*Obrist and Obristen-Muster-Zahl and Quatierungs-Kommissar*] in order to support Wallenstein to control the full attendance of regiments and to look after the warehouse and supply. In this respect Wallenstein was truly independent.[65] For the choice of a location where the mustering was to take place, an independent deputy commissar had to be appointed (no name is given for this person). It was emphasised that the estates should be spared; hence they could not complain about the consequences of the soldiers' wanton acts. Apart from the commissar for the administration of the army (Aldringen) and the commissar in charge of the mustering, a third commissar was appointed – a political commissar, to be precise – and this was the member of the Aulic Camber [*Reichshofrat*] Johann Freiherr von Reckh; in consequence, Wallenstein was not short of good advice or without political council (*consilia*), which had to be implemented in conformity with the statutes of the Holy Reich [Holy Roman Empire]; Wallenstein had to use in the army the advice and recommendations of this commissar of government in all the matters concerning the Reich. A special deputy of the emperor, who was not officially called commissar but was in fact involved in commissarial activity, was to organise the secret service. Finally, a fifth [*sic*] kind of commissars is mentioned, namely those who were sent by Wallenstein himself to 'win hearts and negotiate with the people by using political means in a gentle manner' ['*sanfte politische Mitteln und trattamenta die gemüeter zu gewinnen*'], in order to make difficult circumstances bearable and to restrain the soldiers from looting and excess by paying them appropriately, so that the 'poor subjects' were not unnecessarily oppressed.[66] Accordingly, Wallenstein was not independent either from the administration of the army or from political issues. Gradually, as his actual political impact grew, his own view gained significance in political affairs; but still on 29 October 1625 he wrote that the emperor had to issue him with a command about how far he was allowed to go in the case of negotiations 'out of courtesy and other military means' – 'because I do not feel competent to master the political consequences'.[67] For negotiations of peace, Wallenstein was temporarily vested with special powers and appointed imperial commissar.

In the transfer of military command a commissarial mandate was

created. The concluding instruction declared that not everything could be said within the limits of such an instruction; one had to leave it to the loyalty, vigilance and military experience of the commander, especially when several opportunities (*occasiones*) had been lost and he had to ask for advice in every instance. The commander of the army had to direct his orders towards establishing the peace; he had to defend, by means 'permitted by God and international law', the rights of the emperor and of the Reich's constitution, of religious peace and of peace in the country, and of the obedient estates and people. In a turn of phrase that is typical of the commissarial endeavour, it was left to Wallenstein's discretion 'to take every measure here and now and according to the specific circumstances, to command and demand everything that he deems necessary in order to fulfil the emperor's will'.[68] The only question that arose was to what extent it was allowed to breach the existing legal system in the interests of the matter, in the concrete situation. In other words, how far did this mandate reach?

Despite his actual and real power, Wallenstein was only a commanding general at his first assembly of generals. Because in reality the military operation was always directed towards its military aim, so that it could take into account any other concerns, in this case, too, a situation frequently occurred in which Wallenstein could be portrayed as a dictator – in other words as a dictator of commission entrusted with absolute powers, that is, powers defined only in relation to the goal. But according to his legal status he was not a dictator, as the emperor had given him special functions, tailored to the fulfilment of a specific task. The management of the army as such, *ductus exercitus*, was not in the prince's remit, except for matters of military jurisprudence regarded by the army as internal. The supreme command rested with the emperor himself, who was entitled to issue 'interpositions'. Wallenstein was explicitly not entitled to interfere with the rights of 'third parties'. He was ordered to follow the traditional laws and customs and to raise contributions only in conformity with the existing legislation. The two legal notes sent by the emperor came into effect on 24 August 1630 and were entrusted to Wallenstein. They informed him that ordinary help from the counties had to support the militia and that the emperor had strictly limited powers, defined by the constitution of the Reich [*Reichssatzung*].[69]

Everything that exceeded the limit determined by law was deemed to be an attack, a mere factual violence, a *via facti* occurrence. So unusual was the relationship between the emperor and the commander of the troops that, with regard to third parties – and in particular the estates – the commander of the troops was only entitled to do what was 'in accordance with their right'. The emperor's declaration of outlawry against enemies and rebels created the possibility of far-reaching confiscations. But not even that constituted a change to the existing law. Of course, had the emperor tried once more to test the plenitude of his power in relation to the state of emergency in war and to turn it from simulacrum into genuine *plentiudo potestatis*, he might have empowered Wallenstein to take the measures imposed by the concrete situation, without regard for the laws that forbade it. Then Wallenstein would really have been a commissar of action and a (commissarial) dictator. But this is exactly what the emperor did not do. He considered the estates' complaints about Wallenstein's encroachments to be legally justified.

However, Wallenstein's military successes earned the emperor such power that the possibility of the German Reich having become a unified national state under an absolutist prince may have seemed real for a moment. The most important practical prerequisite for such an impression would have been a unification of the two armies – that of the emperor and that of the league – under the emperor's supreme command. And this was indeed the objective of the imperial proposal for the conjunction of the two armies, which was made on 5 September 1630. The most important reason advanced there (among a number of other arguments) was that such a unification would rob the Protestant estates of a pretext to maintain an army of their own, since the Catholic League was also having one.[70] But the Catholic princes were far from allowing full imperial power over war and peace to become a form of real sovereignty. They raised against Wallenstein the important objection that they could not surrender to a commander of troops, 'for the sake of their status not being compared with his'. Moreover, he was always referring to the authority of the emperor, he did not take the estates seriously, and he was 'too quick to see military executions as the solution'.[71] The emperor responded to these objections by stating that 'his imperial majesty is himself

the captain of his army '[*'ihre Kaiserliche M*ajestät *seyen Ihrer Armada Capo selbst'*]. The declaration of the Colleges of the Prince Electors dating from 4 September 1630 clearly stated that the prince elector of Bavaria had to be given general command over the emperor's army and that the existing illegal situation had to be resolved. The document also demanded that the emperor retain the *auspicia* [auspices for the army] and the *supremum armorum arbitrium* [supreme military decision] for this 'command' [*Reichs-Feldhauptmannschafft*], but only in the terms and conditions for capitulations specified in the constitution of the Reich, and in conformity with customary practices [*löblichen Herkommens*]. The emperor's desire to unify the two armies was commented upon with the remarks that the league did not violate the constitution of the Reich and that, without its support, the emperor would lose everything he had gained up until then. Of course the army should be unified, but under the command of the prince elector of Bavaria, whereby his imperial majesty and highness would in no way be challenged – in fact it would be stabilised.[72] It is well known that, in spite of the imperial councils' support for the idea of imperial plenitude of power, the dispute ended with the 'complete victory of the interests of the prince electors over imperial interests'.[73] After Wallenstein's dismissal, the imperial commander was told to accept direct orders only from the emperor. One part of the army was dismissed and another was placed under Tilly's command.

As for Wallenstein's second generalship as a supreme commander (December 1631–February 1634), we do not have any authentic document concerning the agreement between him and the emperor. The phrases normally used to describe Wallenstein's functions are that he was given a *commissio in absolutissima forma* [unconditional commission] and *summa belli* [the main issue of the war]. The transmission of the command was made public on 15 December 1631 through imperial edict. The official title of Wallenstein's office was the same as on his appointment in 1628: *General-Oberst-Feldhauptmann*.[74] Exaggerated speculation on the actual content of his authorities is widespread. The oldest published document, in a book from 1632, contains a pretentious declaration outlining the specific conditions under which Wallenstein accepted his second generalship. The document is not authentic, but it is a suitable basis for the examination of

Wallenstein's legal status. Its wording (according to the copy located in the State Library of Munich)[75] is as follows:

> This is the summary of the conditions on the basis of which the duke of Friedland has accepted once more, from his Roman imperial majesty, the command agreed upon by his majesty's secret and royal councillors of war, in particular through the dukes of Crommau and Eggenberg etc., to appoint him *solennissime* and in the same capacity as in his last appointment.
>
> 1 The duke of Friedland should be, and remain, not only his Roman royal majesty, but also that of the House of Austria and of the crown lands of Spain.
> 2 He should have the command *in absolutissma forma* [unconditionally].
> 3 If his royal majesty Ferdinand III is not personally present in the armada and does not exercise the command, and when the kingdom of Bohemia is reoccupied and reconquered, his royal highness should reside in Prague and Don Balthasar should stay with 12,000 men in the kingdom of Salvaquardi until a general peace treaty is reached.
> 4 The emperor should guarantee Friedland a crown land of Austria as his ordinary compensation.
> 5 He receives from the conquered lands the highest kind of royal rights in the Reich as an extraordinary compensation.
> 6 He is granted full right of confiscation in the Reich, so that neither the imperial official nor the royal court of Speyer should have any jurisdiction over it.
> 7 That Friedland has full power in confiscations as well as in granting pardon and whenever free conduct granted by the imperial court it is not valid without the confirmation of Friedland, even if it concerns only body and livelihood, not property. The concrete pardon stays with Friedland because the emperor might be too generous and pardon every single member of the court, and therefore the power of the nobility, officers and the army to contend this would be diminished.
> 8 In case peace treaties are likely to be negotiated in the Reich because of Friedland's private interests, the duchy of Mechelburg is also included.
> 9 He should be compensated for all the costs of continuing the war.
> 10 All imperial crown lands should be opened for him and his army for *retterada* [refuge].

Ad 1 The provision does not regulate the content of the military command (as Ritter assumes without question). It rather refers to whoever is the opposite party in the contract. There is no mention of the fact that Wallenstein is commanding the league's or the Spanish armies. In fact, these troops were under their own command, which the Spaniards of Castaneda and Feria had received from the 'commission and authority' of Ferdinand II, despite the fact that they were supposed to remain on good terms with Wallenstein as well as with the army of the league.[76]

Ad 2 The phrase *in absolutissima forma*, which was popular in the seventeenth century, did not necessarily mean more than that Wallenstein was independent of the war council of the court. In 1619, though, Maximillian of Bavaria also demanded from the emperor *plenarium absolutum et liberum directorium* [full, unconditional and free command] in the execution against Bohemia. In any case, this only concerned military leadership and the administration of the army – *ductus exercitus* and *belli administratio* – and did not guarantee any authority or superiority of the state. During the ensuing war it is never mentioned that the emperor had ceased to be supreme commander. He even interferes, by means of 'interpositions',[77] into Wallenstein's affairs, although the circumstances under which he made such intrusions were of as little constitutional significance as for instance his reluctance – noticed by Prince Elector Maximillian – towards Tilly where military operations were concerned. The emperor appointed the generals, even if Wallenstein proposed qualified subjects; the chiefs [*Oberst*] were appointed by Wallenstein himself, by virtue of the generalship mandated to him.[78] Even throughout Wallenstein's second generalship, the cognisance of legal issues was, for the cavalry, in the hands of the field-marshal, and over the infantry in the hands of each senior officer for his own regiment; the general commanding officer handled all the judiciary matters; and the field-marshal or the senior officer summoned the court and issued the verdict. Essentially, in all these respects, Wallenstein's appointment did not differ from that of 1628, and his title reinforced this fact.

Ad 3 A close reading of the document does not demonstrate the widespread view, adopted even by Pufendorf, that the emperor

was probably not present in the army. Only King Ferdinand III of Hungary, the emperor's son, is mentioned.[79] In 1619 Maximillian of Bavaria, too, had forbidden that either the emperor or any other person from his court should obstruct the unconditional and unimpeded command of the military operation. See above, p. 55.

Ad 4 *et* 5 These stipulations concern the agreement about Wallenstein's personal compensation and reward and the guarantees thereof. Leopold von Ranke uses the monopoly on salt [*Salzregal*] and mining [*Bergregal*] as examples of highest royal rights [*höchstes Regal*] in the Reich, by referring back to an Italian text (*uno dei maggiori regali* [one of the major royal prerogatives]; see Wolfgang Michael, *Cromwell* (Berlin, 1907), p. 424 on the right to be a prince elector). Moriz Ritter, on the other hand, finds here another illustration of the complete uselessness of this text, because in his view the only possible interpretation of the formula, as *ius* or *regale supremum iure superioritas* (sc. *imperalis*) – that is, as a reference to the useful rights on tolls and contributions to war – was something of a monstrosity (M. Ritter, 'Gustav Adolfs Pläne und Ziele in Deutschland und die Herzöge zu Braunschweig und Lüneburg', *Göttingische gelehrte Anzeigen*, 3: 1905, pp. 196–209, at p. 206). They really negotiated whether Wallenstein was given the honour of being a prince elector on the basis of the reports sent by envoys in 1632. In the jargon of constitutional law at that time, the honour of being a prince elector could be referred to as a supreme prerogative. The distinction between high and low prerogatives [*Regalien*] is confusing – even in Michael, in an otherwise clear legal situation. But there is no 'highest prerogative' [*höchstes Regal*] within a system of high and low prerogatives [*Regalien*], and it was easy for Ritter to win the argument against Michael on these grounds. At stake here, in reality, is *dignitas regalis* [royal dignity] in feudal law. For it to exist, there is a genuine hierarchy, an *ordo* – and consequently also a supreme prerogative. In those fiefdoms that count as *feuda regalia* and can only be granted by the emperor the following hierarchy can be found: *regnum*, *electoratus*, *ducatus*, *comitatus*, *baronatus*. *Feuda regalia* are fiefdoms that were accorded *dignitas regalis* through the emperor's edict, although the highest *dignitas regalis* was the *regnum*; but that does not concern us here, because only the

highest regal *in the Reich* is mentioned; so the phrase makes perfect sense. Moreover, because the reward, the compensation [*Recompens*] for the *extraordinarius*, unlike the ordinary compensation, is not a sum of money; it is rather a *dignitas*, which is something different from a compensation for the costs and expenses incurred, as it is also clearly distinguished from the agreement with Maximillian of Bavaria of 1619. The phrase clearly corresponds to the correct terminology of constitutional law at that time – so much so that this could be proof of the usefulness of that book.[80]

Ad 6 This point concerns the securing of the army's supply. In M. Merian's *Theatrum Europaeum* (Frankfurt, 1662–1737) the phrase *in absolutissima forma* is used again, instead of the word *schlecht*; and the text continues 'in such a way that neither the imperial *Hofrath* nor the imperial treasury nor the imperial court in Speyer can claim any interests, or has the power to make any decisions, general or particular, or can interfere in any other way' [*dergestalt, daß weder der kajserliche Hoffrath und Hoffkammer noch auch das Cammergericht zu Speyer einiger Interesse darbey prätendiren, oder darinnen, es were gleich generaliter oder particulariter einige Decision zu geben oder sonst Eintrag zu thun macht haben sollte*]. (On these points compare the Hamburg edition.) On 15 April 1632 an authorisation from the emperor accorded Wallenstein the right to pass judgement in cases of criminal acts and to order confiscations not just in the Reich, but also in the crown lands.[81]

Ad 7 This stipulation is, again, about securing supplies for the army. The granting of free conduct is seen as a purely financial matter, as is the writ of protection for individuals and countries.

Ad 8 This point deals with the agreement in favour of Wallenstein and with the securing of army supplies.

Ad 9 Ritter (in 'Gustav Adolfs Pläne', pp. 258–9 [*sic*]) points out that the emperor provided only some financial support. He did not pay for all the expenses [*Unkosten*] (*Theatrum Europaeum* calls them *Spesen* [expenses]). But the agreement also states that Wallenstein will be

reimbursed for all his expenses after the peace agreement. Here too we can detect an analogy with the agreement of 1619 between him and Maximilian of Bavaria.

Ad 10 As Ritter explains, the fact that the army was permitted to retreat to the lands of the imperial crown is, to be sure, self-evident *in emergency* and hence 'it goes without saying', of course (ibid., p. 267 [*sic*]). But here we are not dealing with a matter of emergency. Moreover, the sentence is about the right to 'recover' by using the resources of the crown lands (see *Akten* II/2 [= edited by Goetz, n. 1], p. 328), even if no case of emergency has occurred. The absence of any mentioning of emergency is the most important part of that sentence.

These ten points do not prove anything about dictatorship. Their essential interest lies in the area of proprietary law. The 'appointment' ['*Anstellungsvertrag*'] was not a problem at all in terms of constitutional law. One could rather say that it was the appointment of a mercenary soldier. As far as the constitutional relationship between Wallenstein and the emperor goes, the latter was still the supreme commander; he had only commissioned Wallenstein to lead the military operation and the administration of the army, although in reality he had given him great freedom to act. At points 4, 5, 8 and 9 we can find agreements concerning Wallenstein's payment and the reimbursement of his expenditure. Political functions are not mentioned in this document; on the contrary, point 8 proves that negotiations for peace did not depend upon Wallenstein. Even supposing that Wallenstein was sometimes given *plenipotentia* or *arbitrium belli et pacis*,[82] this would have conflicted with the fact that all of Wallenstein's negotiations were undertaken either with a particular authorisation or with the imperial reservation that the emperor had to ratify them.[83] In a resolution dating from 3 February 1634, the prince elector of Saxony gave the following answer to the question, raised by Arnim, of whom one would have to negotiate with:

> [W]ith the duke of Friedland, as the imperial and highly esteemed *plenipotentiario* and fully authorised person [. . .] since this person is not waging the war in his own name, but in the name of and in obedience to the order

> of his imperial majesty, and the army still belongs to his imperial majesty, and as the duke and his officers, with their troops, have made familiar, his imperial majesty has not completely given away the *arbitrium belli et pacis*. Rather he has reserved it as the supreme *ius maiestatis* for himself.
>
> [*mit des Herzogs zu Friedlandt Fürstl. G. als Keyserlichen hochansehenlichem Plenitpotentiario und Gevollmächtigten* [. . .] *Sintemal derselbe nicht suo nomine, sondern im Nahmen und uff Befehl der Röm. Key. Mait. den Kriegk führet, die Armee auch Irer Key. Mait. Zustehet, derer sich dann Ire Fürstl. G. selbst und die Officierer sampt der Soldatesca verwandt gemacht, und werden Ire Key. Mait. das Arbitrium Belli et Pacis nicht absolute von sich gestellet, sondern Ihr, alß das höchste Jus Majestatis reserviret und vorbehalten haben*.]

It was also emphasised there that all the military powers are insufficient to form the basis for negotiations toward a peace treaty.[84]

The extraordinary status that was given to Wallenstein during his second appointment consisted in an extraordinary autonomy for the military commander and in extraordinary rewards. This appointment would have been a dictatorship only if its consequences would have impacted upon the objective legal situation, therefore constituting a state of emergency. Such an impact did occur through the practice of collecting contributions and imposing confiscations that, in the interest of warfare, had been hugely expanded over the agreed limits; but it is true that, in a critical situation [*Ernstfall*], every military action had to demonstrate a boundless capacity to stretch towards the desired end. Guaranteeing the supply that was directly related to the strategic and tactical conduct of the operation was needed not only in the interest of warfare, but also for the army's equipment and maintenance, for logistics, for the gathering of intelligence, for discipline and morale – and not only in one's own army but also in that of the enemy – so that, with an the expansion of the perimeter of operations and a change in technology, the whole state ended up being subject to military ends. In other words, the state became a technical instrument in achieving a certain goal. The development of the Prussian commissariat of the army has already been described as an historical example of the potential for stretching the limits in order to achieve a certain goal. Such a purely instrumental [*sachtechnisch*] understanding would, of course, have perfectly suited Wallenstein's thinking. He was an

extraordinary organiser; he did not just raise a huge army in the most difficult circumstances, he also administered his own lands at the same time – and in such a way that subsequently they became an example of a great mercantile state, solely governed through instrumental reason. For such a person, respect for the constitution of the Holy Roman Empire and for traditional privileges was always unconceivable. In a personal postscript to a letter to Trautmannsdorf,[85] Wallenstein remarks: 'Those who are coming to me from the Reich tell me a lot about the Reich's policies, the Golden Bull and so on. I don't know how I can get my head around these things when they present them to me' ['*Die aus dem Reich, so zu mir kommen, sagen mir viel von den Reichsabschieden undt goldne Bull usw. Ich weiß nicht, wo ich drin steck, wenn sie darmit aufziehen*']. A collection of contributions based solely on military considerations and – even more – a more ruthless practice of confiscation could now have provided the means to abolish the legal hindrances. The authority to impose confiscations, however, was only directed towards enemies and rebels; on the other hand, it has been the practice of all revolutions to stigmatise the political opponent as an enemy of the fatherland and thereby to rob him more or less completely of legal protection for his person and property. Nevertheless, it was far from the emperor's intention to use such methods in the name of the revolution. Not even the imperial commissioner saw himself entitled to apply a treatment exclusively dictated by instrumental considerations. He did not dare to take advantage of the situation of war to extend his political authority by trying to impose the *iura extraordinaria* [extraordinary rights] of his plenary power, possibly because he feared Wallenstein's huge and overwhelming impact. It was intrinsic to the principles of the monarchic *arcana* not to allow an official or a general to become too powerful. Principles of monarchical government can be found in the form of exhortations to the prince in *Princeps in compendio*, a book from 1632 that is attributed to Ferdinand II and was certainly written by someone in his circle (it is, allegedly, a kind of last will and testament to Ferdinand III). There it is stated, no doubt in allusion to Wallenstein, that the prince should not give any general *libera et absoluta potestas*, *ut sine suo scitu is alia quaeque et quae summi et absolute imperii sunt agere posit, sed ipse princeps maneat generalis*[86] ['boundless and unconditional power, so that

he may act in anything without the prince's knowledge, and especially in matters that pertain unconditionally to the highest power; but the prince himself should remain the general']. On the other hand, in 1630, in order to dismiss the proposal of submitting the army to the supreme command of Maximillian of Bavaria, the imperial councillors turned against the prince elector himself the *axioma politicum* [political axiom] that nobody should be made so powerful that one would have to depend upon his discretion. Therefore the emperor was in a precarious situation on both sides. Respect for the existing legal system had tipped the scales. This is the real heart of the discussion about Wallenstein's dictatorship. In fact it was all about whether supreme imperial authority in Germany was the kind of institution that could abolish customary rights when they stood in the way in a state of emergency. The question of Wallenstein's status vis-à-vis the emperor became insignificant by comparison with that of Wallenstein's dictatorship, because the emperor had not decided to impose extraordinary rights for himself on the basis of his imperial plenitude of power. Ferdinand III's capitulation on 24 December 1636 was the constitutional expression of the fact that the emperor had lost his last chance of establishing a strong central power by appeal to the state of emergency. In an 'extreme need' [*äußersten Notdurft*] the emperor was no longer bound to consult the estates, though he was required to consult six prince electors in order to levy the most basic contributions. In other words he could not levy provisional contributions himself, simply by referring to the state of emergency. Not even in high-profile situations – a breach of peace, or a continuing rebellion – was he allowed to declare a ban without the agreement of the prince electors; even in high-profile situations a special legal process was compulsory and the emperor's prior position that the ban could be *ipso facto* implemented was no longer permissible. Limnaeus, the constitutional legal theorist,[87] remarks that the state of emergency was a favourite excuse; but the king was deprived of it. He could not decide according to his will even *in extremo necessitatis casu* [in an extreme case of necessity]; he had to consult at least the prince electors. This must have made it impossible to transform the *status mixtus* of the Roman Reich into a pure monarchy by appeal to the state of emergency.

3

The Transition to Sovereign Dictatorship in Eighteenth-Century State Theory

The king of France – an absolutist king – governed through commissars. The intendant [*Intendant*], who was in charge of the royal administration, conformity and centralisation – *le vrai agent de l'authorité royale* – was a commissar.[1] His official title was *commissaire départi pour SM* [*Sa Majesté*] *dans les provinces et généralités du royaume et pour l'exécution des ordres du Roi*. He was the chief of a generalship [*Generalität*], a province or a department; he could be recalled on each occasion; and, as an *intendance*, his area of competence was not identical with that of the other districts of administration and jurisdiction – of the governors and parliaments. In the eighteenth century there existed thirty-one such departments, and an additional six in the colonies.[2] Usually only the *maîtres de requêtes* [masters of requests] – that is, members of the Council – were considered eligible for appointment in the border provinces; and this appointment was done through the superintendent [*General Kontrolleur*] of the finances, who followed the suggestion by the minister of war. As a commissar, the intendant only had the forms of authority that resulted from his commission – concerning both his own person and his duty. The forms were different depending upon the different provinces and the personality of the intendant; in difficult cases he liaised with headquarters for further instruction. Normally he had to 'oversee' (*veiller*) the administration of the judiciary, police and finances, in the interest of the maintenance of public order (*le maintien du bon ordre*). He was also entrusted with the general overseeing (*inspection générale*) of everything related to the welfare of the king and his subjects: distributing and collecting taxes; monitoring the judiciary; deploying troops

in different areas; recruiting troops and making decisions whenever queries and quarrels occurred in this matter; supplying corn for the storehouses;[3] setting the highest price in times of scarcity; the development of agriculture, trade and industry; the maintenance of the roads, bridges and public buildings – in short, *le bien de l'état*. He had to report back to his commissioners, the king and the Council, and to inform them permanently about what was going on in his district or what seemed to be in need of reform. By a special decree of the Council he was empowered to conduct investigations, to collect evidence and to write reports; commissions that he himself conduct legal proceedings or make juridical decisions were more rarely authorised. The rule was that he himself should not decide; he only had to ensure that the official court would pass judgement in each case. Even in disputes over taxation or the collection of taxes, he needed to delegate to the courts. When public uprisings occurred – especially the frequent peasant riots during harvest – the *prévôt* [provost] of the gendarmery (or his lieutenant) took decisions through an extraordinary procedure [*Sonderverfahren*] that excluded the possibility of appeal.[4] The intendant or his sub-delegate frequently negotiated with the rebels; he even tried to mediate between workers on strike and their employers, in disputes over wages. Normally he was not keen on using force but proceeded with 'absolute precaution', because it was recognised that prohibitions and police-like measures were not very fruitful in such cases.[5] When necessary, he acquired extraordinary powers from the Council; then he intervened with the support of armed forces and took the necessary measures, which he had to justify afterwards. From time to time, his function as a commissar of action was called a 'kind of dictatorship', in contrast to his normal duty of monitoring and administering – his *authorité exécutive*.[6] The legal remedy against the intendant – appeal to the Council – had no validity unless the Council had explicitely decided something else. The intendant appointed sub-delegates, whom he had to pay out of his own pocket and could dismiss any time. He resided in the capital of his district but he had to undertake a journey of visitation at least once a year (or twice under Cardinal Colbert).

As an agent of the central power, he was naturally opposed to the provincial and local cooperatives, which had maintained for the most

part an autonomous judiciary, government and administration. But there were intendants who knew when to act with a good deal of autonomy towards the central government. Most of them, as commissars, were seen to be useful tools in the process of centralisation, and therefore they were caught up in the conflict with the 'intermediate' powers: the parliaments, the estates, and the provincial capitals with their governors. These governors were originally appointed for a lifetime, but in fact they occupied hereditary functions. In the very beginning they were commanders of the army, and so they were themselves, by definition, untenured commissars, according to the custom of that time; and in most of the cases they appointed commissars in their turn, *commissaires intermédiaires* [intermediary commissars] – even for the collection of taxes.[7] From early on, there had been numerous attacks on the intendant as the representative of a centralised bureaucracy; the best known records of such events are the *Memoirs* of the duke of Saint-Simon and François Fénelon's letter to the duke of Chevreuse in 1710. The attacks continued throughout the whole of the eighteenth century. Because of their number, the intendants were called, allusively, 'the thirty tyrants'.[8]* Beside the fact that the bureaucracy hindered access to the king and that the king saw things only through the eyes of its representatives,[9] the most important reason for complaint regarding breeches of the constitution was the taxation ordered by the king without the agreement of the estates. Normally the estates were granted enormous flexibility in the distribution and collection of taxes. There had always been complaints against the princely commissars from the 'intermediate' instances, that is, from the self-governing estates. In 1648, during the infancy of Louis XIV, the combined courts of Paris knew how to prevent the nomination of several intendants. Later, of course, the commissions were partly renewed. Conciliary theory argued against the *plenitudo potestatis* of the pope, claiming that it should not be exercised by him but by the church and that the pope had in consequence to abstain from direct interference down the steps of the

* [Translators' Note: the Thirty Tyrants is the infamous name of the ultra-oligarchic party installed at Athens in 404 BC by the victorious Spartans at the end of the Peloponnesian War.]

hierarchy, in the ordinary responsibilities of various departments.[10] In the same way, the German estates shared the view that it was not the emperor who had *maiestas*, but the Reich[11] – the empire, of which the emperor was merely a part (but in this area the outcome was different). And, when the French parliaments declared that the king was not beyond the state but was himself a part of the kingdom, they were following the same principle.[12] They saw the *gradation des pourvoirs intermédiaires* [scaling of the intermediary powers] as a *dépôt sacré* [sacred deposit], which bound the king's authority to the trust of the people. Even in the eighteen century, the autonomy of the estates in juridical and administrative matters was so dominant that the absolutism of the French kings could not be compared with that of Napoleon.[13] To a monarchist like de Bonald, monarchy and hereditary intermediate powers were identical, and the commissarial intendants seemed to embody an institution contrary to the historical principle of monarchy. In particular, Montesquieu's state theory is only comprehensible if one bears in mind that what was referred to in the most crucial parts of his treatise was the idea of intermediate powers. The tension between Montesquieu and the Enlightenment stems from a dispute, rife in the political and administrative realm, between the conservative autonomy of the estates – which involved a state power that was 'indirect' ['*mittelbaren*'], in other words mediated by numerous independent bodies – and a direct [*unmittelbar*] central bureaucracy, which could interfere at any time. Montesquieu was a member of parliament; Turgot, the most important representative of the theory of enlightened state absolutism among the physiocrats, arose from the ranks of intendants.

The *pouvoirs intermédiaires* [intermediate powers] were, according to Montesquieu, an essential element of monarchic government, and they respected the basic principles of law. The law needed a mediating institution through which governmental power could flow, so that an arbitrary and spontaneous expression of the will of the state would be prevented. The aristocracy, the seigneurial and patrimonial sphere of jurisdiction, the clergy and the independent law courts which acted as a *dépôt des lois* [storehouse of laws], and also the French parliaments were such intermediate checks on the omnipotence of the state; but not so the council of princes, which was naturally inclined to execute

the immediate will of the prince without relying on the *dépôt sacré* of the fundamental laws. Furthermore, it had the disadvantage of not being 'permanent', like those intermediate corporations; nor did it have the trust of the people.[14] So far, Montesquieu is expressing the very same ideas that will return in the *Remonstrances*, and he is a major opponent of the Enlightenment, as well as of Voltaire and the physiocrats, for whom the inherited corporations and hereditary functions were a barbarian (or 'gothic', as one would say then) exercise in futility and a disruption of the rational scheme of things. The Enlightenment conceived of the state the same way deistic metaphysics saw the cosmos: God, who resides outside this world, created it in such a way that it functioned as a perfect machine, following laws given in advance. The lawmaker constructed the machine of the state in much the same way. To illustrate this construction, Montesquieu employs the simile of the 'balance'. This metaphor/analogy was commonly used in the seventeenth and eighteenth century to express all kinds of true harmony – in the cosmos as well as in foreign and domestic politics, in ethics, and in national economy; and it was not necessarily understood in an abstract and rationalistic way. The theory of the so-called separation of powers becomes incomprehensible for someone who places too much emphasis on separation and division rather than on the notion of balance.[15] A system of mutual checking, prevention and cooperation needed to be established. *Le pouvoir arrête le pouvoir* [Power checks power] ([as Montesquieu puts it in] *Esprit des lois*, Book XI, ch. 4); and *arrêter*, *enchaîner*, *lier*, *empêcher* [to stop, put in chains, tie, hinder] are the key words of the famous chapter 6 of the same book. Above all, the purpose of this simile [of balance] was to illustrate a conversation between the king and the parliament. When a corporate body confronted the king – that is, the holder of the most important form of state power – it could only do this on the basis of an identification with the people it claimed to represent; and it also claimed – and demanded – to control the use of that state power and to issue the rules for its use – in other words the legislation. Uniformity could be achieved if one power annulled the other. In the terminology of the eighteenth century, that would be despotism; today it would be dictatorship.[16] On the contrary, the simile of the balance symbolised a unity achieved through consensus; hence the so-called separation of

powers was nothing less than a doctrinal construct. This separation was always related to concrete political conditions, and it was implicit that its use was always directed at the one who, through his prejudicial claim to power, though his dictatorship, disturbed the mutual exchange of arguments and made consensus impossible. The separation was neither republican nor democratic, as monarchic apologists of the nineteenth century were keen to claim. Nor was it a form of abstract rationalism; in fact this is what Constantin Frantz believed when, in a crude misinterpretation, he saw Montesquieu as the intellectual founder of the modern tendencies towards the centralisation of the modern state.[17] On that view, any imbalanced political 'super'-power is the enemy. In Cromwell's constitution, the separation appears as a means of preventing the abuse of power by the governing parliament. This is well known due to the Long Parliament. In the first half of the eighteenth century, Bolingbroke emphasised the separation in the interest of a strong monarchy, against the parliamentary majority of the Whigs. Bolingbroke called Marlborough, the most influential man of that time, a 'dictator'.[18] This was in retort to the qualification 'despot', by which the Whig designated the absolutist prince. Montesquieu now combined the doctrine of balance with the doctrine of *corps intermédiairs* in order to help in the struggle against the dominance of royal absolutism and its instruments – the minister and his intendants. To that extent Montesquieu still maintained the tradition of the estates and set the intermediate powers against the king's power – a power that controlled all the instruments of the state, and a king who could direct the whole state apparatus in one grip (*il précipite la balance* [he shifts the balance], *Esprit* III ch. 10). Besides, contrary to the glorifying view of history, which was the norm, he did not regard Cardinal Richelieu, the founder of the centralising power of French kingship, as a great man. He even had the courage – quite extraordinary in a man of eighteenth-century society – to quote appreciatively from Boulainvilliers, the ancestor of feudal theories of race. And yet, for him, direct democracy was open to the same criticism as absolute monarchy: the people should have no '*puissance immédiate*' either (*Esprit* XIX, ch. 27); there were no intermediate powers in the direct democracies of the ancient republics either.

In Montesquieu and in the entire literature influenced by him,

despotism means the suspension of the right *balance*. To a certain extent, it would have been even better to talk about a 'mediation' ['*Mediierung*'] of the *plenitudo potestatis* rather than of a balancing of powers. The omnipotent state should never be able to intervene arbitrarily, with all its effective plenitude of power. It should rather be arbitrated [*vermittelt*], mediated in its exercise [*intermediiert*] by an appropriate organ with well-defined authorities – a *pouvoir borné* [limited power] whose authority, unlike that of other mediating powers, cannot be suspended arbitrarily. The highest powers – legislative and executive – should similarly exercise control over each other's authority. The result is that civil liberty is protected from the omnipotence of the state, which is regulated by a network of limited authorities. Whether the omnipotent organ is a corporate body or an omnipotent executive, or whether the instrument of immediate omnipotence – the commissars with unlimited authority outside and unconditional dependence within – are sent by parliament or by the princes is neither here nor there when it comes to the result – the annihilation of civil liberty. This doctrine does not benefit from a formal concept of law. The commitment of the state, which should be based on legislature and the 'inviolability' of the law, is only guaranteed if the legislation and its execution mutually control each other and, above all, if a law, once passed, cannot be changed arbitrarily (whence the demand for royal vetos). Otherwise the alleged commitment that the legislator imposes on himself through law is merely an empty gesture. In theory, sovereignty may be uniform and unlimited; but, in practice, every single officer must be given a limited authority, and even the two highest institutions, the legislative and the executive, should not be allowed to expand their authorities unilaterally. There would be no responsibility at all without an equipoise of authority to authority [*Kompetenz–Kompetenz*].

For the situation in which the omnipotence of the state appears directly, Montesquieu used the word 'despotism'. For him, as for the eighteenth century in general, the word 'dictatorship' was dependent upon the classical tradition and tied to the Roman Republic. Therefore he only conceived of commissary dictatorship as occurring within the existing republican constitution. From time to time Montesquieu mentions the favourite textbook examples of Sulla and Caesar. He

used them without making comments – apart from psychological ones.[19] In tune with the political literature of the seventeenth century (which on this subject was not different from, say, Clapmarius), he views dictatorship essentially as a state of emergency in an aristocratic form of government (*Esprit* II, ch. 3): a minority that was threatened in its dominion has delegated unlimited authorities, *une authorité exorbitante*, to one single citizen. By contrast, a monarchy – for which it was essential that a single person should exercise this *authorité exorbitante* – generates the monarchical principle of paying heed to the 'intermediate' powers, the aristocracy in particular (ibid., ch. 4), as a restraint. For aristocratic states, Montesquieu recommended the establishment of constitutional dictatorships, as had happened in Rome and was attempted in Venice under a stable and permanent administration. But the institution in Venice promoted an omnipotent secret office, which was operating there; and then the ambition of a single person fused with that of a single family, and the ambition of a single family fused with that of several ruling families. It was best to curtail the unlimited aspect of the authority to exercise power through brevity of office tenure. As it is outlined in chapter 6 of Book XI, in the ideal case of a right separation of powers there would be no dictatorship – although the chapter describes a state of emergency in which the legislative and the executive are empowered, for a brief and rigorously defined period of time, to arrest suspicious citizens. The precondition for this state of exception was a domestic conspiracy, or negotiations with the external enemy. Nevertheless, Montesquieu's historical eye did not overlook the general significance of extraordinary commissars for the transition from republic to Caesarism. In the book he devoted to the greatness and downfall of the Romans (*Considerations on the Causes of the Greatness of the Romans and of their Decline*, ch. 11), he praises the prudent distribution of public powers in Rome, where a great number of magistrates restrained and controlled one another, so that each one had only a *pourvoir borné*. This state of the separation of powers ceased when *commissions extraordinaires* started being mandated – such as the ones that Sulla and Pompeius received. In this way both the power of the people and that of the magistrates were annihilated, and influential individuals were able to seize sovereign power [*Gewalt*]. Civil wars were the appropriate soil for such

usurpations, because they generated a dictatorship. Montesquieu's examples are Louis XIII and Louis XIV in France, Cromwell in England and the absolutist German princes after the Thirty Years' War. Unlimited power was exercised under the pretext of restoring order, and what, in the past, had been called 'freedom' was now called 'uproar' and 'disorder'. One could perhaps understand from a historical–political perspective – though not at all from the factual content of what Montesquieu says – how it was possible to detect a spirit akin to that of Rousseau's *Contrat social* in someone who presented such a view of the origins of the modern state.

Montesquieu's statement – frequently quoted since the French Revolution – that, under special circumstances, freedom needs to be disguised, just as the statues of deities were veiled,[20] was made in a different context from the one in which it is usually cited. Namely it was not about justifying the state of siege; it rather raised the question of whether a bill of attainder was permissible. The worrying aspect of such a bill was that one particular individual – a private citizen – was punished under the form of law; that is, one made an exception to the general character of law. The law should be a norm valid for everyone; it should not only be applied to an individual case. At work here is the idea of law as *volonté générale* [general will]. The universal character of the law should consist in the fact that it does not know any individuality and it is valid without exception, like natural law. This conception of law[21] was taken by Montesquieu (and Rousseau) from Cartesian philosophy, with which Montesquieu was acquainted mainly through the study of Malebranche[22] and where his scientific interests were rooted. This idea became paradigmatic in French political philosophy. Whereas in the seventeenth century the principle of the free ecclesiastic community was applied to political corporations in England and helped to create a new form of state in America, eighteenth-century France politicised a metaphysical and scientific concept of law. The Cartesian doctrine that God possessed nothing but a *volonté générale* and any particularity was alien to his nature was politically translated into the idea that the state was only allowed to establish universal and abstract rules – the laws; the concrete individual case could only be decided through subsumption under the universal law, but not directly through law.[23] This conception of law,

combined with various other ideas, is especially evident in Rousseau. By contrast, in Montesquieu the treatment of this question makes it evident how little his political ideas were governed by a doctrinary rationalism, in spite of the fact that he too, in Cicero's footsteps, called the law a *iussum in omnes* [command for all]. Notwithstanding his concerns, he approved of this bill of attainder. The claim that the law must be universal did not entail an abstraction from any concrete content, as it did in Rousseau; rather it followed politically the same idea as Locke's 'antecedent standing law': an unchangeable or 'immutable', constant law should guarantee uniformity and predictability in the practice of law, and thus, through its legal certainty, it should also guarantee the independence of the judge and constitute civil liberty. It precluded an instrumental legislator and an instrumental jurisprudence that would decide on a case-by-case basis, according to specific circumstances; and it ensured what modern theorists of the state have called 'the inviolability of the law',[24] which is essential in any constitutional [*rechtsstaatlichen*] order (as opposed to the kind that obtains in a police state). The most important guarantee of civil liberties, though, was located in the intermediate powers. Montesquieu's famous statement about the judiciary – which he called a third power, beside the legislative and the executive, but which in a certain sense should be invisible and void (*invisible et nulle*) – did not seem to be associated with a rationalist understanding of the *volonté générale*;[25] nor did he imply that the judge was only a slavish applicant of the law to the individual case, a voice of the law, *la bouche qui pronounce les paroles de la loi* [the mouth that utters the words of the law], an inanimate creature (*être inanimé*), what the *Freirechtsbewegung* [Free Law movement] in the last decades has called 'an automat of subsumption'. But another interpretation is more faithful to the spirit and context both of chapter 6 and of the entire work. When he describes legal practice as invisible and void in some sense, Montesquieu has the idea of English jurors at the back of his mind. Those jurors did not establish a permanent body, like the French courts, and they were not a *corps intermédaire*. Here again Montesquieu is far from the absolutism of the absolute validity of an abstract sentence. A *despotisme legal* [legal despotism], such as the one demanded by the French rationalism of the eighteenth century, did not exist for him.

Not even Voltaire elaborated the consequences of the doctrine of dictatorship of the enlightened rationality. Of course he was a friend of enlightened absolutism. For Voltaire, what Montesquieu had said about the justification of bribery and the hereditary bestowal of functions – practices developed in the context of the theory of intermediate powers – was disgraceful and infamous. In the struggle between royal absolutism and the parliaments between 1756 and 1771, he sided with the central power, and the parliaments' resistance was for him *une étonnante anarchie* [a baffling form of anarchy]. When it functioned well, the apparatus of bureaucracy, which was controlled through pressure from a central institution, corresponded to his deistic worldview; whereas the colourful muddle of feudal autonomy and autonomy of the estates appeared to him as a sheer chaos.[26] Nevertheless, he recognised the positive aspects of a democracy only too well, and the natural malice of human beings had already armed him with enough scepticism about absolutist psychology for him to be able to be an unconditional absolutist.[27] Moreover, it was certainly not part of his intellectual nature to pursue systematically the consequences of an idea. By contrast, you'll find the fundamental idea – which derives from common enmity against the historical intermediate powers, together with the common belief in the power of an enlightened bureaucracy – in the *philosophes économistes* [French eighteenth-century economists], the physiocrats,[28] du Quesnay,[29] Dupont de Nemours,[30] Baudeau[31] and Sénac de Meilhan[32] – and also in d'Holbach's[33] *Système social*, which repeated all of Locke's comments concerning the despot: through natural – that is, rationalistic abstract thinking – a universally valid political and social order and justice could be developed, which had to be developed at governmental level. Although the physiocrats regarded any interference from the state in trade and commerce as a detrimental thing, a strong monarchy and a 'true' despotism, – in other words, an authorised and intelligent one – appeared to them as inevitable, if one was to achieve the liberal ideals and the destruction of the intermediate powers, which stood in their way. The state had to be subject to the laws of economic development; but apart from that it superseded everything else, as its main task had be the enlightenment and education of its subjects. Once human beings had realised *l'ordre naturel*,

their natural order, everything else would follow automatically. Until that moment, the dominion of an enlightened authority was necessary, of course: it completed the task of educating the people – by using coercion, if necessary; and the ends of education justified these coercive means.[34] If, then, human beings were educated so as to use their reason, an enlightened public opinion would emerge, which was more suited to control the government than any other established authority were. A man of practical and intellectual significance like Turgot denied the *corps particuliers* any right of existence within the state where *l'utilité publique* [the public good] was concerned: this was the supreme law, and it must not be equated with the superstitious respect for any tradition. The consequent formulation and naming of this theory of the state was elaborated by Le Mercier de La Rivière in his book *L'Ordre naturel et essentiel des sociétiés politiques* [*The Natural and Essential Order of Political Societies*].[35] He developed the system of a *despotisme légal* ['legal despotism'] on the basis of the most universal principles of reason. Reason dictates. His despotism did not have as its goal the slavery of human beings; on the contrary, it aimed to give them true freedom and *culture* [cultivation]. The *despotisme legal* was distinguished from the *despotisme arbitraire* through its objective. Nevertheless, it remained a personal despotism: the despotism of the one who recognised its evident truth. The one who possessed the right, natural and essential insight was permitted to be a despot over the one who did not possess this insight or who refused it. Of course, even for Mercier, the most severe obstacles to a dominion of reason were the human passions. Hence passions needed to be enslaved – through the use of force, if need be; for the right to dictate laws (*de dicter les lois*), just on its own, without physical force, was not sufficient to establish these laws. For this reason, the separation of the legislative from the executive was reprehensible, too – and also futile. Inevitably, for these two powers to be balanced, there would always be a dominance of one over the other in the long run. The theory of checks and balances – the *contre-forces* [counter-forces] – was a chimera. *Dicter les lois positives, c'est commander* ['To rule is to dictate positive law'] – and this also implied having that *force publique* [public power] without which any legislation would be impotent. To suspend the separation of powers was the constitutional [*staatsrechtliche*] definition of 'despotism'. In

the interest of an uncompromising action, all opposing obstacles were abolished and an irresistible power – an *authorité irréstible* – was created. The key term in this theory was unity: *une seule force, une seule volonté* [one single force, one single will] – a unity of evidence, power and authority in which despotism was based on the recognition of the true laws of social order. Consequently the true interest of the sovereign was identical with the true interest of the governed, and the power of the despot could be all the greater the more widely enlightenment had spread – because then the rectification of power emerged automatically with public opinion. Thus legal despotism was not a despotism bound to positive laws, but rather a radically centralised political power that secured the transition to a situation in which the natural laws ruled by themselves and in which the evidence of rationality constituted their justification.[36]

This dictatorship of reason was rooted in the distinction between the enlightened philosopher and the people who needed to be enlightened. This distinction obscured one of the consequences that were obvious for the mentality of that time, and it prevented one from drawing the conclusion – based on natural law – that all authority of the state stemmed from the will of the people, since the absolute power of the single ruler depended on its being formally transmitted by the people. Because the great historical precedent – the *lex regia* by which the Caesars were given power – took the form of a permanent dictatorship with Caesar, it was possible for the ruler to appear as a dictator. In the eighteenth century, however, this was not treated systematically but mentioned in sporadic fashion, in Cérutti's *Mémoire pour le peuple français* (published anonymously in 1788). Cérutti was assistant to the young Mirabeau. This book was seeking to bind democracy and monarchy against the privileged classes, and it made the monarch into a '*dictateur perpetuel et héréditaire de la République*' ['permanent and hereditary dictator of the Republic'].[37]

Even among representatives of radical forms of economic and social equality can we find the conviction that the existing intermediate powers and the politically organised interests of the estates and classes demanded a strong central power. With that came the belief in the state and in the unlimited potential of political means. Morelly's *Code de la nature* (1755)[38] was the first political treatise to

state explicitly that a human being was by nature good and was only corrupted by existing property relations and social and stately affairs; and it introduced, in the ideal state, '*chefs*' [heads] of '*départements*' [departments] who, in cases of emergency, did with 'absolute authority' whatever they considered to be appropriate and who in fact were only ideal intendants. For Morelly, despotism was only a means to realise the ideal condition of equality. The state was an almighty pedagogue, as it had been for enlightened philosophers; and the Jesuit state in Paraguay was an example of the concrete possibility that the Platonic ideal of the communist state of philosophers could be realised. Gabriel Bonnot de Mably, on the other hand, was aware of a theory of 'counter-balance' that made such an absolutism impossible. He also knew that only a strong monarchy could abolish the rule of a '*classe*' [social] or [political] party. He also wanted to use this strong state in order to establish the universal equality that would eliminate the dominion of greed and lust for power – in other words, private property – and would make the contemporary *état corrumpu* [state of corruption] at least approximate the *état de la nature* [state of nature]. According to him, this was only possible through an accurate consideration of human nature and its passions. But the political instrument was not simply the dictatorship of what was obviously right to the dictator. Mably had made extensive critical comments against Mercier de la Rivière's book and his system of *despotisme légal* [legal despotism].[39] Above all, he was sceptical about the power of philosophy, which philosophers were taking for granted. For him, the dictating evidence was anything but evident. The philosophers were wrong if they thought that this evidence was placed like a god in his machine-prop [on the stage of a theatre] (*un dieu dans sa machine*) and directed affairs. A human being was not an angel waiting to hear the truth. Here was, at work again, what the classical teaching had handed down about the relation between affects and reason: passions confuse people and are more convincing than the philosophical truth. From here Mably derived the view – which was not alien to this tradition – that the bad emotions maintained and sustained private property. But at this point a decisive reversal occurred. The absolutist doctrine of the natural malice of human beings was shaken by the fact that the ruling people were also naturally driven by passions and ignorance. In

consequence, everything depended on the creation of restraints and guarantees; and this should be achieved through a right distribution of political functions: *Il s'agit d'établir des contre-forces entre les magistratures pour qu'on ne soit pas la victime de l'ignorance et des passions des magistrats* ['It is all a matter of counter-balancing the various kinds of public service, so as not to fall prey to the ignorance and passions of public servants']. The reversal of the absolutist doctrine of the natural malice of human beings operated here by Mably preceded Rousseau in point of making a political impact – insofar as Rousseau's *Contrat social*, which was published in 1762, did not mention the idea of the natural goodness of humankind, which was to became so famous. It followed from Mably's reversal that government and state were necessary evils, which needed to be limited as much as possible. This was most obvious in America. Thomas Paine produced a statement that, while fully reflecting the spirit of North American liberalism, was phrased in such a way that it could have stemmed from the nineteenth century, when society and state were conceived of as separate entities and the state appeared as a mechanical apparatus superimposed upon an organically flourishing society: 'society' is the product of the rational coexistence of human beings, their needs and the satisfaction of those needs. The state (which of course Paine called 'government') is the result of our vices.[40] Mably had not gone that far. But with respect to the authority of the state he had the same intention as the Americans: to establish a system of mutual controls and dependencies – the so-called separation of powers. [Ancient] Rome, England (of course only incompletely), the German Reich, the Netherlands, Switzerland and, above all, Sweden were examples of such a balance of powers. Nevertheless, according to Mably, the danger always subsisted that the respective owners of the actual instruments of state power – the executive, as he called it – may try to subdue the other powers, by virtue of a natural lust for dominance. Of course, even a direct democracy is a kind of despotism: the people are ignorant, and their government dissolves into anarchy – which then leads again to a need for magistrates with extraordinary authorities. But the most important issue was his mistrust of the executive. Mably recognised the fight against the king's commissars, intendants, *bachas* [Turkish administrators] in their respective provinces – he even

approved of it; against the Jesuit state he raised the objection that the Jesuits would have done better to educate the Indians in self-government, so as to enable them to elect officers for the economic administration of the republic from among themselves.[41] Against the philosophical economists' fanaticism about the idea of unity – their *unité de force et de volonté* – he raised the question of whether a philosopher could imagine that political unity would be created when property and the entire living conditions were unequal and political power only served to maintain this inequality.[42] The free self-governance of the citizens consists in their participation in the legislative. The executive must be divided from time to time according to the different branches of the administration; otherwise an accumulation of powers emerged, a *magistrat universel* [a universal magistrate] – in other words a despot. Regular controls of the government by particular commissions of the legislative are necessary; even a recurring 'year of reform' (undertaken periodically) is recommended – and a very strict control is to be exercised during this time. Apparently Mably did not realise that the institution exercising control was transformed into an executive organ at the very moment when its control became an effective control of instruments [*Zweckkontrolle*], and that the despotic accumulation of power that ought to have been prevented would recur at that point too. But in practice this was most significantly proved by the actions of the Jacobins, who were influenced by him. The enmity towards the executive passed from Mably to the French Revolution. Referring to him, Robespierre stated in the Constituent Assembly of 18 May 1790 that only the legislative was allowed to decide on matters of war and peace, because it had the least interest in abusing its power, whereas the king was inclined to such an abuse, as he was *armé d'une puissante dictature, qui peut attenter à la liberté* [armed with a powerful dictatorship, which can attack freedom]. The work of the commissars of the National Convention started with controlling tasks – that is, with the actual interference of legislation into the minutiae of the executive. Driven only by the aim of guaranteeing a given outcome, surveillance expanded to a point where the activity under surveillance was completely absorbed. But here the Jacobins complied with a suggestion made by Mably in his *Droits et devoirs des citoyens* of 1756, where he said that during a

revolution the representatives of the people must be fully in charge of all businesses and must take up the executive function themselves. So it is that what was later called the Jacobin dictatorship of the National Convention was already anticipated by Mably. He reserved the name of dictatorship, however, only for the Roman legal institution. Back then, stereotypical phrases were reiterated around it, as the article in the *Encyclopédie* summarises: extraordinary conditions demand extraordinary means; during dictatorship the laws are silent; the power of the dictator is compensated for by a limitation in time – and so on.[43] But Mably stated that the dictator was more than a king, because the functions of all other magistrates were nullified through his function. For Machiavelli, the continuing existence of the magistrates was in fact a guarantee against the abuse of dictatorship. By contrast, Mably's understanding of this function reflects the transition to a new concept of dictatorship: it becomes an absolute power, overruling all existing authorities. No longer can we talk now about supreme command over war, or about the crushing of uproar, which the standard concept of commissary dictatorship permitted. In order to justify this dictatorship, Mably claimed that it had to emerge because laws wear out over time and corruption becomes too widespread. Obviously the dictator appeared to him as a kind of commissar of reformation with unlimited powers over the entire constitutional organisation of the state. If one combines Mably's concept of dictatorship with his aforementioned statement that during a revolution the representatives of the people must put themselves in charge of the executive, one arrives at the dictatorship that the National Convention exercised in the name of the people. This is no longer a commissary dictatorship of reformation, but a sovereign dictatorship of revolution.

As in other respects, Rousseau was not as unconditionally up-to-date as Mably in this matter. Instead, if one puts his allusions in the context of the entire *Contrat social*, his construction of dictatorship announced the new concept of dictatorship for another reason. Rousseau dedicated to dictatorship a whole chapter of the *Contrat social*: chapter 6 in Book IV. To begin with, a number of traditional views are repeated here, so that on a superficial reading this chapter in particular is the least to contain any novelty. But this impression

changes on a systematic analysis – not so much on account of the impact of the 'Bible of the Jacobins' on the French Revolution, which was frequently exaggerated, as on account of the chapter's actual [*sachlich*] content. Moreover, this content was already adumbrated in Rousseau's *Aphorisms*; hence a thorough examination is in place. This contradictory book – the *Contrat social* – is best suited to reveal both the critical condition of continental individualism and the exact point at which this individualism turns into state absolutism, and its demand for freedom turns into a demand for terror.

Gierke (*Johannes Althusius*, Breslau, 1880, p. 116), quoting Althusius, tells us that the starting point and purpose of the *Contrat social* is the freedom of the individual. While the starting point was an unconditional natural and inalienable freedom of the individual, its purpose was presumed to be the same. A state should be created in which not one single person is enslaved, in which the individual does not have to sacrifice the smallest aspect of his liberty. With a grand gesture, a great expectation was created in the *Contrat social*, and an answer was promised to a tremendous question, which had never been answered until that day: *trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé et par laquelle chaqun, s'unissant à tous, n'obéit pourtant qu'à lui-même et reste aussi libre qu'auparavant* ['to find a form of association that defends and protects with all its collective power the person and the goods of each member and in which everyone, joining all the others, does not, however, obey anyone but himself and remains just as free as before'] (I, 6). Of course, the answer he gives is not in itself surprising: if everyone associates with everyone else only on the basis of free consent, then he is only obedient to himself and remains as free as before. In this case it is self-evident that freedom cannot be the same as independence; otherwise coexistence would be impossible. The essential thing must always be that the individual is only obedient to himself. Hence the basic contract must always be entered upon unanimously; otherwise the majority can always compel the minority (IV, 2.7).[44] For Locke, this was the decisive justification for the state: every decision of the state is as a consequence of my consent to the state, of my own decision. I have subjected myself to the majority (*Second Treatise of Civil Government*, ch. 7, § 38).

Rousseau, on the other hand, seems to go beyond Locke's individualism because, for him, there is no representative of the free common will. The English people are not free, because they are governed by a parliament instead of being governed by themselves (III, 15.5). The sovereign will of the people cannot be represented any more than the people itself can. Thus the dependence of the individual, as it existed in the estates and in other intermediate corporations, disappears entirely. The individual finally seems to become wholly and unconditionally free; he is confronted only – and directly – by the common will. In the construction of the state, this was expressed in the fact that the state was no longer based on subjection to some power and on a contract with this power – the contract of governance; the *pacte social* only contained an agreement. Theories of the state that combine several contracts, agreements and subjections, like that of Pufendorf, evaporate before the simple logic of the simple contract – which in Hobbes was only a contract of subjection and, in Rousseau, a contract of agreement. In both cases, the result, in the first instance, was that the individual and the state were directly opposed to each other. With this, state theories based on the individual reached their extreme point. In fact Rousseau's theory significantly contributed to the transformation of France into a liberal, civil state. But this system had one further implication. It concerns the basic meaning of the individual in the state.

The infinite contradictions that were possible within the so-called systems of natural law and the superficial nature of the attempts to summarise them, usually under one single label, have already been touched upon (see p. 17). This is where the contradiction shows its most far-reaching implication. In natural law, the starting point of the construction – the individual – meant different things to different theorists. On the character of the initial provision, which was itself formal, depended the political outcome: the extent to which the individualistic starting point was given a substantial content. In natural law, this is where you'll find the greatest contradiction that can ever exist in a theory of the state. There is one natural law according to which the individual is a concrete reality, one that exists independently of any social organisation and form and therefore is (in principle) unlimited – in contrast to the state, which is an essentially limited

entity. And there is another natural law according to which these relationships are reversed. In the natural law of science, as conceived by Thomas Hobbes, the individual person was a centre of energy, and the state – the Leviathan – was the unity that consumed the singularity created in the eddy or vortex of the meeting of such atoms. On the other hand, the natural law of justice upholds, even if in a diluted humanism, a concept of individuality that cannot be given a rationalistic form at all. It is a concept of individuality derived from Christian natural law, which reached its apex in Puritan Christendom. On this view, every individual is superior to any rational exposition and explanation, and therefore superior to any limitation and ascription; superior to any allocation of his/her value, the individual is the bearer of an immortal soul, created and redeemed by God alone. State and society, however, admit of rationalisation. In fact this essential irrationality of the individual paved the way for the complete rationalisation of the social order; but the principle of distribution among what was essentially limited and what was essentially unlimited remained absolutely clear. The state, the essentially limited, was a rational construction; the individual is what was substantially given. In Locke's rather unsystematic statements, which are difficult to reconcile with his metaphysics, the effect that emanates from Puritan Christendom is still strong enough to elevate beyond any doubt the concrete and substantial individuality, with all its pre-stately rights, freedom and property. The kind of implication that Hobbes was after – one derived both from mathematics and from natural science – forced him to abstract from all concrete content. By that move, the individual was stripped of its concrete individuality, too; but – and here we can find the same systematic idea as in Spinoza, if the individual is nothing and the universe is the whole for him – the whole, Leviathan, becomes the substantial bearer of all right.

Rousseau's formula is as follows: every one of us subjects his/her person and his/her entire wealth communally, under the sovereign guidance of the collective will, and in return for this he/she is accepted by the community as an indivisible member of the whole (*chaqun de nous met en commun sa personne et toute sa puissance sous la suprême direction de la volonté générale; et nous recevons en corps chaque membre comme partie indivisible du tout* ['each one of us places his/her

person and all his/her power, in common with the others, under the supreme control of general will; and we, as one body, receive each member as an indivisible part of the whole']: I, 6.10). The similarity of this formula with that of Hobbes (*De cive*, V, 7) has been remarked upon many times; some have even called it a literal copy in which the sovereign of the Leviathan is substituted by *la volonté générale* (Atger, *Essai sur l'histoire des doctrines du contrat social*, Nîmes, 1906, p. 286). Rousseau's starting points may well be individualistic, but after all everything depends upon what is to happen to the whole made up of individuals: will it absorb all social content and become essentially unlimited, or will the individual retain some concrete substance? Rousseau referred to the totality that issues from the social contract as a common 'I', with its own life and will. This collective entity has received everything that is owned by each individual in order to give it back, so that each individual owns it lawfully (I, 6). Subsequently the I exercises a kind of absolute power, *un pouvoir absolu* (II, 4.1), over every individual, just as a human being exercises absolute power over the members of his/her body. The sovereign does not recognise an individual as such (II, 4.8). For him everything is levelled; every social association within the state, every party and every estate is unjustified. One has to take away from a human being his/her entire existence, all life and all force, in order to return it to him/her from the state (II, 7.3). Everything that is demanded by the *unité sociale* [social unity] is legitimate, even if it concerns religious convictions (IV, 8.17); every form of dependence on anything other than the state is something that has been taken away from the state (II, 11.1). But the question of whether the collective 'I' of the state gains a meaning that absorbs the individuals or not is decided less by such assertions than by the idea of a *volonté générale* [collective will], which is not borne by an individual but by the all-embracing unity.

Volonté générale is the essential concept in Rousseau's philosophical construction of the state. It is the will of the sovereign and it constitutes the state as a unity. In this respect it displays a conceptual quality that distinguishes it from any particular individual will. In collective will, what is always coincides with what should rightfully be. Just as power and right are unified in God and, according to the concept of God, whatever he wills is always good and the good is always his true

will, so too the sovereign – *la volonté générale* – appears in Rousseau as something that, through its mere existence, is always just what it must be: *le souverain par celà seul qu'il est, est toujours tout ce qu'il doit être* ['the sovereign, just by virtue of being, always is what it should be'] (I, 7.5). The *volonté générale* is always 'right' (*droite*: II, 6.10); it cannot err (II, 3); and it is reason itself, in relation to which it is determined with the same necessity by which natural law governs the physical world (II, 4.4). It is imperishable, unchangeable and pure (IV, 1). By contrast, individual will, *la volonté particulière*, is null and void (III, 2.6). A particular act, a particular will, a particular interest, any particular dependency (II, 11.1), any particular force and particular concern (III, 15.8) is, in itself, insignificant by comparison with the unity and supremacy of general will. As in Hobbes' use of the word 'private', 'particular' is almost a derogatory term. The *volonté générale* is elevated to the dignity of the divine; it abolishes every particular will; compared to it, all particular interests seem only to be theft. Therefore the question of the inviolable rights of the individual and of a private sphere protected from the encroachment of the sovereign *volonté générale* can no longer be raised. The question is eliminated by the simple alternative that the individual either is identical with the general – and then it has value in virtue of this identity – or is not identical – and then it is null and void, evil, corrupt and, overall, it does not represent a will that has to be respected in a moral or legal sense.

The division of powers and the *pouvoirs intermédiaries* had a practical purpose: to break the power of the state through a system of mutually obstructive and limiting responsibilities and thereby to protect the freedom of the individual. In the case of the *volonté générale*, which alone possessed the dignity of true reality, it would not make sense to talk about a separation [of powers]. Rousseau dismissed it with the joke about the Japanese magician who cuts a child into pieces and then lets her appear again as a whole. He was in fact influenced by the suggestive effect of the simile of the 'balance' (I, 8.2; II, 6.10; III, 8.10; IV, 6.3). But sovereignty itself is superior to such theories. The government or the administration can be nothing but the execution of the *volonté générale*; this is their only justification. The entire activity of the executive is put into a simple relation to the general

legal proposition, as in Locke, with the sole difference that Rousseau unfortunately did not take into account international relations – the analysis of which prompted Locke to the construction of 'federative power' (III, 15.12, n.). The government (*le gouvernement* or *le Prince*) has to execute the laws; it represents the power that converts the will of the law into action, the arm of the law, *la force appliqué à la loi* (III, 15.8). Only the *volonté générale*, the legislation, is by nature an inalienable concern of the people, whereas the executive can fall into the province of a single person, of a few, or again of all people. As a result, the state is either a monarchy, or an aristocracy or a democracy (II.1). Within a monarchically composed executive there are, then, *ordres intermédiaries* [intermediary classes] – like the nobility, which can be useful in a large state (III, 6.5).

The particular attributes with which Rousseau endows the *volonté générale* – correctness, indestructibility and moral purity – combine with other necessary preconditions and give it a manifold meaning. Initially, this will is general with regard to its subject: as the will of the collective, it stems from all (*elle part de tous*). This does not mean that the common will is the sum total of all singular private wills; that would be impossible, because, as its concept indicates, it is opposed to everything private – it is something that everyone owns not as a private person, but as a citizen (I, 7.7; II, 4). Secondly, the common will is general by virtue of its aim: it aims at the general, that is, at the common interest, the *utilité publique* [public utility] or *le bien général* [the common good] (II, 4). This general interest is something other than the sum total of private interests. Through correct distribution and equality of living conditions, however, it will normally coincide with the interest of all, taken individually; but when parties and coalitions within the state create group interests, the common will will be distorted (II, 3.3). Thirdly, the common will is a *volonté générale* in the sense of being general – that is, it cannot concern itself with any individual case, it cannot make any individual distinction, it cannot recognise any privilege or extraordinary right, and it cannot make any concrete decision. Here it is the abstract concept of law characteristic of the eighteenth century that dominates, in contrast to the practical and sober meaning that Montesquieu was giving to the general character of the legal norm. Law is universal, like the *dictamen*

rationis; it is a *loi de raison* [law of reason], which should conform exactly to the *loi de nature* [law of nature] (II, 4.4). If these attributes are realised – if the will is general in its subject as well as in its object and its factual reality [*Tatbestand*] – then law is thereby grounded as right; it is not just a general guideline or a regulative idea, but rather the principle that constitutes the legal character of an ordinance and transforms a mere factual order into a legal proposition with legally binding consequences. If these attributes are absent, then no right exists and the process that matters – to transform power into right – has not been achieved – nor is it achievable through a representation of the common will. The fact that a corporation – a parliament elected according to any suffrage, be it even absolutely democratic – should, as such, express its will as the will of the state can perhaps be explained through historical reasons or practical considerations; but none of this constitutes a justification. *Volonté générale* carries with it certain qualities of value, which either exist or do not exist. The implication of this statement can abolish democracy, because one has to note that, according to the *Contrat social*, *volonté générale* is independent of the form of government. It is part of its nature to be the will of the collective, but single individuals can be mistaken about their own true will; their will can also be governed by passions and hence not be their free will. At this point the classical Stoic tradition will come into effect even in Rousseau: it becomes evident that the *Contrat social* is not a 'Rousseauesque' or 'romantic' piece of work – that the traditional domination of a rational faculty over irrational affects has not yet been overturned. A human being who has been corrupted should be restored once more to a condition of human dignity by the state. Any *force naturelle* [natural power] must disappear, and moral existence must replace the purely natural one (II, 4). If it is possible even for the true will of the majority of civil citizens to be suppressed by the egoistic will of passions [*Affektwillen*], be it from a moral or a legal perspective, then it is also possible for a minority, or even for a single person, to possess true will. For Rousseau, there is only one country in Europe where the preconditions for a true legislature are given: Corsica (II, 10.5, 10.6). For the ideal form of government, direct democracy, rare preconditions are needed: simple overview of all relations, simple customs and material abstinence – these are

elements that seldom apply, so that the perfect form of government is suitable for gods but unsuitable for human beings (III, 4.8). The reservation implicit in all that, which makes the *Contrat social* such an ambiguous book, consists in the fact that Rousseau talks about the will of all and about numerical unanimity (IV, 2.8), about the will of the majority and about a common interest that one should identify by counter-balancing contrary interests (II, 3.2), yet in spite of all of this the will, the interest, the people are moral and not just factual entities. In a slavish people not even unanimity proves the existence of a *volonté générale* (IV, 2.3). When people are good, they only need to rise up and grasp their freedom; if they are corrupt, their relationship with the tyrant remains purely factual and whether they revolt or not is neither here nor there: they have no right to stage a revolution. Only the statement that the people – that is, the government, as opposed to the governed – are good by nature, and hence good under all circumstances and by definition (a sentence that was taken from other writings of Rousseau's, but not from the *Contrat social*), transforms the whole system created by Rousseau's work, with its abstract constructions, into a revolutionary ideology. For all the talk about freedom, this kind of freedom does not stem from the practical–rational longing for security and comfort, as it does in the English theorists and in Montesquieu; it rather bears the pathos of *vertu* [virtue/excellence]. Only the one who is morally good is free and has the right to speak in the name of the people and to identify with them. The further consequence is that only the one who possesses *vertu* is entitled to be part of the decision-making process on political issues. The political foe is morally corrupt, a slave who must be made innocuous. If it appears that the majority is prone to corruption, then a virtuous minority can use all means of force in order to establish *vertu*. The terror it exercises cannot even once be called coercion – it is only the means to help the free egoist to recognise his own free will; to awaken the *citoyen* [citizen] in him. The *Contrat social*, in which direct self-government of the free people is promulgated as an inalienable right, is a fundamental axiom; hence it serves as justification for dictatorship and provides the formula for the despotism of freedom. The most radical pathos of freedom combines with a ruthless and practical suppression of the enemy, but this is just a practical and not a moral

suppression. The contradiction between right and power, which has been levelled against the ruling power by the suppressed right, now serves the victorious minority as a contradiction between right and majority. Rousseau has undertaken to show how it is possible to have a state in which not one single person is enslaved. The practical answer was that the enslaved have to be eliminated. The justification is given in a sentence formulated by Rousseau himself: in certain circumstances human beings must be forced to be free: *on le forcera d'être libre* [he will be forced into freedom] (I, 7,8).

Rousseau does not call this rule of *vertu* dictatorship. He follows tradition and restricts the word to the idea of a constitutionally legitimate, extraordinary empowerment of short duration, designed to resolve a state of emergency. Well-known phrases about dictatorship can also be found in Rousseau: in the interest of *sûreté* [security] and *ordre publique* [public order], extraordinary means are necessary in extraordinary circumstances; laws must not be *inflexibles* [unbending], such that their bureaucratic formalities may become detrimental when there is immediate danger; the lawmaker must foresee that he cannot foresee everything. In short, these are statements taken partly from [Aristotle's] teaching on *epieikeia* [*aequitas*/fairness, see p. 32] and also reiterated by Locke. The dictator dominates (*domine*, IV, 6.4) the law without representing the legislature. This statement catches one's eye because, according to Rousseau, *la volonté générale* cannot be represented at all; during dictatorship laws are 'dormant', the dictator can silence laws but cannot make them speak, and the like. Rousseau's elaborations hint at the same result as those of Mably, even if they come from another direction. Rousseau distinguishes between two types of dictatorship: a genuine dictatorship, in which the laws are silenced, and another one, which is characterised by the fact that the responsibilities bestowed by the existing law are centralised: in other words, a concentration of responsibilities occurs within the executive, without any changes being made to the normal legal system. According to Rousseau, this second, improper type of dictatorship would have emerged around the famous formula *videant consules* [sc. *ne quid respublica detrimenti capiat*, 'the consuls should take care that the republic may not suffer damage'], and it is far from yielding an unlawful space for concrete measures of any kind, as genuine

dictatorship does. There is no need to examine here the accuracy of Rousseau's historical views.[45] The only thing of interest is that his distinction suggests an opposition between dictatorship and the state of siege – an opposition generated in the process of shifting the entire executive power. The legal protection guaranteed through the regulation and limitation of responsibility will be completely ignored, while extremely summary process, with the circumvention of all proper institutional channels, will not be regarded as dictatorship, because nothing has changed as far as *volonté générale* is concerned: only within the executive is there an acceleration and intensification of the force with which one and the same old law is executed. Therefore genuine dictatorship only exists when a temporal suspension of the entire legal system is in place. Rousseau does not explain clearly what is the legal foundation for [defining] this lawless condition; he does not seize the opportunity to develop a dialectics of the legal system that annuls itself. *Volonté générale* applies without exception and universally; given that it is by nature a generality, it is logically impossible to give an explanation of its substance – that it should not hold for any specifically defined period, or be applied with any regard to the particularities of a certain concrete situation [*Sachlage*] – or to announce a concrete exception. This might be the reason why the *chef suprème* [highest commander], the one who is in charge of public security, suspends the authority of the law. Such a mandate must be either a general delegation or an *acte particulier*. How *volonté générale* suspends itself in a case of emergency is a mystery; and even more so is the question of where an executive organ should get the authority for such a suspension. Given the rigorously held view that the executive has nothing to do except execute the law, it follows that this authority can never be claimed. Obviously, for Rousseau appointing a dictator is an act performed by the executive. Nevertheless, he gives an explanation that alludes to the *volonté générale* by saying that, unquestionably, *l'intention du peuple* [people's intention] (which appears to be the same as *volonté générale*) goes towards protecting the existence of the state and preventing its downfall. For, according to Rousseau, the content of the dictator's actions [*Tätigkeit*] is purely factual; his agency is not associated with the legislature. Its legal basis is not constructed, but it is important that it is called a 'commission'.

Rousseau calls dictatorship [*une*] *importante commission* [an important commission]. The concept of commission is a tacit but basic notion in Rousseau's theory of the state. It is an expression of the idea that, with respect to the state, there are only duties and no rights – more precisely, that every exercise of sovereign rights can only be done in a commissarial manner. In a true democracy the office must not be a right; it must not even go in any sense to the advantage of the person who occupies it. It should remain a *charge onéreuse* [costly duty] (IV, 3.4). True, the government is a *corps intermédiaire* [mediating body] between the people as sovereign and the people as subject (III, 1.5); but this phrase is only used as a metaphor for the mediation involved in applying *volonté générale* to the concrete case: it should not be taken to suggest the legal autonomy of the mediating *corps* facing the sole commanding authority, *volonté générale*. Hence it is used in a completely different sense from the one it has in Montesquieu, because it is immediately emphasised that the legal relationship in which this government (or the prince) and the people are embedded is definitely not a contract. *Ce n'est absolument qu'une commission* [It is, absolutely, nothing but a commission]: it is at any moment revocable and at the discretion of the sovereign – whose minister, agent and *commes* [ambassador] is the prince (III, 1.6). Gierke, in his exposition on the history of the idea of the contractual base of the state [*Staatsvertragsgedankens*] (Althusius, p. 92), has emphasised that the decisive step in Rousseau's construction consists in eliminating the contract between the prince and the people and in making the social and consensual contract among the citizens [*Volksgenossen*] the only principle of unity of the people: a further contract of dominion or subjection between the government and the people is no longer required. But it is not sufficient to point out that the contract of dominion [*Herrschaftsvertrag*] is absent here. Whether the content of the contract of the state was negotiated as a definitive assignment or as a delegation of the peoples' function to rule, or it was just relinquished for use or through *concessio imperii* [concession of power] by the people to the prince or the government, it was always a mutual contract on the basis of which the prince was granted certain rights. According to Gierke (p. 151), Althusius' audacity and originality consisted in having applied the absolutists' concept of

sovereignty to the sovereignty of the people in all its 'poignancy'. Yet one has to bear in mind that a *contractus reciprocus* [mutual contract] subsists in Althusius too, and this contract is binding even outside the state, in conformity with the principles of natural law, and it creates mutual (*vicissim*) liabilities between the prince and the people, between mandateer and mandatees.[46] Althusius talks about a *commissio regni* [commission of sovereignty], but only in the general sense of a transferral. *Pactum* [agreement] is a bilateral contract of mandating that defines the mandateer's rights. When Pufendorf refers to the *clausula commissoria* [commissary conclusion] in order to construct a restricted monarchy and says that, in this instance, whenever the prince does not conform to its terms and conditions, he has lost the legitimate power he had acquired upon accepting his rule,[47] all this is also based on the idea of a mutually binding contract. Even if, as Gierke wants (p. 88), one has to assume a 'pure' contract of civil servants, the people are constrained by natural law. The prince who exercises his regime *sub conditione, si pie et iuste imperatus sit* [under condition, if he exercises his rule with piety and justice]: according to Althusius, he has a valid claim to his position as long as he really governs *pie* and *iuste*. By contrast, in Rousseau the concept of the sovereign people does not involve any right. When Rehm (*Geschichte der Staatsrechtswissenschaft*, p. 259) claims from this that, by abolishing the contract of government and by founding the function of the supreme state organ on a one-sided act of the state, Rousseau returns to Marsilius of Padua and Nicolaus of Cusa, he completely misunderstands the essence of the commissarial exercise of office, so fiercely rejected by enemies of the papal *plenitudo potestatis*. The concept of commissar, stemming from an absolutism that contradicts the medieval conception of law as well as the natural law of justice, is applied in Rousseau to the relationship between the prince and the people – except that, conversely, the prince becomes the commissar. There is here no self-binding of the sovereign through law, not even the 'contract' of civil servants practised in constitutional law today. What people do and wish is subject to his will; the person who is working on behalf of the realisation of the people's will can only act in a commissarial manner. There is neither a delegation nor a representation of this will, and even less a right to exercise it. The representatives

and the deputies of the people, when they exist, are no more than *commissaires* (III, 15.5). There ought to be some representatives in the executive power, but the executive is just the arm of the law; it has no will of its own, and it is in essence only a commission, too. What is valid for the princely commissars also holds for all these individuals: their representational status ceases when the person represented, the one in whose place they act (*vices gerunt*), desires to step in (III, 14.1). Nothing proves Rousseau's belief in the absolutism of the state more than this: the transformation – which dominates all his ideas – of the entire institutional activity of the state into an arbitrary, revocable and unconditionally dependent commissarial operation.

The prince, and likewise the delegate of the people and the dictator, are therefore commissars. The dictator dictates to the outside world, but insofar as he is a commissar he himself must (internally [*im Innenverhältnis*]) be dictated to. Now there appears in the *Contrat social* another interesting figure, whose telling connections with respect to Rousseau's concept of dictatorship have been overlooked so far: the *legislateur* [legislator] (II, 7). Both legislator and dictator are somehow extraordinary and unusual. But, according to Rousseau, the legislator is posited outside and prior to the constitution, whereas dictatorship is a constitutionally defined suspension of the existing legal system. For Rousseau, the legislator is not a commissar. Judging by the content of his task, he is identical with the typical lawmaker of the eighteenth century: a wise and eminent person whose *génie* [spirit] fixes the machine of the state and propels it forward. Indeed in Rousseau the lawmaker bears a misleading name, because the most important aspect of his function is that it does not give him legislative capacities; he only has a manner of initiating laws – and not even that in the sense of having a right to propose. He outlines the prudent law, but the sanction comes only from *la volonté généra*le. Rousseau says (II 7.7) that one can find out in the first instance whether what the legislator has proposed is indeed *volonté générale* or not if a free vote – a kind of referendum – has been held. The decision rests with the people – and not only in a superficial juridical sense, but also in the sense that it is a decision as to whether *volonté générale*, with all its constitutional qualities, exists or not. Rousseau emphasises this heavily. But this generates a very peculiar confusion, which Rousseau

himself has perceived as a *difficulté* [problem] (II, 7.9). Human beings, as he observes, are on the whole egoistic and only concerned with their own particular advantage; and they need to become good through the very same wise law that is subject to their own ballot. It follows (as Rousseau puts it) that there must be an authority of a completely different kind, to which the legislator can appeal – namely a divine mission. He thus dictates his law on the basis of inspiration. Now the question arises: By what means does the legislator prove his mission? The Protestant monarchomachs – who in extreme cases admitted that someone *a Deo excitatus* revolted and usurped the existing authority – were confronted with the question of how the elected one can legitimate himself. And they answered by demanding a divine sign and a miracle [from the elected one]. Even Rousseau is talking about a miracle, but a very humanised one: it is not an overwhelming event but, philosophically, *une grande âme* ['a great soul'] (II, 7.11). Through that, says Rousseau, both his mission and the perdurance of his laws are guaranteed. Of course. But the question is whether this guarantees a positive outcome from the people's ballot. Everything should depend upon it, and suddenly it is not mentioned any more. What happens if the ballot opposes the wise law and the great soul? Rousseau does not examine this possibility; he only repeats that the legislator is someone utterly extraordinary – he is not a magistrate, not a sovereign, and in fact he is nothing, because he himself should first create the state in which such concepts come into being for the first time. Therefore his own position cannot be deduced from the state that is yet to be constructed.

The content of the legislator's action is right [*Recht*], but devoid of legal power: it is powerless right. Dictatorship is omnipotence without law [*Gesetz*]: it is lawless power. The fact that Rousseau was not aware of this antithesis does not mean that it is any the less significant. At this point, the contradiction between powerless right and lawless power is so extreme that it has turned into its opposite. The legislator stands outside the state, but he is in the right; the dictator stands outside the right, but he is within the state. The legislator is nothing but right that is not yet constituted; the dictator is nothing but constituted power. When a relationship emerges that makes it possible to give the legislator the power of a dictator, to create a

dictatorial legislator and constitutional dictator, then the commissary dictatorship has become a sovereign dictatorship. This relationship will come about through an idea that is, in its substance, a consequence of Rousseau's *Contrat social*, although he does not name as a separate power: *le pouvoir constituant* [the constituting power].

4

The Concept of Sovereign Dictatorship

To judge by Mably and Rousseau, the signs of an upcoming revolutionary dictatorship were not so evident to their authors as it may seem after the events of the Revolution. In Rousseau, dictatorship is examined in the fourth book of his *Contrat social* and as a problem of government, not as one of sovereignty. It is assumed that a dictatorship can only emerge if a constitution already exists, because the *chef suprême* is the one who appoints the dictator and his function remains within the framework of the constitution – even if only for its legal basis and not in the content of its activity. The omnipotence of the dictator rests on his being empowered by an existing organ with constitutional authority. This is the concept of the commissary dictatorship. As for the dictatorship of reformation, which Mably has in mind, that still does not show clearly the contradiction [involved in dictatorship] either. The transformations in the political and administrative organisation of the common good that one would call 'reformations' were based on the premise that the reformation is initiated by a constituted organ such as the pope or the absolutist prince, so that the source of the newly arising order is the same as that of the previous ones. The medieval mind did not know the difficulty of distinguishing commissary dictatorship from sovereign dictatorship, or the later from sovereignty itself. God, the ultimate source of all earthly power, only operates through the medium of the church – a strongly constituted organism. Even when the pope, in his capacity as individual representative of the uniquely supreme person, was replaced in accordance with a secularised concept – replaced, that is, by a lord whose powers were limited to a certain territory,

but who was nevertheless 'God-like' – the source of all earthly power was still bound up with the idea of a constituted organ. It has already been mentioned that, in the views of the monarchomachs, the people [*Volk*] was a representative of the estates. The only point at which a dissolution of all social forms is possible in the religious reformation and in the writings of the Protestant monarchomachs is when room is made for someone to abolish the existing authority when that person has no constituted function and is only *a Deo excitatus* [stirred by God; see p. 110]. But the justification that Cromwell gave for his own sovereignty is the best witness to how superficially the pious Protestantism managed to break off the existing social order through an all-encompassing, yet never self-constituting omnipotence of the people. The Puritan Revolution was the most obvious example of a disruption in the continuity of the existing order in the state. It faded away without making a sustainable impression on state theory in its own time,[1] although all the nineteenth-century ideas and claims for radical democracy were already present in it. In the directives and constitution drafts left by Cromwell's army it is stated that 'the people' is the source of all political authority. Here the real problem of the state today – the relation between the people and its representation – replaces the monarchomachic problem – the relation between the representatives of the people on the one hand, king and government on the other. Since 1647, when the predominantly Presbyterian Long Parliament seemed to come to an agreement with the king, the notion of an unconditional dependence of the parliament on the people was spreading in Cromwell's independent army among other republican ideas, so that the army – that is, its entrusted people [*Vertrauensmänner*] – identified automatically with the people. The crucial sentence in the constitution drafts of that period is that the representatives of the people depend exclusively on those who have elected them. The power of the people's representatives over anyone (here the king is meant: the political enemy) is unlimited; but this has the unavoidable corollary that their dependence on the people they represent is likewise unlimited.

The popular agreement of 28 October 1647, which became famous as the first draft of a democratic constitution in the modern sense of the word,[2] came from the Levellers, who saw Cromwell

as a traitor because he retained his sovereign power after the abolition of the monarchy. This agreement of 1647 was a draft of the constitution presented to the council of Cromwell's army, which the council amended on 20 January 1648 and forwarded to the House of Commons. It was in no way an expression of the sovereign people; it was presented to the House of Commons as a private member's bill. One month later Cromwell suppressed the Levellers' movement, which he considered to be an enthusiastic reverie [*Schwärmerei*], and imprisoned John Lilburne, their radical leader. Numerous pamphlets exploded now in outrage about the fact that in the past England had been governed by a king, the Lords and the Commons, whereas now it was governed by a general, a military court and the Commons; about the absence of a general right to vote; and so on. For our present purposes, these writings,[3] which are valuable for the history of the political idea, show that the question of sovereignty had already been decided upon at the time. Cromwell was the sovereign. The question is whether his dominion must be called a sovereign dictatorship.

In a speech of 12 September 1654,[4] Cromwell himself characterised the position he occupied when he was appointed by the Long Parliament as captain general of all troops in England, Scotland and Ireland by calling it a transition of an unlimited authority. It was a commissary dictatorship commissioned by the Long Parliament, bearer of the sovereignty of the Commonwealth and of the free state of England, and it could be compared with that of the prince of Orange. A commissary dictatorship had to cease with the dissolution of the parliament from which it was derived; but a sovereign dictatorship was not simply established as a result of that; and Cromwell himself, mind you, was the one who dissolved the Long Parliament on 20 April 1653.[5] Gneist interprets as a 'pure military dictatorship' the interregnum that occurred.[6] In reality, that was already Cromwell's sovereignty. A parliament (Barebone's, also known as 'the Little Parliament' ['the Parliament of Saints']) opened on 4 June 1653; it was made up of trusted men from the Officers' Council, but it was appointed in Cromwell's name as the Lord General. It handed back its mandate to Cromwell on 12 December 1653, having been told that it had not met his expectations. Cromwell then proclaimed

the 'instrument of government' on 16 December 1653. From then on he himself was the 'Lord Protector' or regent of the state. Given the experience gained from the Long Parliament, the responsibilities of the legislative and the executive were regulated in the direction of a proper separation of powers and of a far-reaching autonomy of the executive. But later on, on 22 January 1655, Cromwell dissolved even this parliament, which had been appointed on the strength of this instrument. A third parliament, assembled on 17 September 1656, declared a new constitution, according to which Cromwell was Protector for life and had the right to appoint his successor. On 25 March 1657 the parliament urged the Lord Protector to adopt the name, style and title of a king of England, which Cromwell rejected. On 4 February 1658 this third parliament, too, was dissolved by Cromwell, who then governed without a parliament until his death on 3 September 1658. His son Richard succeeded him to the Protectorate on the basis of Cromwell's statement concerning his succession.

These are the actual and the legal circumstances in which Cromwell became sovereign after the dissolution of the Long Parliament. The consideration of the officers of his army was of a purely political nature; Cromwell did not claim to be mandated by them. His attempts to govern with a parliament and a constitution, which were the result of his political prudence, were intended to regulate his own sovereignty constitutionally and, by that, to limit its exercise by law. To this extent one can view the 'instrument of government' of 1653 as the first example of a constitutional monarchy with an imposed constitution. There was no doubt that Cromwell maintained sovereignty, understood as a basically unlimited power that remained above all the functions limited by rules; the decision on 'the necessity of the state' – that is, on what the theory of the seventeenth century called *iura dominationis* – made that perfectly clear. It need not be decided here whether the following events, as Gardiner has outlined them, were mere attempts to return to the old method of government under Queen Elizabeth or they sowed the seeds of a constitutional theory of the state anticipating the nineteenth century. Only the dissolution of the Long Parliament in 1653 was in fact a disruption of the legal context, a revolution. What happened later were Cromwell's

attempts, founded upon that event, to circumscribe his sovereignty by his own will. One can only speak of a military dictatorship insofar as, after the dissolution on 22 January 1655 of the parliament assembled for the instrument, Cromwell governed a certain period of time through eleven major-generals, who can be viewed as commissary dictators. They were sent out in order to collect the extraordinary war taxes imposed on the royalists. They were given military power in order to maintain public order, disarm the political enemies, arrest all suspicious people and so on. In fact, as commissars of action, they exercised all the stately functions of the supreme authority in the districts that had been entrusted to them. Cromwell praised their service in the restoration of public peace in his speech of 7 September 1656. There is indeed a similarity between these major-generals and the commissars of the National Convention; but their dictatorship rested within the boundaries of Cromwell's sovereignty, from which it derived. It was a military dictatorship in the sense of a commissary dictatorship exercised by the military commander; but Cromwell had given that up already in 1656, because – as Gardiner says – he opposed any military dictatorship.[7] Therefore the question remains whether the sovereignty exercised by Cromwell himself can be called a sovereign dictatorship.

If the mere suspension of the principle of separation of powers is called a dictatorship, then this question has to be answered positively. But a condition of this sort obtains in every absolutist state, and the concept of dictatorship would lose all its clarity if one were to apply it indifferently to all these cases. Politically, one can label 'dictatorship' any direct exercise of stately power – that is, any exercise that is not mediated through autonomous intermediate institutions – and understand by it centralised government, in contrast to decentralised. We have dealt in Chapter 1 with the general connection between this absolutist idea and the concept of dictatorship. It is most conspicuous that a military organisation issues its ongoing military commands unquestioningly and with 'telegraphic velocity' (Berner [?]); and any system based on a strict discipline can be called dictatorship. Given the peculiar legal nature of a military command, the application of the concept of dictatorship immediately suggests itself, since the commissary dictatorship of *commissio* is conducted in the spirit of such a

command. This leads, furthermore, to an explanation of the link to the political notion of Caesarism, which comes into effect through a *coup d'état* and thereby brings into the concept of dictatorship the idea of a contradiction to legitimate monarchy. From the perspective of this ambivalent idea, which does not lend itself to juridical analysis, Cromwell and Napoleon are typical dictators simply because they were generals. For a conceptual definition of dictatorship, one must retain the interventionist character [*Aktionscharakter*] of dictatorial practice. Both in sovereign dictatorship and in commissary dictatorship, the idea of a situation that ought to be created by the practice of the dictator is implicit in the concept. Its legal nature consists in the fact that, in view of the end to be achieved, legal restrictions and restraints that, in a given situation, are an ill-considered [*sachwidrig*] hindrance to achieving the goal are *in concreto* [in practice] eliminated. From this it follows that the military Prussian absolutism whose formation was mentioned above was no dictatorship; nor can the police state be called by this name, because the general increase in public welfare is no object of the kind of activity that belongs to dictatorship. Nevertheless the police state, through its principle of organisation, which is the general task of administration, possesses in principle an element of commissarial character and, as such, is related to dictatorship.[8] But it lacks that which gives the action its precise content, namely the idea of a concrete enemy whose elimination must be the first circumscribed goal of the action. The circumscribing in question here is not an accumulation of factual evidence through the use of legal concepts, but rather a purely factual specification. Therefore in the welfare police state there are numerous cases of a more or less conditional commission of action; but this is not, in its essence, a sovereign dictatorship, because its sovereignty does not depend legally on the execution of a concrete goal and on the accomplishment of a particular aim. The success achieved by the actions of the dictator gains a clear content through the fact that the enemy, who has to be eliminated, is immediately present. The idea of a situation to be achieved can never be psychologically as clear as that of an existing situation. Consequently, through its negation, a clear circumscribing is possible. The dependence on what the enemy does, which Locke referred to in order to justify the specificity of 'federative power',

justifies the true nature of this procedure. As the act of self-defence is, by definition, the defence of a given illegal attack and is defined precisely by the characteristic of the givenness of the attack, so for the concept of dictatorship, too, one must retain the immediate actuality of a situation that needs to be resolved – in the sense that the resolution appears as a legal task, which legally justifies a power according to the concrete situation and to the goal of its resolution. But, as the *concept* of self-defence becomes detached from the particularities of the concrete situation, from the specific technique [*Sachtechnik*] that is part of the attack, and therefore also of the necessary defence – the invention of firearms completely changed the concrete meaning of an act of self-defence – so the concept of dictatorship, too, has a different meaning depending upon the concrete situation. However, this does not explain the legal distinction between commissary and sovereign dictatorship.

Dictatorship is like the act of self-defence: never just action, but also reaction. Therefore, implicitly, the enemy will not conform to legal norms that the dictator regards as a binding legal basis – a binding legal basis, yes, but of course not the specific technical means of his action. The contradiction between legal norm and law-implementing norm, which governs all understanding of the law, becomes a contradiction between legal norm and a specific [*sachtechnisch*] guideline for action. In practice [*in concreto*] the commissary dictatorship suspends the constitution in order to protect it – the very same one – in its concrete form. The argument has been repeated ever since – first and foremost by Abraham Lincoln: when the body of the constitution is under threat, it must be safeguarded through a temporary suspension of the constitution. Dictatorship protects a specific constitution against an attack that threatens to abolish this constitution. The methodological autonomy, as a legal problem, of the problem of law implementation becomes most evident here. The dictator's actions should create a condition in which the law can be realised, because every legal norm presupposes a normal condition as a homogeneous medium in which it is valid. Therefore dictatorship is a problem of concrete reality without ceasing to be a legal problem. The constitution can be suspended without ceasing to be valid, because the suspension only represents a *concrete exception*. This also explains

why the constitution can be suspended for some parts of the state. The sentence *non potest detrahi a iure quantitas* [the amount/extension cannot be derived/excluded from law] should logically be valid here too, because, within a state created by the constitution as a legal concept, there is no territorially circumscribed space in which the constitution would not be valid; no time-span in which it would not be valid; and no particular circle of people who, without ceasing to be citizens, would be treated as 'enemies' or 'rebels' without rights. But it is precisely such exceptions that are intrinsic to the nature of dictatorship; and they are possible because dictatorship is a commission of action defined by the concrete situation [*Sachlage*].

From the perspective of sovereign dictatorship, the entire existing order is a situation that dictatorship will resolve through its own actions. Dictatorship does not *suspend* an existing constitution through a law based on the constitution – a constitutional law; rather it seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible. Therefore dictatorship does not appeal to an existing constitution, but to one that is still to come. One should think that such an enterprise evades all legal considerations, because the state can be conceived of in legal terms only in its constitution, and the total negation of the existing constitution should normally relinquish any legal justification – since, by definition, a constitution that is to come does not yet exist. Consequently we would be dealing with sheer power. But this is not the case if the power assumed is one that, without being itself constitutionally established, nevertheless is associated with any existing constitution in such a way that it appears to be foundational to it – even if it is never itself subsumed by the constitution, so that it can never be negated either (insofar as the existing constitution negates it). This is the meaning of *pouvoir constituant* [constituent power].

The status of the absolutist prince does not depend on the accomplishment of a specific task, and his responsibilities do not represent a form of empowerment with regard to an end that has to be achieved. To every dictatorship there is a commission, and the question is whether a commission compatible with sovereignty exists and, if so, to what extent it may contradict the concept of sovereignty according

to which the commission depends on a specific task. The specificity of the *pouvoir constituant* makes such a dependence possible by reason of the fact that, given the character of this *pouvoir* as a non-constituted and never constitutable entity, it is conceivable that the bearer of stately power puts himself in a dependent position without it being the case either that the power he makes himself dependent on comes to be that of a constitutional sovereign or that, on the contrary, any earthly institution disappears, as in the sovereign's dependence on God. Cromwell appealed to God for his mission. Although he occasionally talked about the people's consent to his dominion, nevertheless, in a decisive moment such as the dissolution of the Long Parliament, there was never any doubt that he saw in God the source of his power and he did not relate his sovereignty to the people, as the radical democrats of his time understood it. On 12 September 1657, in his grand speech to the newly appointed parliament, he declared that he would be frightened of committing a sin were he to return prematurely, to the parliament, the power he had been entrusted with by God; and that he would rather die in disgrace than see the parliament rejecting his protectorate, which had been mandated by God. The parliament immediately confirmed his sovereignty and his position as [Lord] Protector, but without its formal agreement having become the legal basis of his sovereignty. For he had the power to dissolve parliament at any time, and he did it; and the dissolution was anything but the result of an appeal to the people. In 1658, when he dissolved his third parliament, he declared that God should be his judge; the people was not mentioned at all. Therefore Esmein is correct in his characterisation of the Cromwellian constitution as a self-limitation voluntarily granted by the bearer of a power that derives directly from God.[9] The [Lord] Protector was the bearer of a personal mission. The elimination of the existing order was not rationally justified; rather it was an exceptional case, which in monarchomachic state theory was classified under being *a Deo excitatus* [stirred by God].[10] This process cannot be understood at all with the help of juridical categories. It has been argued that dictatorship is a miracle, on the grounds that its suspension of state laws is comparable with the suspension of natural laws in miracles.[11] In reality dictatorship is not this miracle; it is a breaking up of the legal system that

is implicit in such a newly established dominion. By contrast, commissary dictatorship is embedded within a legal context – just like sovereign dictatorship. Sovereign dictatorship appeals to the *pouvoir constituant*, which cannot be eliminated by any opposing constitution. God is a commissioner different from the bearer of this *pouvoir constituant*; and God's dispensation, providence – which, as Esmein accurately observes, for Cromwell had the same meaning as in Bossuet's philosophy of history – is something different from the *acte impératif* [imperative act], which Boutmy[12] defines as the exercise of the *pouvoir constituant*. But the direct commissar of the people, unlike the commissar of the absolutist prince, no longer has a stable reference point for his dependence. The construal that characterised the earlier commissar – namely that he represents and does whatever the represented would do if he were present: *vices gerit* – is still apparent. But, in combination with the idea that 'the represented' is the people, all this acquires a completely new meaning.[13] Bodin had realised early on that it makes a significant difference whether what is decissive for the commissar is the will of a prince or that of the people, that of an individual or that of many thousands.[14]

The idea of a *pouvoir constituant* has been disseminated by Sieyès,[15] in particular through his treatise on the third estate. According to that work, all existing powers are subject to the validity of laws, rules and procedures, which these powers cannot change just by themselves, because the basis of the existence of such things is the constitution. On this view, a power founded on the constitution cannot be superior to it, because the latter, controlling as it does both the union and the separation of powers, is its own foundation. Therefore all constituted powers are opposed to a constituent power, which lays down the foundations of the constitution. This constituent power is in principle unlimited and can do everything, because it is not subject to the constitution: it provides the foundation for the constitution itself. Any enforcement or any legal form, any commitment of any kind, is completely unthinkable at this level; and, where Rousseau's *volonté générale* reigns, even the inalienable human rights are invalid. As bearer of constituent power, the people [*das Volk*] cannot commit itself and is entitled to give itself an arbitrary constitution at any time. The constitution is the basic law [*la loi fondamentale*] not

because it is unchangeable and independent of the will of the nation, but because not one of the organs invested with state authority can change anything in the constitution that warrants it. This is also true of ordinary legislature.

Take a state theory in which a state acts as a unity through organs whose operation creates the will of the state in the first place (although it does not represent this will), so that there is no will of the state outside the activities of these organs. A theory of this kind must understand the doctrine of the *pouvoir constituant* as an attempt to transform the people as such into an organ of the state. With this, the problem of the constitution becomes once more the problem of organising the constituent organ. On G. Jellinek's construal, the state is the sum of all the functions of its organs, but it never 'appears to be itself a subject of the totality of its functions, but only an organ endowed with a range of qualifications [*kompetenzbegabtes Organ*], and consequently also an organ that has a limited range of qualifications'; never 'the state as such', but always just a 'state in the form of a particular qualification'. The qualification [*Kompetenz*] is the state's form of appearance; it 'possesses' the 'right that forms the basis' of the organ's qualification. The substance of the state 'manifests itself' only through the medium of a qualification; in other words the state always appears as a limited power (and this fact subsists even if one rejects the phrase 'substance of the state' as scholastic). The individuals, who form the organic unity, should not be confused either with the state or with the organ of state – which, as such, completely lacks a subjectivity of its own: even the highest state organ is no more than an organ, and changing even the constitution is no more than a qualification.[16] If one pushed this theory to its radical conclusion, one would have to say that the state is seen in it as the bearer of unity, because it only exists in the activity of its organs. It is a bearer that cannot carry anything, while it is itself being carried by the organs it bears. It is not endowed with a qualification – it *is* a qualification. When Jellinek talks about the medium through which the will of the state manifests itself, he does not have in mind a mediation of the type proposed in the theory of intermediate powers, because here the will exists in an unmediated state, through the seemingly mediating organ. The absolute mediation through organs becomes here identical with the

absolute immediacy of the will that manifests itself in the state organ. 'There is no other person behind the organs, because these represent the will of the state itself.'

These well-known and often discussed statements are here repeated in order to clarify their opposition to the theory of the *pouvoir constituant*. Even Egon Zweig's historical outline of this theory, extremely valuable as it is, is affected by the fact that he portrays the entire development as one going from the material to the formal concept of constitution; for him the highest achievement of the theory was, 'if not a product, still a testimony to the epoch of the Enlightenment', which, in its rationalistic approach, attempted to construct the state mechanically.[17] The truth is that rationalism had reached its critical point even as early as in Rousseau's *Contrat social*. One could adduce, as an example of extreme rationalism, Condorcet's attempt to use legal regulation in rationalising the right of resistance.[18] On the other hand, Sieyès' theory can only be understood as the expression of an attempt to find the principle that may organise the unorganisable. The idea of the relationship between *pouvoir constituant* [constituent/constituting power] and *pouvoir constitué* [constituted power] finds its complete analogy, systematic and methodological, in the idea of a relation between *natura naturans* [nature nurturing/creating] and *natura naturata* [nature natured/created]. And even if this idea has been integrated into Spinoza's rationalistic system, this demonstrates even more that this system is not exclusively rationalistic. The theory of the *pouvoir constituant* is incomprehensible simply as a form of mechanistic rationalism. The people, the nation, the primordial force of any state – these always constitute new organs. From the infinite, incomprehensible abyss of the force [*Macht*] of the *pouvoir constituant*, new forms emerge incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily. The content of its willing has always the same legal value like the content of a constitutional definition. Therefore it can intervene arbitrarily – through legislation, through the administration of justice, or simply through concrete acts. It becomes the unlimited and illimitable bearer of the *iura dominationis* [rights/legal prerogatives of rulership], which do not even have to be restricted to cases of emergency. It never constitutes itself, but always something else. Therefore its legal rela-

tion to the constituted organ is not mutual. The nation is always in a natural state, runs one of Sieyès' famous statements. On the other hand, it was essential to the theory of the natural state [*Naturzustand*] that only individuals are in a state of nature. Here the oft-cited phrase that a nation is in a natural state does not mean, as it often does elsewhere, that the nation is in a state of nature by comparison with other nations; we are not dealing here with the construction of international law. The natural state rather concerns the relation of the nation to its own constitutional forms and to all the functionaries who act in the name of that nation. The nation is one-sided in the natural state: it has rights only, but not duties. The *pouvoir constituant* is not obliged to anything. The *pouvoirs constitués* [constituted powers], on the other hand, have only duties but no rights. This has an odd consequence: one part always remains in a natural state, while the other in a legal state – or, or more accurately, in a state of duty. But Sieyès introduces here the legitimacy of representation. He saw the delegates of the Constituent Assembly of 1789 as representatives, in contrast to the bearer of a *mandat impératif* [imperative mandate]. They should not be messengers delivering an already existing will; rather they have to 'shape' it first. He further pointed out that the modern state is composed of a different population from that of a classical republic; that today, in the age of the division of labour, only a small proportion of people have the time and ability to engage with political issues, whereas the others are concerned 'more with production and consumption', so that they simply become working machines (*machines de travail*).[19] A peculiar relationship with the omnipotence of the constituting will emerges from this state of affairs. Even if the will of the people does not exist in terms of content but is shaped primarily through representation, the representative's dependence on this will – a dependence that is unconditional and, to put it succinctly, commissarial – still subsists. The will can be unclear. In fact it is even the case that it must be unclear, if the *pouvoir constituant* is to be truly unconstitutionable.

This consequence, expressed by Sieyès, alludes pretty well to the philosophy of the nineteenth century, which is completely opposed to rationalism; in this philosophy God is an 'objective ambiguity' at the centre of the world, like the formless *pouvoir constituant*, which

is always producing new forms and is at the centre of life in the state. But the dependence of the political functionary who acts in the name of the people does not cease to be unconditional. More than Rousseau, Sieyès emphasised that all actions performed by the organs of state are of a commissarial nature and that the substance of the state, the nation, can manifest itself at any time, in the immediacy of its plentitude of power. Hence the correlation between the greatest power exercised externally and its ultimate internal dependence remains, but only at a formal level. The most important premise for the fact that the will rules and dictates would be that the more focused the will is, the stronger the dependence should be. And, so far as a will that rules unconditionally goes, the ideal would be a military order whose firmness corresponds to how promptly it is executed. In an order, this kind of firmness is certainly not the firmness of legal form, but rather the rigour of a concrete technique. But the commissarial relationship is also governed by the idea of a concrete activity being enmeshed in the causal nexus. Normally the unconditional commissarial dependence of the representative requires a *mandat impératif*. But Sieyès did not reach this conclusion; and he managed to avoid it by arguing that the content of the people's will is not specific. The will therefore only pertains to the person of the representative and to the decision as to whether there should be representation or not. In fact the will should not be precise, because as soon as it has been shaped in any way it ceases to be constituting/constituent and becomes a constituted will.

In point of form, the representatives acting on behalf of the *pouvoir constituant* are, then, unconditionally dependent commissars; but, in point of content, their mandate is not to be limited. One should assume that the most general and basic drawing-up of the constituting will – that is, the draft of a constitution – represents the genuine content of the mandate. But this is so not on account of the legal nature of the constitution, since concrete measures, too, can be interpreted as the will of the people. Unlike ordinary representatives, the extraordinary ones – those who execute the *pouvoir constituant* – can have some arbitrary authority. The exercise of the *pouvoir constituant* must therefore be distinguished from its substance; otherwise the *pouvoir constituant* would be already constituted in its extraordinary

representative. If the extraordinary representatives have the mandate to draft the constitution, then, depending on the interpretation of the content of this mandate, they should be entitled to pass the constitution itself, or to submit it to a people's referendum. Either way, the mandate is performed when this has come to pass.

But it may be the case that the exercise of the people's *pouvoir constituant* is inhibited and that the actual circumstances demand the removal of these obstacles to begin with, so that the constraint inhibiting the *pouvoir* is eliminated. The people's free will can be enslaved through contrived methods and external constraints, or by causing general confusion and disorder in the conditions. Here we have to distinguish between two cases. According to Borgeaud, in order for the people to undertake the constituting act in all its sovereignty, it must have the choice between an old and a new regime:[20]

> After a revolution, tradition has been severed; the old constitution no longer exists and, in practice, as a result of the fact that the people are presented with a new one, another aspect of its sovereignty has been exercised yet again – namely by those who propose the new constitution. For the longing for order is so great that the people's judgement in such circumstances could remain free.

This can '*justifier l'action d'un pouvoir révolutionnaire édictant une charte provisoire*' ['justify the action of a revolutionary power that enacts a provisional charter'], but it should come to an end whenever the new government has been constituted and order has been restored. On the other hand, the same principle can apply even before the disorder caused by the revolution occurs, if the existing order is seen as an inhibition to the free exercise of the *pouvoir constituant* – so that new revolutions and a new appeal to the *pouvoir constituant* are always possible. The task of clearing the way by eliminating the existing order through a revolution would then appeal once more to the *pouvoir constituant* and would make itself dependent upon it. In both cases we can find a commission of action as in the commissary dictatorship, and in both cases the concept remains functionally dependent on the idea of a rightful constitution – because even in the revolutionary dictatorship the constitution to be realised by that dictatorship is

itself suspended, as is the ever present *pouvoir constituant*. But, while the commissary dictatorship is authorised by a constituted organ and has an identity in the existing constitution, sovereign dictatorship exists only *quoad exercitium* [in relation to what it does], and it derives directly from the amorphous *pouvoir constituant*. It is truly a commission, not a refusal to pass it on to earthly representatives, as the appeal to the mission of a transcendent God would be. It appeals to the ever present people, who can take action at any time and therefore can have immediate legal significance. A 'minimum of constitution' ['*Minimum von Verfassung*'] still remains as long as the *pouvoir constituant* is recognised.[21] But because the external conditions have yet to be created in order for the constituent power of this same people to come into effect, in the specific circumstances that justify dictatorship on its own premises, the content of the constituting will, in itself problematic, is not actually available. Consequently this dictatorial power is sovereign, but only as a 'transition'; and, because of its dependence on the task to be accomplished, this power is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be 'sovereign'. The commissary dictator is the unconditional commissar of action of a *pouvoir constitué*, and sovereign dictatorship is the unconditional commission of action of a *pouvoir constituant*.[22]

The National Convention assembled on 20 September 1792 was given the task of drafting a constitution, and it was the extraordinary organ of a *pouvoir constituant*. After it drafted the constitution of 24 June 1793 and the people accepted it in a general election, its mandate, and therefore its authority, were concluded. Because of the state of war and domestic counter-revolutionary movements that threatened the constitution, on 10 October 1793 the Convention decided that the provisional government of France should be a 'revolutionary' one until peace had been established. The constitution of 1793 was suspended through this action and never came into effect again. Although here a constitution already agreed upon was suspended, this is an example of sovereign dictatorship. On the execution of its mandate, the Convention ceased to be a constituted organ. Neither in the mandate to draft the constitution nor in the constitution itself was there any mentioning of a suspension

of the constitution. Hence a constituted organ that could declare the suspension did not exist. Consequently the Convention acted through a direct appeal to the *pouvoir constituant* of the people, in which it simultaneously claimed that it was inhibited in its exercise by the war and by the counter-revolution. It called its dominion 'revolutionary'. According to Aulard,[23] this meant nothing but the concession that the separation of powers – which, in line with Article 16 of the Declaration of Human Rights of 1789, was an attribute of any constitution – had been abolished. But the constitution of 1793 no longer mentioned the separation of powers within the context of fundamental rights. It is, however, in tune with language use at that time to call the suspension of the separation of powers a 'state of exception'. This separation, understood as a limitation of authorities in the legal sense, was abolished even in dictatorship, because in terms of content a commission of action is only governed by concrete technical regulations [*sachtechnischen Regeln*] and not by legal norms. Nevertheless, the suspension of the separation of powers leaves the concept of dictatorship insufficiently distinguished from other ideas like absolutism, despotism or tyranny.[24] In a very general sense, any exception from a condition conceived of as normal can be called a dictatorship; and so this word can designate an exception from democracy; from constitutionally guaranteed liberties; from the separation of powers; or, as in nineteenth-century philosophy of history, from the organic development of all things. But the concept always remains in a state of functional dependence on an existing or imagined constitution. This is what explains the generalisation of the term 'dictatorship', although consensus on its use concerns only negative elements and is therefore not relevant. At that time, the word was a popular catchphrase. *On parle sans cesse de dictature* [people talk all the time about dictatorship], says Barère in a speech of 5 April 1793 in which he justifies the establishment of the Comité de salut public [Committee of Public Safety]. In his essay 'On the Meaning of the Word Revolutionary', Condorcet outlined the concept by a better method than plain denial of the separation of powers. To refer to that separation would have been alien to him as a rationalist of the eighteenth century; he had no comprehension for it. He assumed the coexistence of human beings and the social contract [*Staatsvertrag*].

The latter was not valid for those who wanted to dissolve the state. From there he proceeds to a weighing up of the interests, and this promotes the more pressing interest – namely the assets of the social contract – which outweighs human rights. To some extent, this is to follow an entirely nonjuridical logic of collision [*Kollisionslogik*]. But then Condorcet goes on to say that the word 'revolutionary' refers to a condition that distances itself from axioms of justice – a condition of practical measures, defined only by the actual circumstances. He even defines the revolutionary law as a *loi de circonstance*.[25]

The wider question is: Who was the subject of the sovereign dictatorship implicit in the *gouvernement révolutionnaire*? Officially the word 'dictatorship' was rejected, because it was a catchphrase of the counter-revolution;[26] moreover, it had too many associations with a military rule that the Jacobins feared mostly under the description '*statéocratie*'. Nevertheless, Barère's speech mentioned above gives a very clear picture of the legal situation, against which the normal usage of the word 'dictatorship' by the Comité de salut public or by Robespierre fades away. The reference to Republican Rome could not have been missing from this speech; nor could the fact that, in times of revolution and conspiracy, dictatorial authorities were necessary in the interest of freedom. But, as he explains, when he suggested the establishment of the Comité de salut he did not demand such authorities, because the Committee could not be given any legislative authority and as such remained always accountable to the Convention. Only the executive could control and expedite. The practical significance of this seemingly harmless right of control will become evident in the following chapter. But Barère's argument concludes that the Committee was not a dictatorship because it did not merge legislative and executive powers. That would fit with the standard definition of dictatorship as a suspension of the separation of the powers. But the legislative and the executive were combined in the National Convention. It is striking when Barère, in his speech, calls the National Convention the bearer of dictatorship, because in the eighteenth-century view of dictatorship the dictator could silence the laws, but he could not issue laws himself.[27] Yet Barère, who had before his eyes the sovereign dictatorship of the Convention, uses the word in a way that diverges from eighteenth-century terminology:

that terminology only paid heed to commissary dictatorship. But, he continues, this dictatorship is both necessary and legitimate, because in reality, in a case like this, the people [*das Volk*] exercises dictatorship upon itself; and this is a dictatorship that even free and enlightened individuals can accept.

However powerful the Comité de salut public became over the years, legally there was no doubt that it was only active on behalf of the Committee of the National Convention, and on its mandate. The typical development occurred there too: the working Committee dominated the deciding assembly and in fact ruled, and then the influence of an individual slowly became decisive within the Committee once again, so that, in the three months before the execution of Danton and until 9 Thermidor, Robespierre dominated the Committee and the Committee dominated the Convention, which accepted all the former's proposals and suggestions without discussion, unanimously. But, to continue with the facts about the political situation, the Comité de salut public was not the only Committee of the Convention. In particular, the Comité de suretê générale developed an autonomous activity of its own, whose history has yet to be written. The Committee always remained financially dependent on the Convention. Therefore Duguit[28] is not completely accurate when he says that, between 1792 and 1795, the Committees of the Convention were the '*véritables détenteurs du pouvoir*' ['true power holders']. In the long term, the decisive institution remained the National Convention, at the political level, too – as was evident in the events of 9 Thermidor [Robespierre's overthrow]. Legally it was the only institution that mattered; this was never contested by anyone. Only from the Convention did the commissars of the people derive their powers. They appealed to its *toute-puissance* [omnipotence] whenever they were confronted, in their provinces, with the 'ridiculous' (as they called it) objection to the separation of powers. Their entire power consisted in no more than enforcing the authority [*Macht*] of the Convention. In critical situations, when they acted without a specific mandate, they did so at their own peril and always appealed to the authority of the Convention, as in the betrayal of Dumouriez. The Convention always retained the *impulsion* [impetus]. Any state authority established in France between 1792

and 1795 – and with such immediacy and unscrupulousness – was rooted in the National Convention: it 'emanated' from it, as they liked to say at the time, and its functions were direct emanations of a *pouvoir constituant* similarly recognised only by itself.

5

The Custom of People's Commissars during the French Revolution[1]

Both the [National] Constituent Assembly and the Legislative Assembly had decided, through their decrees, on numerous administrative details.[2] But the genuine unfolding of dictatorship consists in the activity of the commissars. Those commissars were not just complementing the ordinary officials and the many commissars employed in administration (commissars of the police, finance and taxation; commissars appointed by the minister of war in the administration of the army; *commissaires de guerre* – and so on); they also complemented the genuine commissars of business, who were sent by the ministries, and even the *commissaires nationaux du Conseil Executif provisoire* [national commissars of the provisional Executive Council]. The latter were sent on the basis of the decree of 26 November 1792 and were supposed to abolish the feudal burdens in the newly conquered provinces, to maintain public order and security, to lead the people's elections of new offices, to ensure that no counter-revolutionaries were elected, and the like – in short, they should be considered commissars of action.[3] Out of all these commissars, one has to distinguish those who were sent directly, as representatives of the people.

The National Constituent Assembly had asked the king on several occasions to send special royal commissars, invested with powers of action, to reestablish order when uproars occurred either in the country or in the colonies.[4] Besides, the National Assembly could already appoint its own commissars, from its own ranks, with a specific and authorised mandate. In the first instance, though, it could do so only for internal and financial issues: commissars for expediting the decrees, for publishing the protocols and for regulating the

sessions. With the move to Paris in October 1789, a commissar was appointed to choose the room for the session.[5] Then the commissars of the National Assembly got involved in coinage, in the signing of treasury bills and of assignats [*Assignaten*, instructions], in the paper supply for the assignats and in the administration of the *trésor public* [public treasury].[6] But the National Assembly came to exercise a definitive and autonomous administration after the flight of the king in June 1791. First of all it declared that, during the absence of the king, its decrees were valid even without his sanction. The post office was urged to resume its service, so that the traffic of mail would not be interrupted. It was generally forbidden to leave Paris and units of the National Guard were deployed. Through the minister of internal affairs, the Assembly ordered all officials and troops to close the borders, so that no member of the royal family could leave the country and no gold or ammunition could be sent to foreign countries. The Assembly asked the commander of the Parisian National Guard to justify the means he had chosen for the maintenance of public tranquillity and security. The sealing of the royal palaces was ordered.[7] Then three commissars from its ranks (*pris au sein de l'Assemblée*) were sent to the border provinces in order to agree and execute with the administrative bodies and the commander of the troops all suitable measures for the maintenance of public order and security of the state. These commissars were entitled to make all the necessary requests.[8] Furthermore, three commissars of the National Assembly – Latour-Maubourg, Pethion and Barnave – were sent to Varennes, with express orders to take all the necessary means for the security of the king and royal family, as well as for their return to Paris. They were invested with the authority to give orders to all the authorities and troops and ultimately to do everything they deemed necessary for the fulfilment of their task – in the course of which they also had to take care that due respect for the king was not violated.[9] The decree of the National Assembly of 22 June 1799 (Duvergier, vol. 3, p. 72) also bore the character of a commissarial authorisation, according to which ministers were entitled to dismiss from their posts all suspicious army members of personnel and to replace them with others. By decree, the National Assembly itself suspended M. Bouillé from all his military functions and ordered his arrest.[10] The commissars of

the National Assembly, who were sent to the border provinces, were generally entitled by the decree of 24 June 1791 (Duvergier, vol. 3, p. 73) to request the necessary means from the administrative and local authorities; the National Guard was placed under the command of lower grade officers [*Linienoffiziere*]; and the generals were authorised to dismiss any officer who rejected the oath of the constitution and to suspend from office, temporarily, any suspicious person, although in such cases they had to report immediately to the minister of war. Finally, the National Assembly mandated a Parisian court to investigate the events of the nights of 20 and 21 June 1791. For the fulfilment of that task, the court had to appoint two judiciary commissars (but, of course, the court was itself a commissar). To record the statements made by the king and queen, the Assembly appointed three commissars from its own ranks.[11]

The Constituent Assembly (from 1791 to 20 September 1792) also intervened through decrees, and frequently – especially in cases of uproar in particular cities – requested the executive (the king) to send commissars to reestablish order and pacify the population.[12] Here again, the commissars sent to the colonies were vested with exceptionally far-reaching powers and, although dispatched by the king, they were authorised by the Legislative Assembly to make use of *la force publique* [the police], to suspend colonial elected assemblies, to take the necessary steps to hold new elections, to retrieve from the local authorities all the essential information, to arrest the guilty and to transport them to France so that they could be tried there, and to recruit those parts of the troops that were normally supplied by the king. They could, by appeal to the legislature, temporally suspend assemblies and local authorities, or install judiciary offices. The commissars who had been mandated with reorganising the administration of individual districts were accountable to them.[13] On 31 June 1792 the legislative branch appointed its own autonomous commissars for the control (or examination) of the maintenance of the camp of Soissons.[14] After the suspension of the executive branch on 10 August 1792, the Legislative Assembly took a number of measures required by the actual circumstances – just as the Constituent Assembly had done in June 1791. It ordered that, 'in the interest of the internal and external security of the state', all citizens must obtain a certificate

of their political loyalty, of their *civisme* [public spiritedness]. Local bodies were authorised to prevent the dissemination of counter-revolutionary publications; four commissars of the Assembly were appointed to review the business of the executive so far; and, in addition to the commissars who were sent to Soissons on 31 July 1792, six more were appointed; these were to be active in the army of the north and centre and in the Army of the Rhine and to report back to the Assembly. When three of those commissars were arrested by the local authorities in Sédan, the Assembly declared, through the decree of 17 August 1792, that that was an attack on the sovereignty of the people and inviolability of its representatives. It immediately arrested the guilty local authorities and sent to the province three new commissars from the Assembly, who had the power to recruit for the police (*force publique*) and the army. Any civilian or military officer and any citizen who did not conform to the demands of these commissars was declared infamous and a traitor to the motherland. The tasks and spheres of authority of these commissars were circumscribed as follows: they were entitled to assemble the administration wherever they deemed it suitable [*convenable*]; to be informed and to extract information; and to take all the measures needed to promote the interests of the homeland and public tranquillity – or to order someone else to take these measures. The entire executive branch was requested to support the commissars. Furthermore, these executive agencies had the duty to maintain and keep alive the revolutionary atmosphere through proclamations and education [*Aufklärung*]. With the decree of 17 August 1792, the basis was laid for the future exercise of stately power through commissars of the representatives of the people.[15] For the correspondence with the commissars of the different armies, a specific Committee of the Assembly was formed (24 August 1792, Duvergier, vol. 4, p. 414). After that, on 27 August, further commissars of the Assembly were appointed for the organisation of arms and other military needs, and this was done through an instruction that already contained a characteristic formula for the transition of the executive power: the people vested with authority (*personnes ayant authorité*) must comply unconditionally to all the requests of those commissars – who can take all the necessary measures themselves, if they meet with refusal.[16] On the following day commissars

were appointed for the accelerated recruitment of 30,000 men.[17] After that, commissars were appointed to secure the army's demands for cereals and flour, and these were authorised to suspend all the existing administrative bodies and departmental decisions that threatened the army's demands.[18] All the commissars of the Legislative Assembly were to be distinguished from the commissars of the *pouvoir exécutif* [executive power], who were only given responsibilities that fell under their normal jurisdiction in the country.

The National Convention that assembled on 20 September 1792 confirmed the commissars sent by the legislative branch[19] and, under the pressure of internal civil war and of enemies invading from all sides, it constantly appointed new commissars itself. As a result, a complete system of commissarial government and administration was formed in which the centre that gave mandates and issued authorisations was the National Convention, whereas the organs were members of the same National Convention. Given the amount of business, the number of the dispatched commissars was extraordinarily high. On 9 March 1793, for example, eighty-two members of the Convention were sent to the provinces to recruit 300,000 men because resistance to the general conscription was located in autonomously administered bodies – departmental offices and, to an even greater extent, municipal authorities. These commissars became commissars of action alongside the commissars for recruitment, and they were subject to the ministry of war. Initially they were given special functions only with respect to the offices themselves, but later on and until Robespierre's downfall up to a half of the members of the Convention were quite often acting as commissars. With respect to their duty, these commissars were in the same category as the ones in the army and the ones in the departments. They were complemented by a number of commissars with special tasks and specific authorisations.[20] The commissars referred to here were all members of the National Convention (*pris au sein de la convention nationale* ['taken from the National Convention itself']). They were sent in groups – 'deputations' of three or up to nine, and frequently even more. They were allowed to subdivide into smaller groups, but they could always act in autonomous pairs.[21] They were given a kind of uniform.[22] Since the decree of 4 April 1793, their official name was: *Représentants de la Nation députés par la Convention*

nationale à [The nation's representatives, deputed by the National Convention to…] (*Recueil*, vol. 3, p. 64). They were accountable to the Comité de salut public, once this body was established (on 6 April 1793). With that, a uniform organisation and at the same time a new development came to pass. In any examination of the rule exercised by the National Convention through commissars, one must therefore distinguish between the period before and the period after the establishment of the Comité.

The *tasks* of the commissars were different. Here again, the starting point for the entire transformation of the constituting authorities was a mere function to monitor and 'control', which in this case was only the beginning of an action intended to eliminate all political resistance. In general, the action of the commissars in the armies (who should be distinguished from the *commissaires de guerre ordonnateurs*, public servants in the administration of the army) were as follows: to collect information on all military matters – on the general mood in the army, military developments and events, the political loyalty of the officers, the status, equipment and maintenance of the army, impact on the soldiers' mood and discipline through speeches, proclamations, agitations, distribution of the bulletin of the National Convention, elimination of the insignia of the old government, participation in the Assembly of the Electors, surveillance of the officers (especially generals);[23] inspection of strongholds, borders, arsenals, storehouses; production of artillery; fortification of shorelines and field-hospitals; refurbishment of fortified places according to a specific order, through the use of engineers and experts;[24] provision of supplies and organisation of the army's maintenance through requests made to administrative bodies; road maintenance and repair; and exposure of any fraudulent behaviour on the part of the army suppliers, who frequently worked in alliance with the commissars of the administration of the army.[25] On all these matters the commissar of the Convention had to report back to the Convention itself, or to its Comité de défense générale. Initially the commissars of the Convention in the provinces were also given only functions of supervision and control: information and report to the Convention on the general state of mind among the authorities and in the population at large, and on the fulfilment of the laws; receipt of complaints and accusations from

the people; revolutionary propaganda through proclamations, fraternising, speeches, festivities; participation in politically loyal party organisations, Jacobite clubs and societies in the provinces, *societés populaires* [popular societies] – and enlisting them for cooperation in official activity; and the surveillance of the activities of counter-revolutionaries.[26] But a later period also witnessed the 'cleansing' of counter-revolutionaries and aristocrats in official bodies and institutions and the appointment of loyal republicans in their place, as well as the establishment of a new administrative organisation – the division into provinces and districts;[27] the direct execution of the laws if need be – namely in the recruitment of the army, in securing the army's needs, or in fighting the counter-revolution and profiteering (the scarcity of provisions had been traced back to counter-revolutionary intrigues);[28] the reestablishment of public order and security, first of all through the enlightenment [*Aufklärung*] of the masses in uproars caused by the scarcity of provisions, then by securing the free trade of cereals, by preventing profiteering, by accumulating reserves, by attending to the ailments of the population, by negotiating with firm owners over the employment of the unemployed and with the workers over return to work,[29] and by dealing with agitators as if they were distraught persons (*égarés*).

By comparison with the powers of the authorities, the *powers* of these commissars began to expand even more, in proportion to their task, through rights of sheer surveillance and control that corresponded to the purpose of exercising the control required in the concrete situation: inspection of rooms and storehouses; presentation of documents, registers, and correspondence;[30] requests that the various bodies asked to comply with all such things perform and, if necessary, be authorised by the commissar to undertake the requested action;[31] autonomous intervention in official procedures – through suspension or nullification (*Cassation*) of official procedures, through decisions and the like (*Recueil*, vol. 1, p. 327), or through direct implementation of an official procedure; interference in the official appointments [*Ämterbesetzung*] – to begin with, through the installation of a *surveillant* [supervisor] over untrustworthy civil servants and bodies (*Recueil*, vol. 3, p. 28), through provisional dismissals[32] and provisional new appointments in their place,[33] through

arbitrations concerning the list of jurors, through the elimination of untrustworthy jurors (*Recueil*, vol. 4, p. 13) and through the suspension and disarming of untrustworthy National Guards (*Recueil*, vol. 1, p. 329). The means by which these commissars proceeded (*moyens d'exécution*, *Recueil*, vol. 3, p. 9) in individual cases differed according to the concrete circumstances: appeals to authorities, requisition of the *force publique* or *force armée* – that is, the police, the National Guards, battalions of volunteers, or some of the regular troops stationed in the vicinity (*Recueil*, vol. 1, p. 247; vol. 3, pp. 23, 39). When there was a riot, they appealed to the administrative authority for the necessary measures (*Recueil*, vol. 3, pp. 10, 73; vol. 4, p. 13); or they intervened directly and autonomously, with troops they had recruited for this purpose (*Recueil*, vol. 1, p. 160); or they received from the municipal authority a commando of the National Guards, to which they then gave further orders (*Recueil*, vol. 1, p. 267). From time to time they negotiated with the enemy and came to agreements on disarmament and the like (*Recueil*, vol. 3, p. 53: no amnesty!). All these functions were based on a transition of executive power to the commissars, from which it followed that initially they were not entitled to exceed their already far-reaching legal regulations by encroaching upon the personal freedom, the private property, or indeed the life of private persons more than the authority they represented or to which they appealed. But their authority was also extended to arresting all the suspicious people who *might* disturb public tranquillity.[34] Furthermore, it followed that the circumscription of commissarial empowerment was based merely on setting the goal – an authorisation unlimited, according the circumstances of the case. The empowerment formula declared that the Convention delegated the commissars, as bearers of sovereignty, to have full powers to take all the measures needed to promote the interests of public security, tranquillity and order, or needed in specific circumstances, or essential in troubled times – some such formula.[35] The fact that this was in reality an unlimited power has been openly recognised. As early as February 1793, it was officially said about the commissars of the National Convention that they were invested with *pouvoirs illimités* [unlimited powers].[36] Of course, one important limitation to what they could do was that they were not allowed to decide on the

finances of the state. Only commissars of the army were allowed to give remittances from the treasury, and they could do so only in cases of emergency. Generally the commissars appealed to the Convention for remittances.[37] The practice of collecting arbitrary taxes and contributions from aristocrats and from the rich did not exist until later.

After the establishment of the Comité de salut public the activity of individual commissars was controlled with greater precision – because this was done through a more centralised organisation – than was possible under the National Convention, which now comprised several hundred members. The Comité suspended the orders and decisions of the representatives (e.g. *Recueil*, vol. 4, p. 130), and from time to time it even sent special agents to monitor the commissars. That way the freedom of action that these commissars enjoyed was restrained in favour of a strict centralisation. On the other hand, thanks to the revolutionary legislation and to the complete elimination of all civil rights and freedoms, the power of commissars was enlarged beyond all measure in individual cases – and enlarged vis-à-vis the power of local authorities as much as vis-à-vis that of ordinary citizens. Here again there was a correlation between expansion of power to the outside and a more strict dependence on the inside. In the actual exercise of this power, the commissar depended on different actual conditions: most of all, on the support given by local party organisations – the *sociétés populaires* or *Jacobines* – and, later, by local *comités revolutionaires* [revolutionary committees] made up of dependable residents. In particular cases, these proved just capable of controlling the commissar and of exercising a 'local dictatorship' (Aulard) as the commissar himself, and the Comité de salut public used them as a tool. However, the achievement of these months was the restructuring of the current state form in the spirit of the revolution and the suppression of conservative elements in the local and provincial administration, as well as the suppression of the strong federalist movement.

The instruction received from the Comité of 7 May 1793 (*Recueil*, vol. 4, p. 24) gives an overview of the tasks and authorisations of the representatives. First of all, all the issues already mentioned were listed here once again with the comment that, in extenuating circumstances, the representatives were allowed to do everything that the

situation needed and that their real task consisted in this: *étendre et propager rapidement l'influence et l'authorité de la représentation nationale* [to expand and propagate rapidly the influence and authority of the national representation], so that France would be a unified, undivided country and there would be *un centre d'action*, *de gouvernement et d'administration* [a centre of action, governance and administration]. They must report back to the Comité regularly and present the Comité with a plan of action. The fact that control was bound up with all the means of such a control – inspections, reports, dismissals and re-appointments – was the basis of their activity; it followed from this instruction. Because the activity of the representatives came to be wide-ranging but their authority could not be delegated any further, they had to establish, in their district, a committee of correspondents – a *commission centrale* [central committee] – consisting of politically reliable people, whom they should use but who should not make independent decisions. The representatives still could dispose of the state finances that had already been allocated. But they had the option of putting pressure on wealthy citizens – not just to force them to buy bonds of the revolution [*Revolutionsanleihen*], but also on behalf of all imaginable patriotic obligations. Now all the 'constituant' organs disappeared before the representatives. The commissars sent by the *Conseil executif* or by the ministry of war were only allowed to take up their activity after the representatives of the National Convention had signed off their passports (*Recueil*, vol. 4, p. 219).

Quite often, as a consequence of the war and of internal insurrections, the local communities constituted themselves into autonomous unions and then dispatched their own commissars. In such cases the representative of the Convention, in his quality as an agent of central unity, opposed local and provincial autonomy and self-government; he abolished them, together with any *intermediaire* [mediating] manifestation of the supreme power of the state[38] and with any enemies of the Republic. The type of action [*Aktionscharakter*] that the commission of these representatives stood for appeared clearly everywhere. Several revolutionary decrees declared entire categories of state citizens to be enemies of the motherland (decrees of 27 Germinal II and 23 Ventôse II; the summarising decree of 22 Prairial II). The category of those declared enemies of the motherland and

sentenced to death comprised not only aristocrats, priests who did not take the oath (*non-jureurs réfractaires*) and their followers, profiteering suppliers, fraudulent price inflators, or people who spread false rumours, but more generally everyone who encouraged *la corruption des citoyens* [the corruption of citizens] and *la subversion des pouvoirs et de l'esprit publique* [the subversion of powers and of the public spirit]. They were thereby stripped of any legal protection and they became the object of an action guided only by political goals. On 16 August 1793 the Convention declared that a decision taken by a provincial administration that had caused suspending the execution of a directive imposed by the representatives was an attack on the people's representatives; and any official who delayed the execution of a decree issued by the representatives was threatened with ten years' incarceration (Duvergier, vol. 4, p. 120). In the end, the public authorities of the time became, without exception, unconditional instruments of the representatives' action. This entailed a translation of all existing powers and functions, which then combined with the continuing function of the representatives to take all the measures that the specific situation required; in consequence, the legislation of the Revolution was no longer hindered by regard for any rights of the political enemy (and everyone who stood in the way was a political enemy). The dictatorship of the representatives rested upon these two elements. It was a commissary dictatorship within the framework of the sovereign dictatorship of the National Convention. The revolutionary tribunals were certainly a most effective addition in cases where the situation permitted the pretence of a judicial procedure – that is, when the political enemy was arrested and there was enough time to subject him to instrumental justice, which even in an extremely summary proceedure took a certain amount of time. Then the sentence itself was a means to serve the revolutionary end. It was intended to render the sentenced person harmless and at the same time to make an object of exemplary 'punishment' out of him, in other words to use him against the enemy, as a deterrant and a means of intimidation.

The details of this dictatorship are of as little legal interest as the cases in which the representatives of the people posed as strategists in the army. The result was not just the elimination of all internal

political obstacles, but also the creation of an apparatus of government dominated by the centre, one in which no intermediate form of autonomy could halt the 'impulsion' emanating from the centre. And, as mentioned above, the unlimited power that the representative exercised externally correlated with a proportional dependence on an impersonal political centre. It was made absolutely clear that the representative had no more than a *mandat impératif* [imperative mandate] and he was urged to comply with all the instructions emanating from the Comité de salut public.[39] When a compliant administrative apparatus was created, the representative himself appeared to be something of an obstacle rather than a useful person. A certain regularity was necessary, along with a limited jurisdiction – not so much for legal protection as for the benefit of a regulated action, which could now adopt a general character again, once the political opponents had been eliminated and external relations became predictable and normal. Furthermore, all too often the representative acted with too much autonomy, because he saw himself as a colleague of the persons who led the centre and also was, just like them, a representative of the people. Whereas in the Middle Ages new hereditary functions were created for the most part out of the commissions of the reformation, here an abstract apparatus of government and administration emerged, in the form of the state, over the subject – which was also called a state – of its organising and administrative activity. Further reasons combined to prevent the development of a republican commissar into an established official: a certain republican sense of duty,[40] beyond the control of the Comité de salut public and of local party organisations; logistical reasons that allowed for a better surveillance – and therefore dependence – than in the Middle Ages; and so on. In consequence the commissar of the National Convention created, through his action, a 'uniformed administrative bureaucracy', which became a source of contradictory political directives and remained in place even after its creator himself – the commissar – became an obstacle and had to step down.

On 14 Frimaire II (4 December 1793; Duvergier, vol. 6, p. 391; Baudouin, vol. 37, p. 141), the revolutionary government gave itself a provisional constitution whose axiom was: *La Convention nationale est le centre unique de l'impulsion du gouvernement* [The National

Convention is the unique pulsing centre of the government]. All agencies and civil servants were subjected to the direct control of the Comité de salut public – and of the Comité de sûreté générale if it was a matter of surveilling suspicious persons and the internal police [gendarmery]. It was explicitly said in this provisional constitution that surveillance was a part of the execution of the laws: *l'exécution des lois se distribute en surveillance et en application* [the execution of laws is divided into surveillace and application] (Section II, Article 3). The duties of surveillance, which had so far been fulfilled by the commissars of the National Convention, were now transferred to *agents nationaux* [national agents], who were appointed and monitored by the comités (Section II, Article 14). Most representatives were already recalled in May 1794. On 1 April 1794 Carnot had declared in the Convention that the problem with the representatives was that they were concerned with minutiae and that on their arrival the official bodies, as if 'paralysed', left everything to them. Although this effect was welcome as long as the existing bodies were politically unreliable, now it was in the new government's interest that these bodies run their business in an orderly fashion. Here, too, bureaucracy was stabilised through sovereignty. The commissar of action was replaced by a commissar of control as a regular commissar of service. The provisional constitution of 14 Frimaire II was keen to create well-defined responsibilities in the interest of a clear and unified administration – but, of course, only insofar as the leadership remained unconditionally in the hands of the Comité. Through this constitution, the election of local and provincial bodies was eliminated, together with the other vestiges of self-government that still existed on the basis of the constitution of 1791. The Comité de salut public appointed members of the local *comités révolutionnaires* [revolutionary committees] who were given policing powers, as well as the aforementioned *agents nationaux*. With that, a certain consolidation was achieved. This central organisation remained in existence even after the downfall of Robespierre and the dissolution of the Comité de salut public. A proposal of 14 Ventôse III (4 March 1795) to get back to electing the local and provincial authorities with the help of the population was ignored. In the new organisation of the year 1795, the commissars of the directorate (that is, of the central government),

who could be recalled any time, were retained. They were sent to individual administrative bodies (provinces and local units) with the task of monitoring the execution of the laws and, if need be, of enforcing it by way of request. Here again, centralisation prevailed; and the opposition's pointing out that the commissars were nothing but the old intendants and 'subaltern tyrants' hardly changed anything. The sphere of authority of these commissars was inordinately wide. The body in which the commissar was active was only permitted to pass resolutions in the present, and with his consent (Law of 21 Fructidor III). The commissar of the province corresponded with the ministry of interior and sought to obtain his decision in all important matters. The fact that the commissar had to be appointed from among the inhabitants of a district was, after all, a concession to the idea of self-government. But this came to an end under the Napoleonic administration (Law of 28 Pluviôse VIII [17 February 1800]). The sole chief of the department was the *préfet* (prefect), and the district (*arondissement*) subprefect (*souspréfet*) was his subordinate. Deliberately and in the interest of an unconditional centralisation, no locals were appointed as *préfets* or *souspréfets* from then on. This is how the ideal bureaucracy was created; and, through the commissar of revolution of the National Convention (a commissar who was externally omnipotent but internally dependent, and unconditionally so), the intendant of the *ancien régime*, still relatively autonomous, became the *préfet* of the modern administration, who was integrated into the bureaucratic system. Now the machine of government was easy to lead from the centre. Through the *coup d'état* of 18 Brumaire, Napoleon became the leader of this apparatus – which, under normal conditions, operated on well-defined responsibilities.

In extraordinary cases, on the other hand, the threatened sovereignty dispatched commissars who intervened directly, at different points in the system of responsibilities. In 1814, when the war against Napoleon entered French territory, the emperor sent reliable senior officials – senators for the most part – as extraordinary imperial commissars (*commissaires impériaux extraordinaires*); he sent them to various divisions and to the provinces, mainly to control and accelerate the new mass recruitment, which it was normally the prefects' task to organise. In addition to that, the commissars had to ensure the

collection of extraordinary taxes and requisitions and whatever the army needed; to monitor all the measures of defence; and to supervise organising the volunteers. If necessary, they also had to intervene personally, with appropriate measures. The practice of the commissar upon arrival was to summon all the military and civilian officials and to have them report on the condition of the provinces, the status quo of conscription activities, and the extraordinary taxes; and he encouraged the authorities and the people to be keenly involved. He issued proclamations, influenced the authorities through suggestions and appeals, and in urgent cases gave orders himself – for example he called upon the field wardens for defence or requested the arming of citizens when the enemy was approaching, the destruction of bridges and byways useful to the enemy, the removal of cattle, and so on.[41] In April 1814, when the emperor was defeated and the Bourbons reestablished their legitimate rights of possession, it was, once again, extraordinary commissars who transformed the administrative apparatus handed over to the new sovereign. 22 April 1814 saw the promulgation of the decree of the king's steward, the *lieutenant général du Royaume* [lieutenant-general of the kingdom],[42] by which an extraordinary commissar of the king (*commissaire extraordinaire*) was sent into every district of every division. His *duties* were as follows: dissemination of the news that the king had recovered legitimate possession; enforcement of all the provisional measures for the new government; supply of information on anything to do with public order; and finally, in conformity with the general commissarial formula, care to take all the measures needed to ease the establishment of the new government and its activity, according to the circumstances (*circonstances*). And here are his *rights* [Befugnisse]: to appeal to all civilian and military bodies; if necessary, to give orders that all the authorities and civil servants should carry out; to dismiss and re-appoint in office, provisionally (in cases of this sort he had to report immediately to the commissar appointed by the ministry of domestic affairs, who then made a definitive decision); to release all the persons who had been arrested as political enemies, on the basis of imperial decrees; to invalidate extraordinary measures taken in war by the former government, like the deployment of military presence; to make requisitions; to destroy byways – and so on. These royal commissars corresponded

with a *commissaire de l'intérieur* [commissar of internal affairs] and with other commissars, appointed to the different ministries.

One year later, between March and June 1815, when Napoleon was back in Paris again, the administrative apparatus found itself once more in the emperor's service. An imperial decree of 20 April 1815[43] sent imperial *commissaires extraordinaires* to the districts of the different divisions, and it did so after the *préfets* had already been appointed. The duties and authorisations of these commissars were related to new appointments in offices or civic agencies. When the new commissars arrived, the functions of all the mayors, all the members in local and provincial administrative bodies, all the officers and commanders in the National Guard and all the subprefects were annulled. The commissar immediately appointed new officials in their place, following the prefects' suggestion, and he took an oath of allegiance from the newly appointed. All of the latter were immediately reported to the ministry of domestic affairs.

After the emperor was defeated for the second time, commissars of the new government appeared once more. The king himself, as well as the authorised princes of the royal court and the ministers, dispatched commissars to the provinces *pour faire reconnaître l'authorité légitime et comprimer les factions* [in order to impose recognition of the legitimate authority and to cut on the factions]. This time the transformation happened quickly. Some new prefects were appointed, but in most cases the officials and officers who were dismissed from their functions by Napoleon returned to their old positions and resumed their old functions.[44] By the royal ordinance of 19 July 1815[45] the extraordinary commissars were recalled because in the future their service would be superfluous, and even detrimental for a *unité d'action, qui est le premier besoin de l'administration régulière* [unity of action, which is the first requirement of the regular administration].

6

Dictatorship in Contemporary Law and Order

The State of Siege

While the commissars of the National Convention were designed to eliminate the current organisation of the state, a number of institutions were established at the same time with the purpose of protecting the current order against a *coup d'état*. In the first instance, as a legal means to maintain or reestablish the legal order and security, what was practised in the beginning in pre-revolutionary Europe was the provost's jurisdiction [*Prevotalgerichtsbarkeit*], which was active throughout the impressive rebellions related to the harvest in the eighteenth century.[1] It was ultimately executed by the military-inspired gendarmerie – the *prévôts des maréchaux* [marshal's provosts] – in its districts, in so-called *cas prévôtaux* [provost's cases]: robbery, looting, uproar and other kinds of disruption to public safety. The fact that the fight against domestic unrest was initially under the jurisdiction and commissarial mandate of an extraordinary juridical activity – one that was bound up with reduction to a summary procedure – ties in with the development outlined so far, and also with the idea that exercising state supremacy is tantamount with exercising jurisdiction. This is most evident for the strictly constitutional view of the state – that is, the English view, in which the state is limited to its judicial functions. But, because the provost's jurisdiction rested on a specific commissarial empowerment coming from the king, in England, where a royal commission could not justify an intrusion in the liberty of the individual, such a statement for the extremely summary process against the rebels is impossible to find. Under Charles I, the royal commissars received full powers to have both soldiers and civilians sentenced to death, outside of ordinary jurisdiction. Even the Long

Parliament employed the practice of extraordinary commissions. The Bill of Rights put an end to this. In a riot, the army could intervene at the request of civil administration. The exordium to the Mutiny Acts, under Queen Anne and King George I, was phrased in such a way that the prerogative to declare martial law remained with the Crown and its usual authorities, but only in times of war and outside of Great Britain, for example in Ireland. Since James II, the articles of war allowed the destruction of rebels' private property and gave the commander an unlimited power to pass verdicts of life and death [*Leib und Leben*] in foreign countries; but this power was limited in the homeland.[2] But the true legal problem was to justify, in the eyes of the law, the direct violation of life and death and property that was inevitable when an army intervened, regardless of whether that army belonged to the rebels themselves or to a neutral third party. The justification given during the uproars in London in 1780, and frequently repeated, was that civil persons who were found armed were treated as if they had subjected themselves to martial law (but not to the military court). Of course this kind of justice is, 'in reality, just a battle order [*Gefechtsbefehl*]'.[3] Moreover, it gave no justification for the numerous intrusions in the life and property of neutral citizens – which are inevitable when some serious rebellion has to be suppressed with the help of the army. It is for this entire sphere of real military activity – which is, in consequence, to be categorically separated from court martial [*militärisches Standrecht*, martial jurisdiction] – that 'martial law' comes into effect. It is a kind of situation outside the law, in which the executive – that is, the intervening army – can act without paying heed to any legal limitations, doing whatever it takes to suppress the enemy in the given circumstances. Despite its name, martial law [*Kriegsrecht*], understood in this way, is not a right or a law at all, but rather a procedure, which is genuinely governed by a practical goal and in which the legal control limits itself to the conditions under which that procedure has come into effect (commandeering of civil bodies, requests of dismissal, and so on). As legal justification [*Rechtsgrund*] for what happens in situations that fall outside the law, it has been argued that in such cases all the state powers become impotent and without effect and, in particular, the courts cannot function any more. Then the only functioning power

of the of state, the army, should become active as a kind of substitute (some rude substitute), and its action should represent both the verdict and the execution, all wrapped up in one.[4] It has been increasingly vital for the Anglo-Saxon sense of justice that, in times of war and upheaval, the army functioned as a substitute for the courts, and therefore martial law presupposed a kind of *iustitium* [cessation of public activity]. This also happened for example in the American law of 1795, which, according to Garner,[5] is still in effect and which gave the presidents of the United States permission to call in the militia in the event of a hostile invasion, or when the law was disregarded or its execution was so seriously jeopardised that the unlawfulness could not be quelled through normal jurisdiction and executive forces. In itself, such an appeal is the responsibility of the Congress, as outlined in Article I, Section 8, Number 16 of the Constitution.[6] All the measures taken at the scene of war are governed by martial law. Hence, in a conception of the law where the separation of powers is on the whole identical with law and order, martial law means abolition of the separation of powers and its substitution by the brutal command of the military chief.[7] Martial law can be declared in riots, too, if a direct threat to public safety is impending and ordinary law courts are no longer enough. Both the president (namely Lincoln) and the military chief frequently resorted to this authorisation, often with the Congress' consent but also without it – the military chief only with the president's consent; and, after suspending normal jurisdiction, they had the rebels judged by a 'military commission'. The famous decision of the Supreme Court *ex parte Milligan* [1866], dealing with such cases (4 Wallace, *US Supreme Court Reports*, p. 127), rehearsed the traditional explanation that, in cases of hostile invasion or civil war, when the law courts are closed or it is impossible to exercise criminal jurisdiction in accordance with the law in an area effectively dominated by war, the abolished civil authority must be replaced by another 'power', in order for safety to be maintained in the army and in society.[8]

'Martial law' designates, then, one of the spaces set free for the detailed technical [*sachtechnisch*] implementation of a military operation in which it was permitted to do what the circumstances demanded. This means something different from the provost's

jurisdiction or from the summary court martial. The provost's law courts [*Prevotalgerichte*] are extraordinary military courts of first instance and of last resort, which decide on criminal acts involving a disruption of public security regardless of whether the criminals are soldiers or civilians. The summary court martial (*iudicium statarium*) is a summary procedure, initially employed only against soldiers[9] and later on extended, like the provost's jurisdiction, to the sentencing of specific offences, committed in an area that was subject to court martial as a result of a former declaration.[10] Now, when a military chief established, under martial law, courts for the trial of specific criminal acts, this was in fact a return to legal form [*Rechtsform*]. The real core of 'martial law' reveals itself in the state of emergency. This is a concrete action [*Tathandlung*], freed from any legal ramifications, yet serving an aim imposed by the state. In its absolute factuality, in other words in its essence, it is not approachable through proper legal form [*Rechtsförmigkeit*]. Nevertheless, the semblance of such a form can arise from two angles. From the standpoint of the right, a legal procedure can be so summary that in fact it becomes an immediate executive order, and the assessment that precedes the execution is of a purely factual nature; it cannot be distinguished – logically, normatively or psychologically – from the assessment of a soldier who ponders whether the man facing him is an enemy or not. The soldier, too, makes assumptions and arrives at a decision [*Urteil*]; but one cannot say that he has killed the enemy on the basis of a summary verdict [*Urteil*] that is put into practice at once. From the other point of view, the factual one, numerous assessments can prove to be necessary for a method that is based strictly upon facts collected in the form of advice and negotiation; hence these assessments can allow the impression of proper legal form. When a revolutionary tribunal sentences an enemy to death and ponders in advance whether this person is really a political enemy and whether political interest suggests eliminating him, this is justice only according to a formal concept, which describes anything done by a law court as administration of justice [*Rechtspflege*]. In reality, such justice is part of revolutionary activity. The positivist so-called 'form' breaks down in the situations at stake here. When all the legal authorisations of the official bodies have passed into the hands of the military chief, then something

necessitated on military grounds, like – say – the destruction of a home property, is not an act of expropriation consolidated through the provision that no compensation will be granted, and also perhaps through the immediate, *uno actu* [in one action] rejection of possible complaints. A measure that is nothing but factuality remains inaccessible to legal conceptualisation and cannot be explained even with the help of the intriguing notion of a composed official act [*zusammengesetzte Amtshandlung*]. Prussian administrative practice assumed such a composed action, which should contain a factual [*tatsächlich*] procedure at the same time as a legal provision expressed through fact [*Tat*]; and it did so for reasons of practicality of legal regulation, on behalf of the citizen concerned, in order to enable him or her to gain access to means of legal redress.[11] In a complete transition of the executive power, of course, a means of legal redress would no longer be possible, because the fact [*Tat*] would express not only the regulation, but also the rejection of the admissible means of legal redress, so that it could encompass a fabulous wealth of different combinations [*Zusammensetzungen*].

The concept of a composed official act has a strange history, which has not yet been written and can be only briefly outlined here. This practice of the Prussian Supreme Court is only the shallow reflection of a marriage between legal form and fact [*Faktum*]; it was a kind of jurisprudence that, politically, could have both a conservative–governmental and a revolutionary side. When the idea is still alive that one can put oneself outside the law through a particular deed – when someone who committed a crime is *ipso facto* an outlaw, a *hostis* [enemy], a rebel or an enemy of the homeland – that person is put outside the law [*vogelfrei*] and becomes automatically the object of an arbitrary execution. This is well expressed in the old justification [*Erklärung*], still alive during the Revolution of 1793, which explains the force of the formula *hors la loi* [outside of the law]: *et tout Français sera tenu de tirer et courir sus* [and every Frenchman will be expected to shoot and run over/mistreat].[12] In the seventeenth and eighteenth centuries the right to execute immediately, if need be, a runaway who had deserted, a soldier who had shown cowardice before the enemy [*Feigheit vor dem Feinde*], or a traitor was justified through the claim that such a person was a 'scoundrel' ['*Schelm*'] and an outlaw.[13] Quite

frequently, though, one created the fiction of a judgement no sooner pronounced than executed.[14] From time to time one could find both arguments being simultaneously used: in exceptional cases, when someone who was blatantly a scoundrel or a traitor to the homeland was executed on the spot, or when 'the deed itself is both plaintiff and witness' (Lünig, vol. 2, p. 1414), the elimination of the accused could be, *uno facto* [in one single act], both sentence and execution, both a verdict and its carrying out. In particular, an army officer was entitled to knock down a traitor caught *in flagrante* [red-handed]. At the same time this justification – which, incidentally, was also used to defend the killing of Wallenstein[15] – operated with a concept of outlawry [*Friedlosmachung*] and one of composed official act, which any citizen could undertake in his or her capacity as a 'occasional organ of the state' (to employ a phrase coined by G. Jellinek). Naturally the Revolution could make use of this concept just as much, and it could allow its enemies 'to receive justice in the form of getting shot'.[16] Hence the natural rights aspect of the problem can still remain unresolved; that is, overall, whether having a legal position [*Rechtszustand*] is compatible with a general state of emergency and with the war of each against all. From a legal perspective, it is critical that such conceptions of the *via facti Procedierens* [proceeding by way of action] ignore precisely what is essential to the right: its form.[17]

However, because of a legal interest especially in martial law, a whole range of formal requirements [*Formvorschriften*] are being sought – actually not in the fight against the foreign enemy, on the battlefield or in the colonies, but in the fight against the political enemy at home; that is, when the action of the state is directed against its own citizens. Such formal requirements never deal with or pertain to the action itself, but only its premise. This important distinction derives from the separation between two entirely different types of legal regulation: in one, the content is described with attention to the minutest detail [*tatbestandsmässig*]; in the other, only the premise is treated this way. Any legal standardisation involves restrictions from the standpoint of unconditional efficacy [*unbedingter Zweckmäßigkeit*]. The limitation of military implements under international law, on the basis of war conventions – for example the prohibition against certain types of weapons – demonstrates most clearly the antagonism

between legal standardisation and the kind of situation that would satisfy real-life conditions [*sachtechnischer Zweckmäßigkeit*]. Now, the intention to settle legally the deployment of military powers against citizens of one's own state can lead to an indefinite postponement of the use of such resources; the intention would be to create further guarantees that the state of emergency [*Ernstfall*] is only recognised when it has already taken place. But suppose you come to use these extreme reserves, be it only once: in short, if an effective measure needs to be taken, there comes to an end the legal regulation about the content of this very measure. Here standardisation has to limit itself to describing the premises on which the state of emergency may be said to occur. The law then either defines a fact of the case [*Tatbestand*] that offers clearly defined concepts – concepts captured with maximum factual accuracy [*tatbestandsmässig*]; or else it attempts to offer a guarantee through some kind of separation of powers, by allowing that an institution different from the army decide what constitutes a prerequisite for the state of emergency – namely the one that carries out the action effectively. Nevertheless, this separation of responsibility fails in a case of emergency [*Notfall*]. For analogy, in self-defence, when the conditions are met – that is, an illegal attack, in the now – it is permitted to do anything it takes to counter the attack, and there is no specification, in the legal statutes, about the content of what is allowed to happen, because the law does not name the actual measures; it only advises what is *necessary* for defence. In the same way, once the conditions setting up the state of emergency have occurred, the action made *necessary* by the concrete circumstances occurs too. The analogy goes further. It is in the essence of the right to self-defence that its conditions will be determined through the deed itself; hence it is not possible to create an institution that could prove legally [*justizförmig*] whether the conditions for self-defence obtain or not. In the same way, in a real case of emergency, the one who acts in self-defence cannot be differentiated from the one who decides whether there is a case of self-defence to answer. These positions [*Sätze*] are to be considered two legal standpoints [*Gesichtspunkte*] of universal scope, with the help of which the development to follow will raise above what is historical and contingent.

As it is frequently mentioned in drafts of the constitutions and in

the constitutions themselves, in the first part of the French Revolution, until the overthrow of the Jacobin dominion, the intention was that the army should act (*agir*) effectively but not draft conclusions in a legal sense or be entitled to 'deliberate'. In other words, the military commander should always be just an instrument controlled by a civil institution. He is only an instrument and not a commissar, just as the leader of a detachment sent to execute a verdict is a commissar. This attitude could not be upheld in an external war, because there, by definition, the military activity exceeds just a military state of emergency [*Ernstfall*]. By contrast, in a military encounter with one's own citizens, this perspective was enforced all the more vigorously. Under no circumstances – as it is declared by Emmanuel Joseph Sieyès in Article 13 of the draft of a Declaration of Human and Civil Rights – should the army be employed against citizens within the country. Politically, this sentence belongs to the entire system of the Revolution, which was designed to weaken the royal executive. When the military commander is not a commissar, it follows that he is not a commissarial dictator either, but only the instrument of a dictatorship, supposing any such happens. It was thought initially that one could manage with a simple requisitioning of military support from the civil administration. People were convinced that they only had to deal with rioting (*riots*), not with a civil war. Modelled on the English example of the Riot Act, the French law dating from 21 October 1789, '*contre les attroupements ou loi martiale*' ['against gatherings, or martial law'], was declared when, in Paris, uproars over the shortage of supplies broke out and the National Convention, which had moved from Versailles to Paris only just prior to that, recognised the need to protect the freedom of its deliberations from the tumult.[18] The law conferred local communities the right and responsibility to demand that army forces (*force militaire*) be immediately raised when public peace (*tranquillité*) was threatened, in order to reestablish public order (*ordre*). The local community was accountable for all the consequences of any neglect in this matter. Martial law (*loi martiale*) was declared by hoisting a red flag from the main window of the town hall. At the same time the local community called upon the chiefs of the National Guard – the self-defence militia, the police, or the regular troops – to supply armed support. At the signal given by the red flag, all disorderly

congregations (*attroupements*), whether armed or not, became illegal and had to be dispersed by armed force. The requested armed forces (National Guard, police, or regular troops) had to be made to march straightaway, under the order of their officers and accompanied at least by one local clerk. A red flag also had to be borne in front of the troops. A local clerk (but not the officer) had to ask the assembled crowd the reason for their gathering. The crowd was then allowed to nominate six men to represent its complaints and petitions; the others had to withdraw immediately and peacefully. Failing this, they were strongly urged by the local clerks to retire peacefully to their homes. The injunction ran thus: *Avis est donné que la loi martiale est proclamée, que tous attroupements sont criminels; on va faire feu: que les citoyens se retirent* [Everyone is advised that martial law has been declared; that all gatherings are criminal offences; we are going to shoot; all the citizens must withdraw]. If the crowd withdrew peacefully, then only the ring leaders were prosecuted and punished, in an extraordinary procedure. If, before or during this injunction, the crowd used violence, or if it did not retreat peacefully after the third exhortation, then armed force was deployed. The legal meaning of this function of the army – which is set in motion once the above-mentioned formal prescription of the law is satisfied – is very clearly defined by the law of 1789, namely in the sense that this law becomes in effect identical with what is understood by *loi martiale*: *la force des armes sera à l'instant* [the force of weapons will be immediately] (that is, when violent acts are committed, or after the third ineffective exhortation) *déployée contre les séditieux sans que personne soit responsible des évènements qui pourront en resulter* [used against the rebels, without anybody being responsible for the events that might ensue]. As for the rioting crowd that commits violent acts, it is said of its participating members that they would be punished insofar as they '*échapperont aux coups de la force militaire*' [manage to avoid the blows of the army forces]. The whole idea of this regulation is that all the initiatives and directions rest with the local authorities – elected as they are by the citizens – and that the military commander is only an obedient executive.

Through the decree of the constituent National Assembly of 3 February 1790 (Duvergier, vol. 1, p. 120), the local authorities were urged to declare *loi martiale* if public security was imperilled in any

way, and to support each other in the recruitment of army troops. Again, through the decree of 2 June 1790 (Duvergier, vol. 1, p. 235), the municipalities were mandated with the maintenance of public security and order and all the decent people (*honnêtes gens*) were asked to contribute to rendering the disturbers of public order innocuous. Such people were to be declared enemies of the constitution, of the National Assembly, of the nation and of the king; they had to be arrested and penalised according to the law, and all had to be done '*sans préjudice de l'exécution de la loi martiale*' [without detriment to the implementation of martial law]. The National Guard, the police and the army had to comply with the demands of the administrative organs in order to maintain public peace and preserve the respect for law. In addition, there existed already special courts that had been granted jurisdiction over riots and similar crimes by way of a commissarial mandate.[19] The fact that the National Assembly itself appealed to the king to give the necessary orders to his commissars or troop commanders has already been mentioned in a different context.[20]

When the riot increased, the statutes on *loi martiale* stipulated this condition: when and where repeated disruption of public peace is imminent, *loi martiale* continues to be declared and remains in force for an indefinite period of time. During this time and until *loi martiale* was explicitly suspended, all gatherings were prohibited. The law of 26 July 1791 against forming crowds, whose oversight was a function of civilian authorities, was enacted at the same time as this amendment. This law imposed the mobilisation of armed force to suppress such crowds, and it compelled every citizen to contribute to this suppression under certain conditions.[21] Local communities were held accountable for the damages resulting from the turmoil. But, most importantly, right now the inescapable consequence of emergency law [*Notrecht*] came into effect: the person who exercised it had thereby the power to decide whether the conditions required to declare it existed or not. There were urgent cases in which the armed force was now permitted to intervene even without a formal request [*Requisition*], especially to fight robbery and looting. When the riots had taken over a whole province, the king placed the orders needed to reestablish order under the responsibility of his ministers, and accompanied them by an obligation to inform the Legislative Assembly

about his measures straightaway or to convene it on the spot, if it was not already assembled. These regulations of the law (Articles 30 and 31) were incorporated into the [French] Constitution of 1791 (Title IV, Article 2). This law also repeats the characteristic formula that, when an armed force actually proceeds against the rebels, according to the requirements of this law (which is an injunction to disperse), its members are to bear no responsibility for the consequences that might follow from this action (Article 27).

The state of siege is not mentioned in the law of 26 July 1791, although this matter – the *état de siège* – had been regulated in a compendious manner before, in the law of 8 July 1791. But that, of course, was a completely different context from battling against rebels and restoring public safety. The law of 8 July 1791 dealt mainly with technical–military issues, namely the maintenance and classification of military positions and posts (*places de guerre et postes militaries* [places of war and military outposts]), and this problematic was divided into three categories: policing of the fortifications; terms and conditions for the employment of officers; and accommodation for troops, construction of fortifications, compensation for the private property that was of necessity confiscated as a result – and suchlike. The state of siege was mentioned here in connection with the fact that, in a fortified place, the relations between the army and civilian authorities are also under control (among other things). The law meticulously listed the fortified places and posts where it was valid (109 fortified places and fifty-nine military posts). There was no mention of the possibility of other areas or districts where martial law or the state of siege could be declared; nor was there any mention of an attack on the domestic enemy, either by critics or by rebels. Three kinds of *états* [states] were distinguished in which any of the fortified places specified could be found: *états de paix* [states of peace]; *états de guerre* [states of war]; and *états de siege* [states of siege]. In times of peace, military officials had supreme authority only over the army and over undisputedly military affairs; for the rest, policing was exclusively a matter for civilian bodies. In times of war, civilian bodies retained their policing function, but the commander was entitled to request measures concerned with order and the police, insofar as these measures went hand in hand with military security in the area. Hence he had to lay

before the civilian authorities the decision of the war cabinet (*conseil de guerre*) at the fortified place; and the civilian authorities were thereby released from their responsibility. Finally, in a state of siege, all the legal functions of civilian authorities, insofar as they concerned maintaining internal order and the police force, were passed on to the commander, who exercised them as part of his personal responsibility. This was not about executive functions; rather *all* the constitutional functions of *all* the civilian authorities were transferred. The commander had to be given the same legal capacities as any civilian body whose jurisdiction was the preservation of public order and security. This was not a transition of executing power in the modern sense; on the contrary, it was assumed that the chief of the army should exercise all the functions by himself. As in the *état de guerre* [state of war], appeals to the civilian authority were not mentioned here. Only in the decree of 1811 (which will be discussed later) was the provision made that the army chief should relinquish his function to the civilian authority. In consequence, the commander of a fortified place did not step into spheres of jurisdiction like a commissar of the National Convention, through appeals or devolutions; he was only entitled to do what a civilian body could have done – albeit *exclusivement* [exclusively], as the law laid down. The whole regulation makes sense only if one bears in mind that the state of siege at stake here is an actual situation of severe emergency, which satisfies actual and well-circumscribed requirements: when the fortified place has been cut off from all external contacts (the law in fact specified concrete details), the state of siege is *ipso facto* in place.[22] By contrast, war was *declared* – and this happened either on the basis of a decision of the Legislative Assembly, which was requested by the king and which he had to proclaim, or through the king's declaration, under reservation of approval from the Legislative Assembly, if the declaration was necessary at a time when the legislative body was not assembled (Articles 8, 9). The reason for this regulation was that the state of war involved the right of military authorities to make requests of the civilian ones; what is more, it permitted encroachments upon private property, for instance the demolition without compensation of buildings situated within a specified area from the fortification (Articles 31, 32). In urgent cases, when the chief of the army could no longer receive the

king's order, the law generally gave him the authority to implement all the measures needed for defence, and to do so on the basis of a decision coming from the war cabinet (Article 37). The purely factual nature of the entire regulation is completely obvious and requires no further explanation. The word *état* refers to an actual situation, which involves specific [*sachtechnische*] consequences permitted by the law. Like the state of defence (*état de défense*) or the troops' stand-by (*état de requisition permanente* [state of permanent guard]), the state of siege of a fortified place is a practical state of a military–technical [*militärtechnisch*] kind. When the army commander declares it, all it amounts to, in law, is equivalent to a person acting in self-defence and making his enemy aware that he will make use of his right to self-defence. The state of siege has not yet become the nodal point of a fiction with the help of which certain legal consequences are supposed to have come about.[23]

The Jacobins were staunch opponents of *loi martiale*, partly because the unleashing of the disorganised masses, through which the Jacobins gained their political power, could be suppressed with the help of this law. In addition to this general reason – which made any political opposition into an enemy of the institutions that protected the existing order – *loi martiale* made available, for the local authorities (which at that time enjoyed a high degree of self-government, according to the constitution of 1791), the armed force they could use to serve their federalist interest of suppressing the radical revolutionary movement centred in Paris.[24] On 23 June 1793 the National Convention abolished *loi martiale* in one sentence.[25] It was assisted by its commissars, by the revolution's legislation and by the revolution's tribunals, which dealt with the enemy according to rules of judicial process [*justizförmig*]. It retained the state of siege as a purely military institution. A turning point occurred now in the development of this concept by reason of the fact that other areas apart from fortified places could come to be under siege too, and (as this first extension was only a technical one) because at the same time the actual state of siege was replaced by a 'declaration' of state of siege, which was intended to justify a legal fiction. The distinction is evident in the two laws that were passed before and after the *coup d'état* by the radical members of the directorate on 18 Fructidor V (4 September

1797). That a military conception became the bedrock of government corresponded to the militarisation of the state: the 13 Vendémiaire, as well as the 18 Fructidor, were the work of the army.[26] The law dating from 10 Fructidor V (27 August 1797) extends the application of the states of war and siege to communities 'within the country'. The directorate could declare state of war (but not of siege) once it had been authorised by the legislative body. This meant, in practice, that the army commander had become the commissarial chief of the communities declared to be at war and was no longer answerable to civilian authorities or submitted to their administration, as under the legislation of *loi martiale*. The state of siege remained a concrete fact, local communities *were* under siege as soon as they were cut off by troops or rebels (here the notion of an 'internal' enemy cropped up). As soon as the *coup d' état* of 18 Fructidor succeeded, the directorate seized for itself – that is, without the legislative body – the authority *de mettre une commune en état de siege* [of placing a commune under state of siege]. In this way the government could bring about the state of siege whenever it deemed it necessary. The formal act of the government's declaration supplanted the real state of emergency. The concept gained a political meaning; the technical–military procedure was employed in the service of domestic politics.

The effect was still the same as after the law of 1791: the army commander ordered what, in his view, was needed for the successful completion of a military operation. Insofar as no military operation was at stake, he had, towards citizens, no powers that the civilian authorities were not entitled to. For the extension of these powers, the regime of the directorate invented a new concept, which was not as successful as that of 'state of siege'; it was, nevertheless, one of the most curious fabrications in the fight against the political enemy. Side by side with the phrase *état de siege*, there appeared an *état de troubles civils* [state of civil unrest]. When a province, a canton or a parish was publicly known to be in a 'state of upheaval' ['*Unruherustand*'], then, according to the law of 24 Messidor VII (12 July 1799; Duvergier, vol. 11, p. 297), the directorate of the Legislative Assembly could propose to declare state of upheaval. This gave permission for measures such as the following: the relatives of emigrants and former aristocrats – the kin of 'robbers and chief bandits' (women as well as men) – were held

responsible for all the occurrences of murder and looting, and they were held as hostages. At every murder of a patriot, four hostages were deported, others had penances imposed on them, and so on. Notorious bandit chiefs, for whom lists had to be compiled, were presented to special military courts (*commissions militaires*) and could be sentenced to death without further ado (Article 39). This law was suspended again on 22 Brumaire VIII (Duvergier, vol. 12, p. 5), immediately after Napoleon's successful coup.

The constitution of 22 Frumaire VII (13 December 1799) initiated instead a new development: the suspension of the constitution (*la suspension de l'empire de la Constitution*). According to Article 92, this could be declared for all regions and for as long as armed rebellion and riots threatened the security of the state (*la sûreté de l'Etat*). The suspension was regulated by law; in urgent cases, when the legislative body was not assembled, it was declared by the government, which had to convoke the Legislative Assembly there and then. The administrative *senatus consultum* of 16 Thermidor X (4 August 1802) mentions the suspension of the constitution and of the powers of the Senate (Article 55). The state of siege is not mentioned either in the constitution of year VIII or in this *senatus consultum*; hence the suspension of the constitution had not yet been connected to this concept. The authorisation to declare state of siege was transferred to the government, on the grounds that it also had the armed forces at its disposal and could declare war.[27] There are only a few cases in which we know that the state of siege was imposed.[28] On the other hand, the constitution was suspended in the Vendée region through the resolution of 7 Nivôse VIII (Duvergier, vol. 5, p. 56) and through the law of 23 Nivôse VIII. The army commander sent to these areas to suppress the riots was authorised to place the rioting communities outside the constitution (*hors de la constitution*), to pass orders on pain of death, to impose extraordinary collections by way of atonement, and so on. The government appointed exceptional courts [*Ausnahmegerichte*] (see Duvergier, vol. 5, p. 66). Napoleon had not used the state of siege as a weapon in political struggles.[29]

Nevertheless, Napoleon had widened the content of the state of siege, and therefore justified its political expediency through the decree of 24 December 1811. From a political perspective, this was

a preparatory measure for the campaign against Russia, and it had a military character. Still, when the decree was issued, it was reckoned that upheavals of the German population in the annexed areas were possible. In other words, one had already envisaged the internal enemy. The regulation dealt mainly with administration and services in fortified places, just as it had by the law of 1791 – which had also given the tripartition into state of peace, state of war and state of siege (Articles 50 ff.). The state of war was declared by imperial decree, when the situation required the military police to be more efficient and more active (Article 52). The state of siege, on the other hand, was decided upon (*déterminé*) through a decree of the emperor or on the basis of the occurrence of a siege, violent attack, raid, internal rebellion or, finally, forbidden assembly within the fortified area. The important fact about this regulation was that the formal declaration, which had a decree as its point of origin [*Entstehungsgrund*], stood side by side with real states of affairs [*faktische Sachlage*] like siege or attack. According to Article 92, the effect of declaring a state of *war* was that national and local militia groups were placed under the authority of an army chief (governor or commander); that civilian authorities could not issue any directives without having consulted the army chief; and finally, that they had to issue all the police regulations that he considered necessary for the safety of the place or for public peace of mind. But with this came far-reaching powers, which the army chief could exercise on the spot: compulsion to do fortifications work; explusion of foreigners, suspects and *bouches inutiles* [non-productive members]; and, in the last resort, a general authorisation to take any steps that might be required for defence and to eliminate anything that obstructed the movement of troops and the defence (Articles 93–5). Here the ruling idea was that the benefit of the military operation justified any infringement of civil liberties, even in the absence of a suspension of constitutional provisions. The state of *siege* (Articles 101, 102) had the effect that the chief of the army became the head of all the civilian bodies that had anything to do with the maintenance of public order and of the police; furthermore, he retained for himself the entire authority that belonged to these bodies. He could either exercise this authority himself or 'delegate' it at his discretion, to the civilian body, which then exercised it in

the name of the army chief and under his supervision (*surveillance*), throughout the entire circuit of the fortification or blockade. It was thus assumed that the army chief had a genuine right, which did not derive from a transition of civilian functions and hence was not a mere accumulation of the responsibilities of civilian bodies in charge of keeping public order and security. In general, the army leader had to regulate all the affairs, both in military and in civilian life, without paying heed to anything except 'his secret instructions, the movement of the enemy and the activity of besiegers'.[30] He became a commissarial chief for all public authorities; in turn, their responsibilities and activities were only an instrument for his action, which was governed by military objectives and therefore reached far beyond civilian functions. The transition of executive power was not the basis for the right that granted the military leader complete entitlement; it was just an administrative–technical means of placing the bureaucratic apparatus in his hands. Therefore he also received functions related to the administration of justice: for all the offences that he would not entrust to ordinary courts, he used the *police judiciaire* [military police/crime squad] (that is, a department that dealt with all the matters involving criminal prosecution, including those under the jurisdiction of the examining magistrate), and he did so through a *prévôt militaire* [military provost/provost martial]; he also appointed military courts in place of the ordinary courts (Article 103).

It was not conceivable at that time that a suspension of the constitution could be declared on account of a state of siege, although Article 92 of year VIII's constitution contained a provision for such a suspension. Military jurisdiction, like the other functions that had been transferred to the military authority, was a way of protecting the military objective, and therefore part and parcel of the activity of the military chief. The suspension of the constitution, according to Article 92, meant that an unconstitutional situation could come into effect for a certain region; through this, the commissar of action was able to take all the necessary steps to achieve his goal. Thus the suspension created a space for this action, by eliminating legal considerations whose observance would be *in concreto* [in real life] a great obstacle [*ein sachwidrig Hindernis*]. But, while a *hostis* [enemy] declaration, outlawing, putting someone *hors la loi*, or treating someone as

felon [traitor] led to the suspension of legal state only for the object of the execution, these territorial provisions affected both the guilty and the innocent. One could proceed ruthlessly, just as under the declaration of *loi martiale*. That this was the meaning of the suspension of the constitution, according to Article 92, became evident through the orders that were given at the same time. Until the constitution was suspended in some districts according to the law of 23 Nivôse VIII (13 January 1800) already mentioned, a resolution was issued on 7 Nivôse VIII (28 December 1799; Duvergier, vol. 12, p. 56; *Bulletin des lois*, 2nd series, Paris 1795/6, No. 3518) that promised amnesty to the rebellious army; but it also stipulated that the leader of the government's troops could put the communities that were still in rebellion *hors de la Constitution* [outside the constitution] – with the effect that they were treated 'like enemies of the French people'. This form of collective responsibility contained a legal complication that was absent from the *hostis* declaration directed at individuals. When the chief of the army was authorised by the law of the 23 Nivôse VIII to threaten people with the death penalty and to demand arbitrary compensations, when military tribunals were set up around the same time, it transpired that the rebellious region was treated as a war zone, although it did not cease to be homeland and its inhabitants did not cease to be citizens. The idea that a certain region was *hors de la Constitution* – Article 55, *senatus consultum* of 16 Thermidor X: *le Sénat* […] *déclare, quand les circonstances l'exigent, des départements hors de la Constitution* [when circumstances require it, the Senate declares districts to be outside the constitution] – and thereby could be treated like a war zone was used as a legal basis for the commissary dictatorship exercised by the military commander. Now, although in the state of siege intrusions into the citizens' private sphere were likewise permissible out of military considerations, suspension was not necessarily required as long as the idea that the state of siege is directed against the external enemy prevailed. This is why the decree of 1811 must have appeared to be unconstitutional as soon as it was applied to the fight against the political enemy within.

The state of siege was only mentioned in the constitution of 1815. According to Article 66 of the Acte additionnel [Supplementary Act] of 22 April 1815, the right to declare state of siege in cases of

domestic troubles (*troubles civils*) was reserved to a law, under the title *Droits des citoyens* [Citizens' rights]. The reason for this provision lay in the Napoleonic practice of government, whose unconstitutionalities were listed in the decree of dismissal of the Sénat conservateur [Conservative Senate] of 3 April 1814, which declared Napoleon's forfeiture of his throne.[31] But one could not say that the emperor had made any special use of the state of siege as a political weapon in domestic struggles. Still, after the experiences of the invasion of 1814, a constitution had to clarifiy this matter first of all, as was attempted in the Acte additionnel of 1815. In civil riots the state of siege could be declared only by legal means – that is, with the cooperation of the peoples' representatives. The decision on using military power in a military action against one's own citizens was not to be left to the emperor's – in other words the highest army commander's – discretion. But the suspension of the constitution, as it was defined in the constitution of year VIII and in the *senatus consultum* of year X, which was still valid, was not mentioned in connection with the state of siege, although precisely the violation of constitutionally guaranteed rights (and here the military tribunals would come to mind) was the strongest accusation against the 1811 provisions concerning the state of siege. However, as in the case of *loi martiale*, it was accepted that, if the requirements for military intervention were defined in law, 'nobody was responsible' for what happens as a result of it. Only military tribunals were seen as unconstitutional; and this was not just because the constitution guaranteed every citizen a *juge naturel* [natural judge], but especially because, in the military courts, the chief of the army appeared not as a soldier but as a commissioned judge [*als Richter kraft Auftrags*]. The contradiction between law and mandate [*Auftrag*] – or, in this context, military order – between the proper responsibilities of the civilian and the military body, this was the really contentious issue of Napoleonic constitutions. After Napoleon's defeat at Waterloo the Chamber [of Representatives] ruled independently, and on 28 June 1815 it appointed a government commission that was authorised to place suspicious persons – disseminators of rebellious literature and the like – under observation and to arrest them without taking them to court within the legally prescribed period of time, even if this fell well outside any

statutory regulations – all for the sake of protecting public peace. An exceptional court of appeal was created in the Chamber. In a bill of the same day the Chamber ruled that Paris *was* under siege, which corresponded to the military situation.[32] The same bill ordered that civil bodies remain functioning and that the government commission alone could take exceptional measures to protect personhood and property. Hence military authorisations had to remain strictly limited to the military operation (understood in the narrow sense). Creating a specific legal right for the exceptional authority of the government commission through the formal suspension of the constitution had not yet been envisaged.

With its numerous laws that infringed personal liberties and the freedom of the press, the Restoration government met with fervent resistance, from the Chambers [of Peers and of Deputies] and from the population alike.[33] For these people, the state of siege was an administrative and technical device akin to the state of exception, whereby each body could do what turned out to be necessary in a specific situation; this is how it was used in the fight against the enemy within. Here is a typical formula – one that declared state of siege in Grenoble in May 1816, through a telegraphic order from the cabinet of ministers to the military leaders: '*le département de l'Isère doit être regardé en état de siege, les autorités civiles et militaires ont un* pouvoir discrétionnaire' [the district of Isère must be treated as being under siege, the civilian and military authorities have *discretionary power*].[34] But now this was linked to the fight for constitutional guarantees, in particular for personal freedom and for the freedom of the press.

Given the exceptional law that dealt with the state of emergency, these liberties stood, *vis à vis* the problem of sovereignty, analogously with the question of vested [*wohlerworben*] rights in constitutional corporatism [*im ständischen Rechtsstaat*]. All the parties agreed without hesitation that the exercise of sovereignty was tied to spheres of authority regulated by law. But the question of *iura extraordinaria maiestatis* or *iura dominationis* (see above, pp. 12–13) returned in a different form, by deploying the same distinction between what was legally regulated – that is, a limited exercise of the sovereignty – and the substance, always remaining hidden but at hand, and in principle unlimited, of the omnipotence of the state – which penetrated the system

of spheres of authority, owing to a specific state of affairs measured by criteria of instrumental efficiency [*sachtechnischer Zweckmäßigkeit*]. The royal government regarded Article 14 of the constitution of 14 June 1814 as the legal basis for all the extraordinary authorisations. This article specified, under the heading 'Formes du gouvernement du Roi' ['Kinds of Government Exercised by the King'], that the king was head of the state, had the military power under his command, declared war and made peace, appointed officials and made all the provisions needed for implementing the laws and the security of the state.[35] The royal government saw it perhaps not as a commissarial authorisation in cases of emergency as much as an expression of its own sovereignty. This is why it was not perceived to be unconstitutional even when it gave orders that violated the existing laws and the constitution itself, provided that, in the king's judgement, these orders were necessary for the safe preservation of the existing order. In the political terminology of the day, this was a *dictature* [dictatorship]. The truth is that it was neither a commissary nor a sovereign dictatorship; it was simply the pretension of sovereignty as a form of authority – in principle unlimited – in a state whose self-commitment [*Selbstbindung*] through ordinary legislation only held for situations considered to be normal. From the perspective of constitutional law [*staatsrechtlich*], the monarchic principle, which could adopt so many and diverse political and theoretical–constitutional [*staatstheoretisch*] meanings,[36] denoted a distinction between sovereign functions of an ordinary and of an extraordinary type. The first were captured through legal regulation, and hence they were subordinated to it; the latter were the direct expression of an unlimited *plenitudo potestatis*. Only a literature that has lost any sense of the fundamental juridical problem in political science – that is, the opposition between right [*Recht*] and the exercise of right [*Rechtsverwirklichung*] – can detect here, in the distinction between the substance of sovereignty and its exercise, a minor scholastic subtlety. If sovereignty is indeed omnipotence of the state, and if this is true for any constitution that does not separate or completely distinguish between powers, then the legal regulation invariably captures the predictable content of the execution, but never the substantive fullness of the force [*Gewalt*] itself. The question of who decides on it (that is, on the case that is not regulated by law),

is at the heart of the question of sovereignty. The monarchies of the Restoration appealed to this notion of sovereignty as an authority, in principle unlimited, in order to do whatever was advisable to keep the state safe, whatever the actual circumstances; and they did so without being bothered that the existing regime might oppose such measures. Thus they grabbed the *pouvoir constituant* for themselves instead of seeing themselves as its mandatees. During the discussion of the orders of July 1830 – which had been initiated on the strength of this position and had led to the outbreak of the revolution and to the overthrow of a sovereign kingdom – Minister of Justice Chantelauze remarked in his report that Article 14 did not give the king the authority to change the constitution, but only to secure and protect it against amendments, and that the current situation [*Sachlage*] made the expression of such a *pouvoir suprême* necessary. But it was immediately obvious that the bearer of a sovereignty thus understood could only be interested in maintaining the status quo. The report stated, further, that one was allowed to transgress the legal system in order to preserve the spirit of the constitution. A *pouvoir constituant* that belonged to the king as opposed to the people was also discussed.[37]

The decrees of 26 July 1830 – 'the *coup d'état*' – ordered restrictions on the freedom of the press, the dissolution of the Chamber of Deputies, and an amendment to suffrage (if these are relevant here). On 27 July riots broke out in Paris and the National Guard sided against the king. On 28 July 1830 the city of Paris was for the first time declared to be under siege – by royal order and 'with reference to Articles 53, 101, 102, 103 of the decree of 24 December 1811'; the justification was that internal riots throughout 27 July had disturbed the tranquillity of Paris. Even here, in a declaration of state of siege, the military nature of the event was evident; initially the suspension of civil liberties was not related to the state of siege, but to the royal orders issued on the basis of Article 14 in the interest of state security.

The purpose of the revolution of 1830 was a constitutional government modelled on the English pattern. Article 14 of the 1814 *Charte* recurs in the constitution of 13 August 1830 as Article 13 and in the same form – except that now the King was only supposed to make the arrangements needed for the execution of the laws; it was explicitly added that he himself could never suspend the laws or give

a dispensation for their execution. The state of siege is not mentioned in this constitution. It was declared by royal order as early as June 1832, and it was directed against two movements completely different in their political character, which nevertheless had a common enemy: the liberal bourgeoise. These movements were the royalist rebellion in the Vendée and the proletarian uprising in Paris. The bourgeois parties back then made no objections to the state of siege.[38] A royal order of 1 June 1832 declared three *arrondissements* [districts][39] to be under siege, on the grounds that it was necessary to suppress the insurgent movement in these areas quickly and by all legal means; the minister for domestic affairs and the minister of war were entrusted with the execution of the order. The law of 3 June 1832 declared squarely, without any particular justification, that the communities of several provinces were under siege.[40] A third order, of 6 June 1832, declared Paris under siege,[41] but with an addendum not to be found in the other orders, stating that no changes should be made to the commando and to the service of the National Guards. The raid on public and private property, the killing of members of the National Guard, infantry [*Linientruppen*] and public officials, and the need to maintain public security by forceful means were mentioned by way of justification. At that date all the civilian authorities retained their functions, but in fact this was only because the government had ordered it. The instruction that the commander of Paris received from the minister of war stated that, owing to the state of siege, the military commander could exercise all the functions of civilian authorities, be they administrative or judicial; however, the intention of the government was to allow military jurisdiction to step in only in special instances, related to the rebellion – and certainly for offences committed by the press. There was to be no interfering in the business of ordinary authorities. The government endeavoured 'to restrict the state of exception to the rebellion', and none of the citizens not involved in it were to have their general rights and liberties impaired. Here one sees plainly how the instrument of unconditional military action – the commissary dictatorship – could become a legal institution [*Rechtsinstitut*] regulating the state of siege. As fitted the constitutional [*rechtsstaatlich*] character of this citizen monarchy [*Bürgerkönigtum*], one attempted to restrict the military chief's sphere of authority by limiting not just

its prerequisites, but also its legal content. No longer could a certain district be placed outside the constitution; nor could the unlimited power of the state be exercised directly – not even over a limited perimeter and duration. Yet the exercise of a commissarial mandate had the typical effect of eliminating and compressing legally limited duty, thereby impairing, at least in part, the regular separation of duties and the legal protection it offered. Now, according to the new state theory, the civil servant had no right, *vis à vis* the state, to exercise his duties and responsibilities, and the citizen had no automatic journalistic entitlement to claim that spheres of duty, as regulated by law, remained unchanged. But the most striking disposal of a constitutional right was embodied in another effect: the fact that the citizens' legal protection was impaired when judicial duties were suspended through commissarial actions and summary process, and when legal remedies were abolished. According to Articles 53 and 54 of the constitution of 1830, it was guaranteed (as it had been under previous constitutions) that nobody should have his or her 'natural' judge revoked, and that extraordinary courts or commissions were not permitted. This constitutionally recognised right to a natural – in other words lawful – judge could not be put to sleep with the idea – or rather poor excuse for one – that the military commission had become a legal judge simply as a result of the state of siege (an idea that rapidly made inroads even at the time). The court of appeal [*Kassationshof*] was then holding the view that Article 103 of the decree of 24 December 1811 contravened Articles 53 and 54 of the constitution of 1830.[42] A right guaranteed through the constitution appeared here *tout court* as an obstacle to military action. Therefore it must of necessity follow that other constitutional rights also opposed military action.

The National Guard, whose responsibility in the 1832 declaration of a state of siege in Paris was expressly protected, fought with fierce zeal against the rioters of 1832 – that is, against the revolutionary proletariat. In June 1848 the same situation arose: the state of siege, declared by the National Assembly of 24 June 1848, aimed to protect private property and the civil constitution. Paris was placed under siege (*Paris est mis en état de siège*). Moreover, General Cavaignac was invested with *executive* authorities. The petition had requested that all

the powers (*tous les pouvoirs*) be passed on to him.[43] But a transition of the power of enforcement [*vollziehenden Gewalt*] was not justified by its restriction to executive functions [*Exekutivbefugnisse*], in the sense that the military commander had received only the sum of the functions normally given to civilian authorities, while it was clear beyond a shadow of a doubt that the general had no legislative powers. In view of the state of siege and of the power vested in him as supreme commander of the capital's armed forces, Cavaignac issued a number of orders (*arrêtés*): banning posters that did not come from the government; disarming National Guards who did not respond to the call to defend the Republic; executing, in 'court-martial' style, anyone caught working on the barricade (such people had to be treated as if they had been caught with a weapon in their hand); cross-examining persons arrested on account of their involvement in the riots of 23 June – this had to be done through officers at the court-martial of the first military division, who had to report back; and prosecuting all the crimes and assaults committed in the area of Paris under the management of the military authority.[44] On 28 June the National Assembly delegated the executive power to Cavaignac under the title of president of the council of ministers. He took over the government and appointed the ministers. The state of siege was suspended on 19 October 1848 through a resolution of the National Assembly.[45]

The events of the year of 1848 led to a legal regulation of the state of siege that marked a final stage in its development. The regulation concerned only the political – the so-called fictional – state of siege and addressed two questions: the responsibility for its declaration, together with the conditions that would suffice for it; and – at the next stage – the content of the authorisations granted to the military commander. It is immediately obvious that the matter of a provision concerning the sufficient conditions or the responsibility (whether it befell the parliament or the government) failed to touch the kernel itself – which, according to the analysis so far, should be called dictatorship. The attempt to define the content of powers of the military commander is even more interesting. The law of 9 August 1849 on the state of siege retains the existing regulation for the military state of siege. The real problem with the provision of a political state of siege was perceived to be the suspension of liberties guaranteed by the

constitution. The law embraced the principle that all citizens, despite the state of siege, retained their constitutionally guaranteed rights insofar as the latter were not suspended through a special provision of the law (Article 11). Therefore the provision had to make sure to list certain rights, which were to be suspended at the very moment when the state of siege was declared; in other words, these rights no longer constituted a legal impediment to the concrete measures taken by the leader of the army. Nevertheless, the legal regulation went beyond this simple denial of rights, to delimit the leader's powers also in an assertive fashion. Up to this point, the most controversial question was that of military jurisdiction; and it was resolved by deciding that the constitutional guarantee of a natural judge could be suspended. At the same time, the void resulting from this suspension was filled by making more detailed provisions concerning the composition of the extraordinary courts and their responsibilities. Here once again the suspension of a right combined with a positive regulation for the state of exception. Likewise, other functions of the military leader were listed: undertaking house-to-house searches; banishing suspicious persons; confiscating weapons and ammunition; prohibiting dangerous publications and meetings. Thus the permissible intrusions – into personal liberties, into the freedom of the press, into the freedom of assembly, and, as far as arms and ammunition were concerned, into private property – were clearly defined. But the military chief was not allowed to interfere with other civil rights and liberties warranted by the constitution of 1848, such as private property, freedom of conscience and of expression [*Kulturfreiheit*], freedom to work, and the right to ratify taxation.

With this law the development [of the state of siege], insofar as it presents fundamental historical aspects, comes to an end. The legislative details of later provisions need not be discussed here any further. The crucial fact is that the authorisation to take an action that the given situation necessitates has been replaced by a number of limited functions. It is no longer the constitution as a whole that is suspended, but rather several concrete constitutional liberties; nor are these suspended without qualification, but only by naming the permissible intrusions. However, the fundamental distinction between a military and a political state of siege already indicates that, in reality, the aim

of this regulation was to give the military chief some far-reaching functions pertaining to police security that were not yet contained in the transition of executive power. By contrast, direct action was not yet recorded. The distinction between a military and a political state of siege was discussed for the first time in 1829, together with the labelling of the latter as a fiction.[46] The political state of siege was called a fiction in order to express the fact that here, unlike in military operations, there was unconditional freedom of action. Consequently particular rights were removed – in the beginning, the right to a *juge naturel*; then personal freedom and the freedom of the press – without considering that the actions of the military commander depended on the enemy's resistance and on the nature of his combat and intervened in the life and property of political enemies. According to current legal conception, however, with the declaration of the state of siege these enemies did not cease to be citizens and to have constitutionally guaranteed rights to freedoms. The military commander had to impair the civil liberties of non-participatory citizens whose person or property was within the scope of the military action. While these frequently cruel interventions were not mentioned, the authority to suppress a newspaper was discussed and analysed in detail, until the historical significance of what was really going on was overshadowed by arrangements for a police security. And, while there was an attempt to limit the powers and functions of the military chief, it went without saying that the powers and functions of the Constituent Assembly, as bearer of a *pouvoir constituant*, were unlimited and not bound to constitutionally guaranteed liberties. A decree of 27 June 1848 decided, *par mesure de sûreté générale* [as a measure of general security], the deportation of all the persons who had been arrested on the grounds of participating in the insurgency; it also ordered that inquests against the leaders of the insurgency should be continued through court martial, even after the suspension of the state of siege.[47] There was, accordingly, one place where an unlimited power could in principle appear; and the *pouvoir constituant* was the basis for this. But its exercise was not left to the technical–practical [*sachtechnisch*] discretion of the military commander; this power was a prerogative of the Constituent Assembly, and it was delegated to the military commander only through a mandate from this Assembly. Dictatorship,

which was so much talked about, was no dictatorship of the military leader; it was rather a case of sovereign dictatorship exercised by a Constituent Assembly. The military leader was its commissarial appointee.

In Roman law as well as in the literature on natural law – and especially in Locke, the uncompromising representative of the legal state – the right over life and death appeared as the most important expression of an unlimited authority. But in the nineteenth century, when dictatorship was mentioned, one understood by it the so-called fictional state of siege; and when one tried to capture the legal concept of dictatorship, the discussion turned to topics such as the freedom of the press – but not to the countless people who had lost their lives, in reality and not just in fiction, on the two sides of the civil war. This state of things was due to a peculiar incapacity to distinguish between the content of a commission of action and a legally regulated procedure. We could perhaps be excused if, for the sake of illustrating and clarifying this distinction, we shall anticipate a debate that took place elsewhere and refer to Article 48 of the German constitution of 11 August 1919, which regulates the state of exception. We shall do this because Article 48's provisions concerning the state of exception illuminate its historical development in as much as they cannot be understood without this development. According to paragraph 2 of this article, when public security and order were considerably disturbed or threatened in the German Reich, its president [*Reichspräsident*] can take the measures needed to restore them and, if necessary, he can be assisted by armed forces. Here lies the authorisation for a commission of action unlimited by law: the president himself decides the conditions in which it should take place (although he does so under the control of the Reichstag, as regulated in paragraph 3 and in Article 50), and its actual execution has to be carried out by a commissary body. So this clause indeed records a clear case of a commissarial dictatorship – an authorisation for unconditional action that is certainly unusual according to the legal conception of the state so far, if one regards it as an automatically valid right, without waiting for the law on the state of exception, which is envisaged in paragraph 5 but still needs to be enacted. The president of the Reich can then take *all* the necessary measures when, in his judgement, they are necessitated by the

concrete circumstances. Therefore he can also – as Reich's Minister of Justice Eugene Schiffer admitted in the National Assembly[48] – use poisoned gas against cities if, in a given case, this is the necessary measure for the restoration of security and order. There is no restriction, just as there are no hints as to what one needs in order to accomplish an end in a given, concrete situation. But one must bear in mind that, if this unlimited authorisation should not signal the dissolution of the entire existing legal system [*Rechtszustand*] and the transferral of sovereignty to the president of the Reich, these measures are always no more than concrete ones; as such they are neither acts of legislation nor acts of judicature [*Rechtspflege*]. Schiffer, the Reich's minister of justice, concluded from here that in Article 48 no specific restriction is defined and that the empowerment is unlimited. But the conclusion itself applies only to concrete measures; where the legislature and the administration of justice are concerned, it only applies through positive provisions of the constitution – as the minister assumed them to be, invoking comments made by the correspondents Delbrück and the Count of Dohna in the session of 5 July 1919. An intervention into the sphere of constitutionally guaranteed freedoms is always of a concrete nature. Should every arbitrary act of the legislature also come under the general fiat of Article 48, then this article would amount to an unlimited delegation, and it is inconsistent to claim that this would not suspend the constitution: the interpretation that the monarchy of the Restoration gave Article 14 of the French constitution of 1814 suspended that constitution in exactly the same way. The only difference is that in that case the king claimed a sovereignty understood as an extraordinary and unlimited plenitude of power, whereas now the president of the Reich, or rather the parliament (in view of the control it has over him), decides an unlimited state of exception. Thereby the president or the Reichstag would become the bearer of a *pouvoir constituant*; and the constitution would remain a precarious and provisional arrangement, being part of the constituted order. The president of the Reich could accept such authority on the basis of a mandate from the Constituent National Assembly, if one is to view its members as bearers of a *pouvoir constituant* and the president as their commissar. Such a construction would be conceivable according to the constitutional law of Western European states. The result would

be, however, that his mandate comes to an end with the establishment of the National Assembly. By contrast, the Reichstag would certainly not be in a position to mandate such unlimited commissions, since it is a *pouvoir constitué*.

The contradiction implicit in this positive regulation of Article 48 becomes apparent when – again, under the impact of historical developments along this line and in the aftermath of a general empowerment to action – the article itself stipulates further that, for *this purpose* – namely for the restoration of public security and order – the president of the Reich is entitled temporarily to suspend, completely or in part (!), the following basic rights adopted in the following articles of legislation (and the period of time is not sufficiently defined): personal freedom, Article 114; domiciliary rights, Article 115; privacy of letters and post, Article 117; freedom of the press and censorship, Article 118; freedom of assembly, Article 123; freedom of association, Article 124; and private property, Article 153. In contrast to the unlimited power granted in the previous sentence, the power here is limited through the listing of those basic rights that can be interfered with. According to the previous analysis, the enumeration does not indicate a delegation of legislative power, but only an authorisation to concrete action, on the strength of which obstructing rights can be disregarded in the concrete case. The basic rights listed are, however, numerous, and their content is so general that the authorisation is barely circumscribed – although it's missing, for example, in Article 159. Nevertheless, to grant, first, an authorisation on the basis of which the entire established legal situation can be suspended, including for example Article 159, and then to list a certain number of fundamental rights that can be suspended remains a peculiar regulation. It is absurd to reassure the president of the Reich that he can, say, allow the official authorities to ban newspapers when he can theoretically advance against cities with poison gas and threaten the death penalty or allow extraordinary commissions to impose it. The right over life and death is *implicite* [implicit], the right to suspend the freedom of the press is *explicite* [spelled out].

These contradictions are not conspicuous in the German constitution of 1919 because they are the result of a combination of sovereign and commissary dictatorship, and therefore they are parallel to the

entire development in which this confusion is implicitly contained. There is only one explanation for the remarkable circumstance that the development is dominated in its entirety. In the transition from princely absolutism to the civil legal state, it was taken for granted that the solid unity of the state had finally been secured. Tumults and riots could disturb the security, but the homogeneity of the state would not be seriously threatened by social factions within it. If an individual or group of individuals is to disturb the legal order, this is an action whose counteraction can be calculated and regulated in advance – just as the civil and criminal procedural execution defines with precision the scope of its instruments of power, and that is the legal regulation of its procedure. It may be that the goal to be achieved is jeopardised by such a limitation. When the accredited measures of execution are exhausted, the coercion of the guilty fails. Binding, whose strong sense of justice must have been most outraged by this, expressed it thus: 'The guilty ridicules the right.' But this ridicule does not threaten the unity of the state and the existence of the legal order. The execution can be regulated according to a legal procedure, as long as the enemy is not a power that throws into question this unity. That was the historical value of an absolute monarchy, at least for the constitutional liberalism of eighteenth- and nineteeth-century continental Europe: it destroyed the feudal powers and the power of the estates and, by so doing, it created a sovereignty in the modern sense, of unity of the state. The endeavour of isolating the individual and of eliminating any social group within the state, so that the individual and the state may stand in opposition to each other, was emphasised in the exposition concerning the theory behind legal despotism and behind the *Contrat social.* In his speech on the republic, Condorcet, who here as well was the soul of his time, declared why he had ceased to be a monarchist and became a republican:[49] today we are no longer living in a time of powerful groups and classes within the state; the *associations puissantes* [powerful associations] have disappeared. As long as they existed, an armed despotism (*un despotisme armé*) was needed in order to keep them down. Today, on the other hand, individuals, isolated as they are through the equality of all, confront a uniform collectivity; one needs only a few instruments of power [*Machtmittel*] to force them into obedience – *il faut bien peu de*

force pour forcer les individus à l'obéïssance. If this is really true, then one can also regulate the so-called political state of siege just as in a civil or criminal procedural execution. One can outline the instrument of execution and thereby establish guarantees of civil liberty. Then the state of siege is indeed fictional. But, if this is not true, then powerful associations will emerge again in the state and the whole system will collapse as a result. In the years 1832 and 1848, which constitute the most important date in the development of the concept of the state of siege towards a legal institution, the question arose concurrently whether the political organisation of the proletariat and the counter-action to it had not created a completely new political situation and, together with it, new concepts in constitutional law.

Nevertheless, the concept of dictatorship, as it was formulated in the claims of the dictatorship of the proletariat, was already available in its theoretical specificity. In the beginning, as one might expect, the idea adopted by Marx and Engels made use only of the political catchphrase common at the time: it had been used since 1830 to label different people and abstractions – one talked about the dictatorship of the Lafayettes, of the Cavaignacs, or of Napoleon III just as one talked about the dictatorship of the government, of the street, of the press, of capital, or of bureaucracy. But a tradition, starting from Babeuf and Buonarotti and leading up to Blanqui, had also passed on a clear idea, from 1793 until 1848, and not just as a sum of political experiences and methods. It must be left to a separate investigation to show how the concept developed, in systematic correlation with the philosophy of the nineteenth century and in the political context of the experiences of the First World War. But at this point one may indicate that, from the perspective of a general theory of the state, the dictatorship of a proletariat identified with the people at large, in transition to an economic situation in which the state is 'withering away', presupposes the concept of a sovereign dictatorship, just in the form it stands at the root of the theory and practice of the National Convention. What Engels required for his 'praxis', in his address to the League of Communists in March 1850, also held for a political theory of the state of this transition to statelessness [*Staatlosigkeit*]: it was the same situation 'as in France 1793'.

Appendix*

The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution

I

Today's prevailing interpretation of Article 48 of the Weimar Constitution

According to a general view no longer under debate today, Article 48, §2 of the Weimer Constitution institutes a prevailing right. The functions of the president of the Reich, which it contains, are not dependent upon §5 of the constitutional law [*Reichsgesetz*], which still has to be enacted. Therefore the president of the Reich can, in conformity with §2, take all the measures he deems necessary for the restoration of public security and order when these are seriously threatened. The common interpretation of §2 today attempts, however, to restrict the functions of the president of the Reich by declaring that the constitution is 'inviolable' insofar as sentence 2 of Article 48, §2.2 does not list certain provisions that can be suspended.[1] The wording of sentence 2 – 'For this purpose he [*sc.* the president of the Reich] may temporarily suspend the constitutional rights, in part or in whole, as they are defined in Articles 114, 115, 117, 118, 123, 124 and 153' – seems to

* Translators Note: Carl Schmitt refers frequently in this appendix to official protocols of the sessions of the German Reichstag and the National Assembly. Unfortunately, the access to these protocols is rather complex and sophisticated. For this reason the Bayrische Staatsbibliothek in Munich has provided an accurate digitalised database of these reports, protocols and appendices online (http://www.reichstagsprotokolle.de). This database is now the ultimate authority on these documents. We have given the web address alongside the bibliographical details given by Carl Schmitt whenever possible.

demonstrate that other articles cannot be infringed. Every enumeration is, by logical necessity, a restriction, because it excludes whatever is not enumerated. *Enumeratio ergo limitatio* [listing, hence limiting] is an old and correct inference. But the question is, in what direction the restriction is deployed, and whether the list in the second sentence is really meant to impose a restriction on the first. The common interpretation has not raised this question in any way. Yet its theortical success has another reason too – apart from that plausible inference from listing to limiting. One would hope to have found, in Article 48, §2.2, the text of the law that repositions the Reich's president, with precision and clarity, within constitutional boundaries. In consequence, the common interpretation has another advantage, quite apart from its seeming logical simplicity: it corresponds to a constitutional [*rechtstaatlich*] desideratum that demanded, urgently and undeniably, a limitation of the extraordinary authorisations of the president of the Reich.

The practical implementation of the state of exception

In reality, however, the Reich's president's and the Reich's government's[2] practical handling of Article 48, §2 also encroaches upon articles of the constitution other than those listed in Article 48, §2.2, and it shows no tendency to stop within the limits fixed by the prevailing interpretation. Nor indeed can it stop there; for an effective state of exception would become an impossibility if, apart from the seven basic rights enunciated in sentence 2, every article of the constitution could raise an insurmountable obstacle to the actions of the president of the Reich. But this simple truth is concealed by a host of multifarious considerations, in some constitutional articles that are not enumerated and are infringed anyway, on the basis of Article 48, and with general approval. For example, the first measure related to that listing that ought to have attracted attention concerned the establishment of extraordinary courts. They were established, although Article 105 of the constitution – 'extraordinary courts are not permissible. Nobody must be deprived of his statutory judge' – did not belong with the fundamental rights that could be suspended. This is all the more remarkable as the typical provisions for the state of war or siege – for example the Prussian law of 4 June 1851 –

otherwise declared that the constitutional guarantee of a statutory judge could be suspended, in order to make courts-martial possible in the state of siege. Historically, the suspension of this basic right in particular marks a decisive moment in the development of the idea of suspending [*außer Kraft setzen*] basic rights.[3] The supreme court of the German Reich ruled that the extraordinary courts under Article 48 are permissible, and it referred to the third sentence in Article 105, which explicitly reaffirmed the provisions for courts-martial and drumhead trials; and these included, in its view, all the extraordinary criminal courts of the state of exception. Hence there would be no question of infringing Article 105. It seems to me that this reasoning is incorrect. The issue is, however, very unclear.[4] It all turns on finding an example to show us how the real question – the question of whether the Reich's president can infringe articles of the constitution other than those seven enumerated – can be circumvented. In the case of Article 105 – and also in the case of others, for example those concerning regulations that interfere with the freedom of trade and commerce and involve closing shops and businesses (that is, regulations pertaining to Article 151) – one availed oneself of the fact that the provisions of the president of the Reich were interpreted as a constitutional regulation because they had the character of 'law'. And they, alongside other constitutional regulations, first gave basic rights their positive content.[5] But why doesn't this also apply to those seven fundamental rights that can be suspended – the rights enumerated in Article 48, §2.2, in which the general guarantee is declared only in accordance with the law, or with constitutional law?[6] A regulation issued by the president of the Reich for the non-itemised Article 151 created a legal situation that is ultimately identical with, say, that of the itemised Article 115: on the basis of Article 48, the president of the Reich gives both articles their defining content, so that they no longer harbour restrictions hindering his actions. Why, then, does sentence 2 pays the honour of an enumeration, and in particular an enumeration with such restrictive implications, to exactly those seven fundamental rights?

Difficiencies in the prevailing interpretation of the practice of the state of exception

However, the real difficulty with the prevailing interpretation lies at a deeper level. Why is it that the president of the Reich, according to Article 48, §2, can issue provisions that have the force of law? For the most part, one refers here – and this is absolutely justified – to certain remarks that were made in the Constituent National Assembly; hence one refers to a history of origins. The remarks in question concern sentence 1 and do not mention sentence 2. We will discuss this in greater detail later. But, whatever the history of origins may be taken to indicate, one ought to assume that, if no article of the constitution can be infringed apart from those seven basic rights, the president of the Reich is not authorised to make any legal provisions at all; for the constitution defines the procedure of legislation in Articles 68 and following, and it would be an essential interference with this regulation of the constitution and it would infringe it if, in addition to the sole legislator mentioned in the constitution, a second one should be installed – one equal to him and in competition with him on the basis of equal status. One cannot argue that one is dealing here with legal provisions [*Rechtsverordnungen*] to which the formal procedure of the legislation does not apply, because legal provisions need authorisation through a formal law. If now one wished to respond that the constitution itself, in its Article 48, §2, gives the required authorisation, then that would lead to a remarkably circular argument – because the real question is how far-reaching the authorisation of Article 48, §2 is, and how the prevailing interpretation restricts sentence 1 – which gives the authorisation – through the listing in sentence 2 and does not allow the president of the Reich to deviate from any non-itemised provision in the constitution.

Here it becomes apparent that the prevailing interpretation of Article 48 breaks down in front of any practical attempt to carry out the state of exception. On the prevalent interpretation, the exceptions that this state entails should never be exceptions from constitutional provisions, unless one dealt with those seven basic rights. Any state of exception brings with it certain encroachments upon the hierarchical [*organisatorisch*] structure of the constitution, yet it seems that these have not been paid any heed at all. But such encroachments occur in

essence as soon as a typical instrument in the state of exception comes into play: the transition of executive power. The government of the German Reich used the transition of executive functions as an instrument of the state of exception right from the start: it did so partly by suspending articles of the constitution (initially through the law of 11 and 13 January 1920) and partly without a suspension (through the decree of 22 March 1920). The concentration of power implicit in the transition of executive power – that is, in the concentration of functions in the hand of the Reich's president or of his civil or military commissars – alters all those constitutional provisions that control the functions in question; worse, it breaks the entire system through which functions are being distributed, essential as such a system is to a federal constitution. One cannot reasonably deny that the constitution is being violated when, in a Reich that is, by constitution, a federal state, federal state authorities [*Landesbehörde*] are subordinated to a civil commissar of the Reich – or, during a military emergency, to a commander of the regular army [*Reichwehrkommandeur*] as chief military commander. It obviously does not comply with the Reich's constitution that the Reich's president is the chief of the federal state authorities, or that Thuringia is governed by Stuttgart and Hamburg by Stettin. 'The military state of exception, which concentrates all aspects of power in the hand of the Reich', is, as the government of the German Reich affirms,[7] indispensable. How could one carry out such a concentration without infringing the constitution, when the latter rests on the principle that state power is distributed between the Reich and the individual states [*Länder*]? Again, this does not affect only Articles 5, 14, 15 and others, but also the fundamental organisation of the Reich itself. This came palpably to light in the Reich's actions against Thuringia and Saxony, as decreed by the president of the Reich on 26 September and 29 October 1923: the normal distribution of responsibilities among the Reich and the federal states is entirely suspended; the sovereign rights of the federal states are encroached upon; officials of the federal state authority have to follow instructions from the military chief, who reserves the right to intervene even when members of the municipal and federal state authority staff are dismissed; the criminal police department is subordinated to the regular army; in Thuringia school closure is compulsory on

penance day, and schools are extensively controlled; the free economy is interfered with through confiscations; and more.[8] The decree of 29 October 1923 (*Reichgesetzblatt* [*RGBl*], 1, p. 955) states that, over the entire period in which this regulation is in effect, the chancellor of the Reich has the authority to dismiss ministers from the federal government of Saxony as well as federal and municipal authorities in that state and to appoint other people to manage those jobs. Heinze, commissar of the Reich, subsequently declares that the ministers of Saxony are herewith dismissed from their offices. Civil servants were charged with running the business. While 'in the exercise of executive power', Lieutenant General Müller, commander of the local army [*Wehrkreiskommandeur*], ordered: 'for the time being the assembly of the federal state [*Landtag*] does not convene' (ibid., p. 981). In principle, the dissolution of the government of a federal state by a commissar of the Reich and the suspension of the assembly of a federal state infringe the federal organisation of the Reich. Furthermore, in that specific configuration, they infringed Article 17 of the constitution of the Reich [*Reichsverfassung* – henceforth RV], and the arrest of members of a federal state assembly could be a violation of Article 37, just as the dismissal of officials could be a violation of Article 129. On the prevailing interpretation, one must declare this whole procedure unconstitutional.[9] However, here again, one could try to conceal it by relating the procedure to paragraph 1 of Article 48 – namely the executive power of the Reich [*Reichsexekution*] – rather than to paragraph 2.[10] It would be an abuse to eliminate the restrictions defined in Article 15 RV by applying unreservedly the concept of the executive powers of the Reich. Beyond doubt, the government of the German Reich uses the military emergency as an instrument, in order 'to create a case for the *executive* powers of the Reich during situations of high tension'. That should not lead to confusion among jurists with the executive powers of the Reich. Otherwise it is a riddle how one will manage to establish such an executive power of the Reich without infringing articles of the constitution other than those seven. Here again, it would be impermissible to save the prevailing interpretation through a circular argument: there is no violation of the provisions of the constitution, because the constitution itself grants the authority, in its Article 48. For it should be ascertained with precision how

far-reaching the authority granted in Article 48 is; and an interpretation that, in order to limit that authority, uses the enumeration of the seven basic rights of sentence 2 as a lever relinquishes an *enumeratio ergo limitatio* argument of its own and thereby jeopardises itself when, for any reason, it expands that authority so much that even the non-enumerated provisions of the constitution not listed in the article can be violated.

Governmental declarations concerning Article 48, §2

It would have eased the interpretation of Article 48, §2, if the government of the Reich had offered a clear ground for its own actions. Unfortunately this is not the case. In official and quasi-official explanations, ministers of the Reich have commented upon the article in different ways, so that a precise position on it is not discernible. Maybe no government has any great interest in attaining juridical precision on a matter like the state of exception. The following fact should be highlighted as characteristic: according to a declaration of 5 October 1919 that was signed by Bauer, then chancellor of the Reich (*Reichskanzlei* [RK] 9267 to No. 1097 of the Constituent National Assembly), the enumeration of articles of the constitution in sentence 2 would only amount to a list given by way of example; it does not imply any restrictions. 'In conformity with this prescription [*sc.* Article 48], the president of the Reich is authorised to take the necessary measures: in particular, he can temporarily suspend constitutional basic rights and, if required, he can intervene with help from the armed forces.' The declaration adds that, as long as the constitutional law yet to be passed does not limit the functions of the president of the Reich, these functions are unlimited within the framework of Article 48. A statement frequently quoted is that made on 3 March 1920 by Schiffer, the Reich's minister of justice, in the 147th session of the National Assembly (*Stenographische Berichte* [*SB*], vol. 332, p. 4636)*: according to this statement, on the basis of

* [Translators' Note: Bayerische Staatsbibliothek Münchener Digitalisierungszentrum/Referat Digitale Bibliothek gives an online and free database of all digitalised protocols: http://www.reichstagsprotokolle.de. The web address as recommended by the database is: http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000016_00304.html (Verhandlungen des Deutschen Reichstages

Article 48 the president of the Reich can take all sorts of measures – legislative and administrative, as well as purely factual ones – but not those that suspend or abolish the constitution, because such measures are only possible according to sentence 2; sentence 2 is an extension of sentence 1. On 7 July 1923, in the 377th session of the Reichstag (*SB*, p. 11741),* Öser, the Reich's minister of internal affairs, without addressing the problem of legal principle, states that the immune rights in Articles 36, 37 and 38 RV are privileges to be taken for granted by all the members of parliament and cannot be limited, not even through 'emergency regulations' [*Notverordnungen*]. On 30 October 1923, around the campaign against Saxony, the *Deutsche Allgemeinen Zeitung* published what looked like a quasi-official account of the Reich's government's legal views, which declared:

> It is only permissible to suspend some of them [*sc.* the basic rights]. Further restrictions result from the fundamental provisions in the constitution. But within these boundaries the president of the Reich is entitled to issue any provision he deems necessary for the restoration of security and order. He can suspend laws or proclaim new laws, deploy the armed forces, take economic and financial measures and so on. No provision in the constitution of the Reich prevents him, in case of emergency, from temporarily suspending ministers in a federal state and from delegating their duties to others. By the decree of 23 March 1923, this procedure was already practiced against Thuringia. Among these measures that the government of the Reich can take on the basis of Article 48, the heaviest is that of the *executive* branch of the Reich [*Reichsexekutive*].

Finally, it should be mentioned that on 2 January 1924 Marx, chancellor of the Reich (*Drucksache* [= ?], No. 6412), spoke in the Reichstag about the guarantee to electoral freedom in Article 125 RV and, without explicitly referring to the enumeration in §2.2, he emphasised that this constitutional provision cannot be suspended, not even by Article 48.

[Reichstagsprotokolle]. Nationalversammlung, 147th session, 3 March 1920, vol. 332, pp. 463–7)].

* [Translators' Note: Reichstag 377, 7 July 1923. At http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000044_00764.html]

The need for a thorough examination of Article 48, §2

Such statements by the government of the Reich seem to comply with the prevailing interpretation of Article 48, §2. But they do not contain a detailed legal comment, and they carefully avoid using any word other than 'to suspend' [*außerkraftsetzen*] or 'to abolish' [*beseitigen*] the constitution. The statement made by Schiffer, the Reich's minister of justice, on 3 March 1920 seems mostly to correspond to the prevailing interpretation; but it does not explain what 'suspension' means. Furthermore, this statement emphasises that, in the deployment of actual measures, everything is possible and the president of the Reich can attack cities by using poisonous gas and suchlike, so that, given this actual absence of limitations, the practical meaning of the constitutional restriction remains unclear: when the president of the Reich decides on life and death in such manner, according to sentence 1, the restriction deduced from sentence 2 becomes an empty formality and is, in its substance, meaningless; when he, *vi armata* [with armed force], orders the shooting of all journalists, editors and newspaper printers and can flatten all printworks, there is really no need to reassure him that he is authorised to ban newspapers. When this is done explicitly, by listing the freedom of the press as a suspendable right, there must be some specific meaning to it. There is one key problem that is not answered in any declaration of the government – namely why encroachments on the organisation of the Reich and in particular on the transition of executive power, which on the face of it count as being legitimate after all, should be legitimate in spite of their inevitable collision with the provisions of the constitution. In view of this unsatisfactory *status quaestionis* [*Problemlage*] – a perfunctory and sweeping claim, a contradictory practice related to it, and government declarations that do not take a clear position on the legal difficulty – one needs to examine more closely the wording of Article 48, §2 and the history of its origins in order to understand its content. Paying heed to the history of its origins is in fact mandatory. The fact that it is appealed to here should not mean that any of its arbitrary statements or any of its numerous protagonists is given as authoritative. Especially the discussion of the state of exception shows, on occasion, a striking lack of constitutional perspective and is frequently dominated by the most immediate

political lessons and agendas. But the emergence of the text in its current form and the reasons for its integration into the constitution must be fully examined in their historical context, so that the comments on the exact words do not get lost in a sophistry of linguistic technicalities. It is commonly accepted that Article 48 was already an established law and that the president of the Reich already had the authority deriving from Article 48, §2 before the implementation of the constitutional law proposed in §5. But it is not the wording of Article 48 that reveals automatically why this is so; the history of its origins does this in the first place – the explanations from reporters whose reading is rightly seen to be of crucial significance. This is true in particular of the comments made by two members of parliament, Clemens von Delbrück and the count of Dohna, in the sessions of the National Assembly of 4 and 5 July 1919. On these occasions there was no doubt that the president of the Reich should hold the extraordinary responsibilities immediately, right from the implementation of the constitution. If those comments are decisive in answering the question about the relation between §2 and §5 of the article, then one ought not to ignore them – as happened so far – in the interpretation of §2, and especially of the relation between sentence 1 and sentence 2. Besides, it would be fundamentally flawed to attempt to investigate a constitutional provision for the state of exception that deliberately held back a detailed regulation, without any concern for the abnormal state of affairs in 1919. And it would also be fundamentally flawed to ignore the conclusions that the founding fathers of the constitution have drawn from this state. The current situation is definitely not normal enough for one to do so with good reason.

The wording of Article 48, §2

At first glance, both sentences of Article 48, §2, in the current version, are somehow twisted and dislocated, because the beginning of the second sentence ('for this purpose') does not connect smoothly to the end of the first sentence ('to intervene with the assistance of armed forces'). A history of origins easily explains this. In §63, Preuß's draft of 3 January 1919 granted the president of the Reich the authority to take any measure in order to restore public security and order. 'The president of the Reich can [. . .] step in with the assistance

of the armed forces and take the necessary measures for the restoration of public security and order.' The second sentence, in which it is declared that certain fundamental rights can be suspended, has only been added by the assembly of the federal states [*Staatenausschuß*]. It was simply connected to the first sentence through the words 'for this purpose' and, apart from the enumeration of the basic rights that could be suspended, everything remained unchanged. Thus the president of the Reich can suspend certain fundamental rights 'for this purpose'. Originally the words 'for this purpose' followed the final words of the first sentence, 'to take the necessary measures for the restoration of public security and order'. Following a suggestion by Beyerle, and only in the session of the National Assembly of 5 July 1919 (*SB*, vol. 327, p. 1328),* they put 'the military intervention' in second place in sentence 1; up until then it had been in initial position, but they did not want the most extreme means mentioned first. In other words, the sequence was changed for purely editorial reasons. And this is how the words 'for this purpose' came to follow the words 'the assistance of the armed forces' and to appear to be slightly dislocated. Nevertheless, the meaning is still clear. In consequence, 'for this purpose' does not mean 'in order to intervene with the assistance of the armed forces'. Nor does it mean 'in order to take the necessary measures' (because grammatically, syntactically and logically 'to intervene with armed forces' and 'to take measures' are of equal force). It means, rather, 'for the restoration of public security and order'. If we are to follow both the history of origins and the natural reading of the words, any other meaning is impossible, linguistically or conceptually. The purpose that dominates the whole of §2 is, of course, the restoration of public security and order. To intervene with armed forces, or to take measures, is not an end, but only a means for this end. If one wishes to understand the phrase 'take measures' as the purpose of sentence 2, then that sentence ought to read 'in order to be able to take these measures', and not 'in order to take these measures'. The close relationship that the prevailing interpretation tacitly establishes between sentences 1 and 2 – in order to make a restrictive interpreta-

* [Translators' Note: Nationalversammlung, 47th session, July 1919. At http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00599.html]

tion possible – can in no way be justified by the text. The text only says: 'For the purpose of the restoration of public security and order, the president of the Reich can take measures and he is allowed to suspend certain fundamental rights.'

Perhaps one could understand the very broad and general term 'measures' in such a way that the suspension of basic rights would appear as the taking of a measure. Then sentence 2 would also talk about taking a measure. But in that case, too, the restriction that the prevailing interpretation wants to extend to sentence 1 would also be logically impermissible, because then, again, sentence 2 would only mean this: 'if the measure taken by the president of the Reich consists in the suspension of fundamental rights, then it is restricted to certain fundamental rights, namely the ones listed'. Thus the restriction certainly does not bypass sentence 2, and it never goes so far as to restrict the authorities of the president of the Reich in a general way. The plausible inference from enumeration to limitation is, however, only valid within the framework of a function related to the enumeration; and that function can only be the suspension of basic rights. Its validity does not extend outside the following conditional: 'if the president of the Reich wishes to suspend basic rights, then he can only suspend the basic rights enumerated here'. What he can do without the suspension of basic rights – whether, in order to achieve his goal in an actual case, he can ignore particular provisions of the constitution without suspending them – cannot be decided on the basis of the list in sentence 2.

The meaning of the terms 'suspension'/'to suspend' [*Außer Kraft setzen*]

Conceptually, to suspend a norm means to cancel its validity through an explicit declaration, both for oneself and for any body acting on its authority. In this very precise sense, the word 'suspension' reappears in Article 48, §§3 and 4: the Reichstag can demand that the measures taken by the president of the Reich be suspended. In that instance, to suspend means 'to cancel' and 'to abolish'. It is nevertheless possible, in a real course of action, to ignore a norm (and provisions of the constitution are, basically, norms) or to deviate from it in a specific case without suspending it. Paragraph 1 of the Enabling Act of 13

October 1923 states, for example (*RGBl*, vol. 1, p. 943): 'during this course of action one can deviate from the basic rights guaranteed by the constitution'. This means something other than a suspension of the basic rights, because only the acting organ itself (in the Enabling Act, the government) – and no other body that the specific situation may call for – is allowed to deviate. Suspension therefore has an unambiguous and specific legal meaning. When one violates a legal regulation, one does not cancel or suspend it. The delinquent violates the norm on which criminal law is based, s/he deviates from it, s/he breeches it – s/he does all this without suspending it. But a person who takes exception for which s/he has obtained permission does not suspend a regulation either. In the legalistic idiosyncrasy of its logic, this is most evident in a typical example of exception, namely mercy: the one who pardons takes exception to the norms of criminal law and criminal procedure without thereby intending to suspend these norms. Moreover, the exception should prove the power of the rule. In fact the exception emphasises the unchanged continuation of the norm from which it deviates. By its very definition, an exception is an intervention that does not abolish, bend or suspend the norm. But in Article 48, §2 we encounter exceptions, measures for the state of exception, which interfere with existing law yet are made into permissible exceptions.

In terms of the history of law and the constitution, the development that led to the suspension of fundamental rights confirms the meaning of this concept. According to historical development, only fundamental rights, and not any arbitrary articles of the constitution, can be suspended. This can be explained by the fact that the suspension of basic rights can abolish legal limitations that are set in favour of the citizen and against the authority acting on behalf of the state. Suspension or repeal eliminates these barriers for every acting organ within whose sphere of authority the suspension falls. This is immediately clear in the so-called small state of siege (§16 of the Prussian law on the state of siege of 4 June 1851): here the government suspends certain fundamental rights without a transition of executive power. In other words, there is no change in the formal responsibilities of the governmental bodies and none of the concentration of responsibilities that is intrinsic to the transition of executive power. This, then,

is where the constitutional barrier is lifted, for all the bodies qualified to act as the concrete situation requires. The formal function remains, but the content of that function – what the relevant authority is allowed to do – is extended. Hence the suspension of basic rights achieves the lifting of a legal barrier for all the relevant authorities.[11] But, if the fundamental rights are suspended through the transition of executive power, this means that the person who holds executive power and all the administrative authorities under his jurisdiction are freed from the constraints of fundamental rights, as these are anchored in the constitution. Thus, when Delius states (*Preußisches Verwaltungsblatt*, vol. 36.15: 1915, p. 573): 'Of course, with the loss of the articles of the constitution, the power of the civil administrative is also extended' – he is being essentially accurate. But the holder of executive power can, as a superior, give orders to all the relevant bodies; he can interfere at any stage, and therefore he concentrates all the power in his hand. It is not excluded, as a result, that the suspension of the basic rights, for him as for all the relevant bodies, abolishes the whole legal area in which basic rights are couched.

In the circumstances, the authority to suspend basic rights (with or without the transition of the executive power) implies, conceptually as well as in terms of the history of the constitution, a strange impact on the constitutionally regulated administration of the state. It is a particular way of eliminating legal barriers that are set against the administration – the proactive arm of the state – and that hinder the actions of the state in order to create a wider field of action. To ignore these legal barriers in a particular case differs from suspending them for a certain period of time, either entirely or in part. Therefore the authority to suspend fundamental rights is a particular authority, one that arises side by side with the various other effects of the state of exception. It makes no difference whether the suspension is declared by the holder of the executive power himself, on his own behalf and for the other bodies, or by some other entity. This function simply joins the other one, of managing oneself, as an autonomous function. If one wants to analyse the wording of Article 48, §2 in detail, then one should not overlook the fact – without its having to be given as a crucial argument for this reason – that the phrasing of the constitution is legally correct insofar as, according to §1, the president of

the Reich *can* take measures, whereas according to sentence 2 he is *allowed* to suspend basic rights. The second authorisation, to suspend basic rights, does not follow automatically from the authorisation to take all necessary measures. However, if one wants to call the suspension a measure (and here is not the place to discuss whether this is correct or not), then Article 48, §2 states that, under the category of permissible measures, one is restricted to the listed seven fundamental rights. In other words, any measure that signifies suspension is limited by its very nature. So, for example, a provision that allows the reduction of civil servants in order to promote global austerity, regardless of Article 129 RV, is unconstitutional, because it implies a suspension and Article 129 guarantees rights that cannot be suspended. On the other hand, according to Article 48, §2.1, the president of the Reich can, in a given case, prohibit the exercise of the authority of the Reich, federal state or municipal staff officials and delegate their duties to other people. This is an infringement of Article 129, but not a suspension. The same applies to all other constitutional provisions about basic rights that are not listed, for example the much debated Article 159.[12]

In conclusion, the wording of Article 48, §2 shows that the president of the Reich had a general authorisation to take all the necessary measures and a specific authorisation to suspend certain basic rights – the ones listed there. The restriction only applies to the specific authorisation: if the president wants to suspend basic rights, then he is restricted through the enumeration. As a result, one must restrict the restriction that, according to the prevailing interpretation, should be extended to the whole of sentence 1. In the light of a close analysis of the wording of the article, any attempt to construct, on the basis of the enumeration, a legal barrier not just for suspension, but for any action concerning any other article of the constitution is a deliberate misrepresentation.

History of the origins of Article 48, §2

The result of a thorough examination of the text of the constitution would be most remarkably confirmed by a history of origins. The fact that sentence 2 appears initially in the exclusion of the federal states and is only appended to the general, unlimited authorisation formu-

lated in sentence 1 indicates a particular interest that the federal states had in this provision. One should not forget that, back then, the federal states' governments were completely unmentioned in the provision regulating the state of exception (§63 of Preuß' draft; Article 68 of the first governmental draft). The famous §4 was only accepted and incorporated in the National Assembly on 5 July 1919, following a proposal by Beyerle. The fact that the Reich's president held the power to suspend certain basic rights created the possibility for those official bodies that were in principle in charge – normally the police, and hence the federal organs – to be able to secure public security and order without the president himself having to take action. He could, through suspension [*Ausserkraftsetzung*], abolish [*beseitigen*] the basic rights listed and eliminate their implicit constitutional barriers, and by doing all that he could clear the way for the federal state authorities to take an effective course of action. Thus, when public security and order were under threat, the president of the Reich would not need to take action in person and to interfere in the administrative responsibilities of the federal states. In less complex cases it would be sufficient to suspend the basic rights of the official bodies that were in principle in charge (irrespective of whether they belonged to the Reich or to the federal states). Both in fact and in words, the function resulting from sentence 2 correlates with the so-called 'small state of siege' formulated in the Prussian law of 1851 on the state of siege (§16), according to which the government, even without a transition of executive power, was entitled to suspend certain fundamental rights of the official bodies that were in principle in charge. Therefore sentence 2 makes sense entirely in its original intention, which is also practical today: the president of the Reich has it at his disposal to enable the federal state authorities to take an effective course of action without stepping in himself.

Nevertheless, this idea is not clarified any further in the published documents. Yet one must not ignore a peculiar statement made by Fischer, member of parliament, in the session of the eighth panel of 8 April 1919 (vol. 336, p. 275), to the effect that the president of the Reich may suspend basic rights when the public security is under threat in a *federal member state* [*in einem Gliedstaat*]. The remainder of the discussion revolved mainly around the means of control and,

further, around the question of the fundamental rights that could be suspended; but very little thought was given to the meaning of suspension itself. All the relevant statements show all the more definitely that the authority held by the president of the Reich on the basis of sentence 2 was invariably distinguished from that based on sentence 1. The view of the constitutional panel [*Verfassungsausschuß*] is formulated very precisely in the report of Dr. Ablaß, member of parliament (vol. 336, p. 233),* which says that, in Article 49 (what is Article 48, §2 today), the president of the Reich obtained a completely new function (this marks an opposition to the earlier legislation on the state of war and the state of siege); this is, *first*, the authority to restore public security and order through the use of the armed forces if necessary; 'and *then* the authority' to suspend, possibly, the fundamental rights – entirely or in part.

> *This* authority is very far-reaching. But when we look at the events of our time we find that it is all borne out of the present misery and that it puts in the hand of the president a strong instrument that he will not be able to relinquish under any circumstances. This augmentation of the power of the president I embrace most happily.

In the entire history of origins, this is the clearest statement on the balance between sentence 2 and sentence 1. One cannot express with greater precision the mutual relationship between the two sentences. The Reich's president should be given two separate authorities. All the remaining formulations confirm this intention. Ablaß's co-reporter, Fischer, describes the president's authority as being twofold: he can deploy the army and he can suspend fundamental rights anchored in the constitution (ibid., p. 275). Preuß says (ibid., p. 288): 'The president of the Reich can [. . .] make the necessary provisions and also issue certain regulations that call to mind what was hitherto named the state of siege.' The statements made by two members of parliament, von Delbrück and the count of Dohna, in the 46th and

* Translators' Note: Nachmittagssitzung der Verfassungsgebenden Deutschen Nationalversammlung, 8 April 1919. Aktenstück 391, vol. 336; for Fischer: http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000020_00276.html; for Ablaß: http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000020_00233.html

47th sessions of the National Assembly of 4 and 5 July 1919 (vol. 327, pp. 1304 ff., 1355 ff.),* are equally clear. They became in fact the true source of the interpretation of Article 48. On these statements rests in particular, as we have already mentioned, the undisputable view that Article 48, despite the detailed regulation reserved to §5, constitutes an immediately existing right. All constitutional discussions of Article 48, §2, the statements made by the chancellor of the Reich in the quoted comment of 5 October 1919 and those made by the Reich's minister of justice, Schiffer, on 3 March 1920 refer to those elaborations of 4 and 5 July as the decisive argument – and so does the Supreme Court of the Reich in its verdicts, and all other authors and commentators. What, then, results from these elaborations for the relationship between sentence 2 and sentence 1 in Article 48, §2? Without the separation of the two powers defined in both sentences, they would be completely incomprehensible. On 4 July 1919, the member of parliament von Delbrück said that the president has an unlimited authority until a detailed regulation is made in the constitution of the Reich; 'he can therefore take all the required measures; he is also in a position to issue legal provisions, insofar as they are necessary, until the details are defined by the constitution of the Reich'. It was not mentioned even once that the enumeration of the fundamental rights in sentence 2 implies a general restriction of the authority granted by sentence 1, although, when it came to it, it must have been impossible for any jurist to pass over this fact in silence, because it was implicit in the distinction between the two authorities that had been emphasised up to that point. On the contrary, on 5 July von Delbrück rehearses the typical enumeration of the president's twofold authority: the president can intervene by using armed forces and can take measures necessary for the restoration of public security and order; 'he can, furthermore, suspend a number of fundamental rights'. According to sentence 1, the president can take measures without any limitation, up until the promulgation of the constitutional law of the Reich; in fact he can take *any* measures, legal provisions and sanctions – and

* Nationalversammlung, 46th session, Friday 4 July 1919, vol. 327, pp. 1303–4. At http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00574.html; Nationalversammlung, 47th session, Sunday 5 July 1919, vol. 327, pp. 1335–6. At http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00606.html

he can appoint extraordinary courts. 'I wish to emphasise again this interpretation, which, to my mind, results unquestionably from the construction of this article.' Once again, not one word is said about a general limitation on the basis of those seven articles of the constitution. To mention them would have sent the train of thought in the opposite direction. The remarks made by the count of Dohna are also telling in the same way; for he raises the question why it is permissible to introduce extraordinary courts despite the fact that Article 105 of the constitution is not listed among the fundamental rights that can be suspended. But a jurist who shared at that time what is today the common view should have started in this case with the restrictive effect of the enumeration in sentence 2, and should have proceeded to give reasons – for example, the decision of the Supreme Court of the Reich (*Entscheidungen des Reichsgerichts in Strafsachen* [*RGStr*] 56, p. 161) – in order to justify the fact that the president is allowed to appoint extraordinary courts although Article 105 is not included in the list of suspendable fundamental rights. Instead the count of Dohna stated the following: legal provisions like that of the law concerning the state of siege of 1851 have to be introduced as soon as possible on the issue of martial courts and drumhead trials; to do so is the job of the detailed provisions of the constitution; this constitutional provision is even more necessary 'as what is really questionable is precisely the question of whether drumhead trails, extraordinary martial courts and the like can be instituted on the basis of the provision expressed in Article 48, §2'. Therefore, until the promulgation of this constitutional regulation, there is a 'lacuna'. However, 'until then, I also share the view that the president of the Reich has the right to take *all* the necessary measures and can define even the provisions concerning the code of procedure governing extraordinary martial courts'. That means: it does not matter whether Article 105 is included in the list of suspendable fundamental rights in sentence 2; it is even permissible to infringe upon fundamental rights that are not listed, because in any case the authority to take *all* the necessary measures also justifies the institution of extraordinary courts, even if this is questionable according to sentence 2. As the count of Dohna has said, the president simply has *plein pouvoir* [full power]. The restrictive effect of the enumeration made in sentence 2 is not just tacitly

ignored, but also implicitly rejected. It was not possible to reject it explicitly, because all those involved, insofar as they had a distinctive juridical mindset, were too aware of the true meaning of sentence 2 to be able to mention an initial attempt to interpret sentence 2 after the constitution came into effect.

To summarise, the history of origins reveals the following: no author of Article 48, §2 assumed that §2, sentence 2 involves a general restriction on the universal authority granted in sentence 1. The president of the Reich was accorded the authority to take all the necessary measures. The fact that the enumeration in sentence 2 implied a fundamental limitation on the authority given in sentence 1 was not only just ignored; on the contrary, sentence 2 was understood as an authorisation, which was of course limited by that enumeration but on the whole added a specific authorisation to the one defined in sentence 1. The investigation into the history of origins confirms the result we have gained through a detailed analysis of the language. Neither the practical necessities related to the implementation of the state of exception, nor the words of the text of the constitution, nor the history of origins and all the discernible intentions of the authors of the law can be reconciled with that plausible interpretation of §2. Its plausiblility – the argument about enumeration being a limitation – proves to be a perfunctory extension from sentence 2 to sentence 1. In the meantime, its constitutional motif remains remarkable, because any limitation of the authority of the president must be defined. The question is whether this limitation should be defined on the basis of a pseudo-argument or in full juridical awareness of the particularity and difficulty of Article 48, §2. The article represents something unique from the perspective of a general theory of the state and constitution. Everything depends on the correct recognition of its peculiar nature. Here one has to take into account the opinion of the editors of the law, not by reason of who they are, but because they indicate the general source of an unusual provision – namely the dominant state of mind in the Weimar National Assembly, according to which Germany was in an abnormal situation that, for the time being – that is, until the passing of a more detailed constitutional provision – demanded, beside the authority defined in sentence 2, the completely exceptional general authority defined in sentence 1.

This is the rationale for the regulation defined in Article 48. In what follows we will attempt to define this power more clearly in terms of a theory of the constitution and to integrate it into the general idea of a constitution, which dominates the historical development of the concept of the state of exception as a legal instrument [*Rechtsinstitut*].

II

The regulation of Article 48, §2 as a provisional solution

The members of the Constituent National Assembly were completely aware that, through Article 48, §2.2, the president of the Reich received an unusual, 'unlimited' power – *plein pouvoir*. One assumed that the worries about such plentitude were appeased on the one hand through the ministerial counter-signature and its implicit control and, on the other, through §3 of the Article, which stipulated that the measures taken must be immediately reported to the Reichstag, and also suspended at the Reichstag's demand. One saw an absolute guarantee against any abuse in a principle of accountability to the parliament that was construed in this reasonable way. Preuß emphasises in the constitutional panel that it was impossible for the civil power to abnegate its extraordinary authority, and therefore to be released from its accountability. The government of the Reich always remained accountable to the Reichstag, even if a military commander was mandated to execute the measures.[13] This being said, there is no word in this context, either, to the effect that sentence 2 of Article 48, §2 contained a simple and effective limitation of the president's authority. The main tool through which one expected to evade the entrappings of this too far-reaching power of authority was altogether different – namely the legal provision of the Reich, which would soon be passed and would regulate the details. The issuing of a draft of this legal provision was thought to be so close that no one stopped to think seriously, even once, about the particular conditions that were bound to result from a dissolution of the Reichstag. Members of parliament from all parties – von Delbrück, the count of Dohna, Martin Spahn, Haas, and others[14] – referred to this future constitutional law of the Reich throughout the whole of 1919. Not one of them imagined that it might be possible for this law not to be drafted for many years.

Distinction from constitutional emergency law [*Staatsnotrecht*]
In consequence, the complete and finalised regulation was not given in Article 48, §2, although the latter is an established law. The constitution is still open on this matter. On the one hand, with the coming into force of the constitution, the president held the extraordinary authorities defined in §2; on the other hand, as the count of Dohna put it, there is a 'lacuna' in the constitution on this point. This word is extremely felicitous; the only way in which it might perhaps mislead was by being apt to cause a confusion between the extraordinary authorities of the president of the Reich and constitutional emergency law [*Staatsnotrecht*]. Constitutional emergency law is based on the fact that, in an extreme and unpredicted situation, any organ of the state that has the power to act leads the way outside or against constitutional provisions, in order to save the existence of the state and to do what the concrete situation requires. Such a law, which most states' governments arguably had to resort to during the war, is frequently justified through the argument that there should be a 'lacuna' for it in the constitution, because the law in question can only be valid in an entirely unforeseen situation. The detail of the justifications and reasons adduced do not matter here.[15] To distinguish constitutional emergency law from the regulation in Article 49, §2, it should only be emphasised that this provision – Article 48, §2 – does not carry a constitutional emergency law simply because the constitution construes it as a responsibility. It is conceivable that, in an extreme situation, a constitutional emergency law would be enforced autonomously, alongside the authority of Article 48; and, in the specific circumstances, the government of the Reich on its own, and not its president, would appear to support this emergency law [*Notrecht*]. In fact if, for example, extensive parts of the Reich were occupied by the enemy or there were a *coup d'état*, it is conceivable to exercise this legal authority even against a president of the Reich in order to salvage the constitution – maybe because the president refuses to declare state of exception. All these are unforseeable situations and slip through a legal regulation. Article 48, §2, in contrast, regulates the state of emergency as a constitutional legal instrument. As a result, any confusion with constitutional emergency law becomes impossible. The next question about constitutional emergency law –

whether it is possible to eliminate the constitution itself and to introduce another constitution, in other words to have a kind of right to a *coup d'état* – need not be discussed here. This has been occasionally suggested in the theory of constitutional law.[16] Such a right certainly does not follow from Article 48.

Distinction from the position of the sovereign prince

By this article, the president of the Reich receives about as little status as the sovereign prince by the monarchical principle. It is characteristic for any political system [*Staatswesen*] based on this principle that, even if there is a constitution that defines and separates state functions and spheres of authority, it always remains possible to reintroduce the full, undivided power of the state at some point. In this case, side by side with the ordinary power that is constitutionally apportioned, an extraordinary state power coexists in latency – a power that can never be entirely covered by the constitutional regulations. It is up to its bearer, who thereby proves to be the souverain, whether this appears in its full form, as plenitude of power, to protect public security and the existence of the state; and then the entire constitution, except for the monarch's own position, becomes a stop-gap arrangement [*Provisorium*] and a rented transaction [*Precarium*].[17] One might attempt to minimise this occurrence to the status of an emergency, and then push it back even further, by calling it a state of the last resort or by summoning similar formulae; but, as long as deciding on the matter for which this situation has arisen is in the hands of the monarch, he is the true sovereign,[18] and state power rests essentially on the monarchical principle. As for the constitutional law of the Prussian monarchical constitution, one could at least hold the view that, through the emergency regulation [*Notverordungsrecht*] contained in Article 63, the constitution left it open for the king to change any law, by decree – and even the constitution itself: all he needed for that would be a counter-signature.[19] It is evident that the president of a republic can never be a sovereign in this sense. Therefore one cannot talk about an extraordinary organisation of the state, springing from Article 48 and coexisting with the ordinary one.[20] In a republic, that would be a hybrid duplication of state power. The situation is different in a sovereign monarchy because there the

monarch preserves the *plenitudo potestatis* in spite of the constitution and represents the constituent unity of the state precisely for this reason.

Distinction from the sovereign dictatorship of a national assembly

The sense of this difference between a monarch and a republican head of state seems to have inspired a statement in General Maercker's book *Vom Kaiserheer zur Reichswehr* (Leipzig, 1921, p. 376): 'The law [Article 48] does not permit us to justify the fact that the constitution of a free state [*Volkstaat*] grants the supreme official of the Reich rights that neither the emperor nor the king received on this scale.' Dr Cohn, member of parliament, also made the remark in the National Assembly that the regulation of Article 48, §2 goes even beyond the Prussian law of 1851, because that law offered more legal guarantees than Article 48, §2 in its suggested (and accepted) form. Such comparisons ignore the fact that even in a democracy – and especially in it – extraordinary powers are possible. In particular, democrats have understood that the far-reaching authorisations granted through Article 48 are something specifically democratic. Preuß and Haas, two members of parliament, represented this point of view in the National Assembly. The Reich's minister of justice, Schiffer, explicitly adopted this position in the frequently cited speech of 3 March 1920, by arguing that in a democracy there is basically a consensus between the leading majority in parliament and the government and that the latter must be given all the means of power deemed to be necessary. The democrat Petersen stated in the same session that 'no form of government [*Staatsform*] can be granted the means of power with less hesitation than democracy, because a democracy is based on the equality of right of all citizens.' The idea of a constituent power that is up to the people – that is, the idea of a *pouvoir constituant* – arose from democratic thought as well. This is the source of all constitutionally constituted and therefore circumscribed power – and yet it differs from it by being unlimited and unlimitable. The possibility of a legally unlimited power – such as is up to a constituent assembly after a revolution – is based on some basically democratic reasoning of this sort. As long as such an assembly has not accomplished its work – the constitution – it possesses any imaginable authority. The

entire state power is amalgamated in its hands and can manifest itself tempestuously, in any arbitrary form. An exhaustive standardisation and segmentation of the state's responsibilities and functions has not yet come into existence; the constituent power of the people has not yet been bound to constituted limits; and the constituent assembly can therefore exercise *plenitudo potestatis* at its own discretion. For this I have suggested the phrase sovereign dictatorship,[21] because on the one hand we find here an unlimited legal power that is completely at the discretion of the empowering body (as long as the word 'sovereign' can be used), while on the other hand the constituent assembly is only commissioned, just like a dictator; it is not sovereign like a monarch in an absolute monarchy or in a monarchy based upon the monarchical principle. Here the contradiction between a constituent/constituting and a constituted power is only relevant insofar as the monarch, in a deliberate opposition to the democratic principle, claims for himself the constituent power – as happened for example in France under Charles X. The monarch is then a sovereign and not a dictator. The legal plenitude of power of a constituent assembly rests upon its exercise of the *pouvoir constituant*; therefore omnipotence lasts only until the constituting of powers through the constitution's coming into force. The very moment the assembly has accomplished its work and the constitution has become established law, every sovereign dictatorship comes to an end. Moreover, the constitutional possibility of a sovereign dictatorship comes itself to an end. A sovereign dictatorship is irreconcilable with a constitutional form of government. A republican constitution that wished to retain this possibility would have to be on the whole a stop-gap measure and an object rented out to a sovereign dictator who, given the extraordinary state power under his command, could always devise new organisations, parallel to the constitutional ones. For all the phrases like 'unlimited power' or *plein pouvoir*, which are used to describe the functions of the Reich's president as defined in Article 48, §2, it would be impossible for him to exercise a sovereign dictatorship on the basis of this constitutional provision, not even jointly with a counter-signing government. Either sovereign dictatorship or constitution; the one excludes the other.

The typical constitutional regulation for the state of exception

The constitutional development now covers the commissary (as opposed to the sovereign) dictatorship, in such a way that the defining circumstances for the exercise of dictatorial authorisations as well as their content are defined and listed matter-of-factly [*tatbestandsmäßig*]. A criterion of the constitutional state is to delimit all the state's functions competently and to modulate its full power through a system of jurisdictions, so as to make it impossible for that fullness to appear stark and unbridled – at any point. The basis for this circumscription and division of all functions and authorisations of the state is the constitution. According to the old definition, its essence consists in the separation of powers.[22] This corresponds to the idea of the constitutional state. But reservations must always be made for the exceptional case. Dictatorship is always an abnormality, because in it the constitutional circumscription of spheres of authority remains dependent upon the actual situation, in other words it is at the discretion of the one authorised, and its extent is in fact unassessable because no reasonable limitation has developed over time in this area, as in a normal situation. Here there is no jurisdiction – in the sense that an already established law would define its function matter-of-factly. But it is proper to consistent constitutional thinking – and it is also confirmed by the historical development of the nineteenth century – that in this case even specific types of limitations were sought and identified. In this way a typical conception of the state of war, state of siege, or state of exception took shape in the course of the nineteenth century, and it gained the character of a proper legal instrument. The general and unlimited authorisation to take any measure deemed necessary in a given situation was replaced by an enumeration: transition of executive power (that is, a concentration of existing functions, without them being extended); possibility to suspend certain constitutional provisions (that is, an extension of the content of functions); right of the executive organs to issue legal provisions on the basis of law [*Rechtsverordungsrecht*]; increase in the severity of penalties [*Strafschärfungen*]; and admissibility of extraordinary courts (drumhead trials and court-martials). In this way, after the French Revolution, the state of siege became a legally organised institution and the commissary dictatorship was integrated into constitutional development.[23]

The particular nature of the regulation of Article 48, §2

The intention here was to adapt to this development – namely by circumscribing the acceptable authorisations, the defining conditions and the effects of the state of exception, which one pursued by referring to the constitutional law of the Reich, to be enacted according to §5. This is the reason why the count of Dohna talked about a 'lacuna' that existed until the issue of this law, and why he demanded that, in the law, the legitimacy for extraordinary courts in particular should be regulated as it had been in the earlier laws on the state of war and on the state of siege. For all its detail, therefore, the envisaged regulation in §5 should not concern minor matters and irrelevant issues; it must necessarily restrict the general authorisation given in §2, sentence 1, until then outstanding. In terms of constitutional theory, the detailed regulation would be the true regulation. Until then, though, a stop-gap was in place. The statements picked up from the history of origins that have been mentioned several times, in particular those by von Delbrück and the count of Dohna, pointed that out and distinguished between the legal situation 'until then' – that is, from the commencement of the constitution until the detailed regulation – and the legal situation that had to be created by this regulation. This phrase, 'until then', is the core of the argument.[24] The peculiarity of the authorisation emanating from Article 48, §2.1, which was valid in the meantime, consisted in this: on the one hand, the sovereign dictatorship of the constituent assembly ceased with the constitution's coming into effect; on the other hand, a delimitation of the commissary dictatorship in conformity with the typical constitutional development had not yet come into existence, because, in view of the abnormal situation the German Reich found itself in, one wanted to guarantee greater flexibility. It would be incorrect to conclude, from the reservation about the detailed regulation in §5, that Article 48, §2 had not yet become an established law at all – just as it would be incorrect to ignore this reservation and to treat §2 as a conclusive and definitive regulation. Until this regulation was issued, a peculiar legal situation [*Rechtslage*] persisted – a situation that Graf Dohna, in the session of 5 July 1919, found to be 'indeed worrying' in the long term, despite the control exercised by the government of the Reich and the Reichstag. However, for the time being, this situation simply

persisted. As a result of the simple fact that the constitution came into force, the dictatorship of the president of the Reich – for one can give this name to his extraordinary authorisations – was by necessity one of the commissarial kind. But its meaning was deliberately kept open; and in its substance, if not in its legal justification, this dictatorship operated like the residue of a sovereign dictatorship of the National Assembly.

Consequences of the postponement of the regulation defined by §5, detailed regulation

It could be said that, from an organisational point of view, only the constitutional regulation of §5 completed the constitution. A further question would be whether there was any constitutional obligation to issue this law. Just as, in international law, a government could be obliged to provide a legal draft and to enforce a law, a corresponding public–legal obligation within the state is conceivable. The deliberate postponement of a law can be unconstitutional and could lead to a charge being brought before the state's constitutional court, according to Article 59 RV. But the government of the Reich is always able to argue that the Reichstag should either issue a serious request for the preparation of such a legal draft or exercise its right to take the initiative. If it does neither of these things, it makes room for one of the many cases to be encountered in the practice of today's parliamentarism: when the parliament is unwilling to take action, it tacitly makes it possible for the government to proceed in a certain way, without the parliament itself having to make a decision. In essence, these are cases of authorisation granting. The state of today's parliaments generates, in addition to the numerous open authorisations of this sort, a whole system of delegations in disguise. When the assembly of the federal state [*Landtag*] adjourns, so that the government realises the possibility of issuing an emergency provision [*Notverordung*] according to Article 55 PrV* during that adjournment, then this is a particularly clear example of the transformation that can occur in the account of

* Stier-Somlo, Fritz. *Kommentar zur Verfassung des Freistaats Preußen vom 30. November 1920. Nebst dem Landtagswahlgesetz, der Geschäftsordnung des Landtages, dem Gesetz über die Wahlen zum Staatsrat und anderen Nebengesetzen* (Berlin/Leipzig, 1921). The commentary to Art. 55 is at pp. 185–8.

constitutional forms and institutions. The same effect is produced if the implementation of the constitutional law of the Reich, as defined in Article 48, §5, is deliberately and indefinitely postponed by the Reichstag, so that the president and the government of the Reich can without impediment issue provisions and take measures that the Reichstag itself can neither issue nor, according to Article 48, §3, suspend. Such a practice threatens all the constitutional institutions and organs of control with loss of meaning, and the constitution itself with dissolution. But to discuss the matter in greater detail would exceed the scope of this presentation. It must suffice to say here that, in the case of an unforeseeable postponement of the statute of the Reich envisaged in §5, the regulation defined in Article 48, §2 could change its character, because a law-abiding republican constitution cannot accept that a provisional arrangement be left open for an indefinite time on an essential point. Time has run out, and there is no longer enough of it left to introduce this change. For the time being one could not say that the detailed regulation envisaged in §5 is constantly being postponed, for an indefinite period.

III

The general limitation of the authorisation granted in Article 48, §2

It was necessary to distinguish the peculiar stop-gap arrangement of Article 48, §2 in terms of constitutional law from other far-reaching authorisations and constitutional possibilities. That way it became clear that here, within the framework of a constitutional, republican–democractic constitution, an extraordinarily far-reaching authorisation has been left open – one that is nevertheless based on this very constitution and presupposes it. It might be politically possible to use Article 48 for the elimination of the Weimar Constitution, just as in 1851, in France, the position of president of the state was used to introduce another constitution through a *coup d'état*. But, in constitutional terms, it is impossible according to Article 48 to transform the German Reich from a republic into a monarchy. The authority of the president of the Reich rests upon a constitutional provision. It would be contrary to the constitution to change it with the help of such an authority in any way other than the one stipulated in the constitution

– that is, through the regulations concerning amendments to the constitution according to Article 76. This, of course, does not exclude measures taken by the president of the Reich that can intervene in individual constitutional regulations and thereby create exceptions without suspending the constitution. Such breaches (as E. Jacobi calls them)[25] of individual constitutional articles are not changes to the constitution, and they neither suspend it nor nullify it. They are the typical instrument of dictatorship: a means of saving the constitution itself as a whole through an exception to its provisions.

The constitution as a requirement for 'public security and order'

The constitution remains, on the whole, not just the end of all the measures in Article 48; it is also decisive as a basis for its requirements. It defines the fundamental organisation of a state; moreover, it decides what order [*Ordnung*] means. Not every constitutional provision is in practice of equal significance; politically speaking, it was a dangerous abuse to use the constitution to enshrine in it all kinds of wishes close to one's heart as fundamental and quasi-fundamental rights. Organisation is essential to any constitution; this is what creates the unity of a state as system [*Ordnung*]. The constitution amounts to what is normal order in a state. Its purpose and value consist in adjudicating, at a basic level, the dispute over what is public interest, public security and order (this matter receives very different answers from different interests and parties, so that, if everyone were to adjudicate it individually, that would dissolve the state). The concept of public security and order is of interest not just from a legal–policing point of view, it is also a category of constitutional law. It would be politically naïve and juridically wrong to use an idyllic, pre-March [1848] concept of peace and security, and to attempt to handle a dictatorship that encompasses the whole state with the help of ideas of administrative law such as police law has built with a view to imposing law-abiding limitations on the police.[26] The constitution defines exactly what the state is, in relation to a situation assumed to be normal. Article 48, §2 assumes an abnormal situation, and therefore it grants an extraordinary authorisation in order to make the restoration of a normal situation possible. But Article 48 is only one part of a constitution that came into effect. Therefore, according

to Article 48, what is normal – together with the decision as to what constitutes public security and order – cannot be arrived at by ignoring the constitution. Equally, a constitutional establishment as such cannot threaten public security and order and cannot, according to Article 48, be abolished on the grounds that that would be necessary for the restoration of public security and order. In the form that newspaper articles have given to a remark made by Kahr during a questioning before the people's court [*Volksgericht*] in Munich of 11 March 1924 – according to Article 48 a directorate could be formed, and it would be 'entirely possible' to suspend the entire constitution of the Reich on the basis of this article ('this should be possible; that is a purely legal question') – such an understanding is a misconception of the law. Only the seven basic rights listed in sentence 2 can be suspended. Other constitutional regulations or the constitution as a whole cannot be eliminated with the help of this article – not constitutionally.[27] Apart from other reasons (that we will elaborate upon in what follows), this is primarily because it is impossible to define the fundamental concept of Article 48 – that is, public security and order – without the constitution itself. Hence the fact that the German Reich is a republic can never be a threat to public security and order within the meaning of Article 48. It is quite another matter if an article of the constitution is breeched in order to eliminate a looming threat to the constitution, or if an unconstitutional abuse of constitutional institutions can be prevented. Admittedly, here the article allows an extremely broad scope for independent decisions on what is truly constitutional. But here it is important in the first place to define the first general limitation to the authority granted in Article 48. It rests upon the fact that, as constitutional provisions, constitutional features themselves, and the constitution as a whole, can never represent a danger.

The inalienable organisational minimum implied in Article 48

For all the measures that, according to Article 48, §2.1, should be taken – and even for those of a factual nature – there is a further limitation, which is absolute. This limitation is defined by the fact that Article 48, in itself, entails a minimum of organisation, which therefore must not be obstructed in its existence and its functioning.

Initially the article establishes a responsibility – to be sure, that of the president of the Reich. Once more, what the words 'president of the Reich' mean is only defined by the constitution itself. Only the constitutionally designated president of the Reich is lawfully responsible for the measures made possible in Article 48 – and not, for example, a person who, through Article 48, has attained a position corresponding to that of the president. The president of the Reich could not, on the basis of this article, extend the period of his office or attempt by any means to create a situation that would actually change the constitutional set-up of the president of the Reich. Here lies the first fundamental and indispensable connection with the established constitution. Furthermore, according to Article 50 RV, the measures stemming from Article 48 need the counter-signature of a minister of the Reich. A president who would not depend on this counter-signature, and therefore on control from the Reich's government, would no longer be a constitutional president of the Reich. Because of this, the government of the Reich must remain in force in all circumstances; and it must remain in its constitutional form, as a government that, according to Article 54 RV, requires the trust of the Reichstag to fulfil its duty. Measures taken by the president of the Reich that, in conformity with Article 48, §2, suspend the government of a federal state, forbid its ministers to exercise their duties, and charge other people with fulfilling these jobs – in other words, measures such as those taken against Thuringia through the decree of 22 March 1920 and of 10 April 1922 and against Saxony through the decree of 29 October 1923 – are permissible – again, according to Article 48, §2. But the same measures would not be permissible if they were taken against the government of the Reich itself, because the government of the Reich is a component of the organisational minimum that is assumed by Article 48 itself for the regulation of the state of exception. This organisational minimum should not be eliminated or obstructed by way of taking actual measures. In combination with Article 48, the fact that, according to Article 53 RV, the chancellor and the ministers of the Reich are appointed by the president and may be dismissed by him can augment the president's political influence to unprecedented levels, if the Reichstag is not assembled or if its explicit decisions on a vote of no confidence have been made difficult as a result of shifting

coalitions. However, this does not change the fact that the controlling function of a government that carries the trust of the Reichstag must remain in force at the constitutional level. Finally, the Reichstag is part of the inalienable organisational minimum required in Article 48, alongside the president of the Reich and the government of the Reich, just as it is a constitutionally defined body in the constitution of 1919. Here, too, the political power of the president of the Reich can increase to a very high level if the political possibilities of Article 48 are combined with other constitutional possibilities. In a way that is profoundly odd for the president of a republican state, this happens the very moment when the Reichstag is dissolved according to Article 25 RV. (The reason is that the so-called Supervisory Board [*Überwachungsausschuß*], which was appointed to preserve the rights of parliament or popular representation [*Volksvertretung*], can neither decide upon a vote of no confidence, according to Article 54, nor demand a suspension of measures, according to Article 48, §3.) But the president of the Reich would not be allowed, by appealing to Article 48, to prevent the new Reichstag from being elected within a constitutionally defined period of time and from assembling. He cannot repeal the defined period of time for new elections – which is of sixty days, according to Article 25, §2 – nor is he allowed to extend it; he is not allowed to interfere, by way of decrees [*Verordnungswege*], with the constitutionally guaranteed right to vote – in fact he is not allowed to prevent the exercise of this right, or to eliminate the electoral freedom guaranteed in Article 152 RV, through any measures whatsoever. But he is fully entitled to take any measures at his discretion that guarantee electoral freedom and, if need be, to decide what electoral freedom means in a given case. He is not entitled to reduce the number of members of parliament on the basis of Article 48, §2 – maybe by appealing to the requirement to stabilise the currency as an austerity measure; in fact with the help of this popular argument he could not even deny members of the Reichstag the constitutional right to free travel on all German railways, or the right to claim expenses. The immunities of the deputies of the Reichstag (but not those of the deputies of the federal assembly) are protected from measures based on Article 48. However, this is the case only within the strictest boundaries of Articles 36–38 RV. Assemblies for reporting to

constituencies would not come under this rule,[28] and party organisations or party assemblies in general would even less. Should the worst happen – should elections be completely impossible to hold, or should the Reichstag be unable to assemble, say, because the largest part of the country were occupied by the enemy or for some other extreme reason – then the state's emergency law [*Staatsnotrecht*] would apply; but the constitutional authorisation of Article 48 would not.

The concentration of measures and the concept of measure

A final limitation of the authority of the president of the Reich can be deduced from Article 48 itself, according to which he can only take *measures*. Maybe the word 'measures' has not been chosen unwittingly, because the draft by Preuß (§63) and the first draft of the government still talked about 'provisions'. In the 147th session of the National Assembly of 3 March 1920 (vol. 332, p. 4642),* Dr Cohn, member of parliament, declares: 'Initially – and I appeal here to the testimony of all the members of the constitutional committee – when we discussed the constitution, none of us conceived, ever remotely, the possibility that the measures the president of the Reich would be allowed to take in the name of Article 48 for the restoration of public security and order could be anything but formal provisions for the restoration of a disturbed security and peace. This is absolutely obvious if one considers that the provision is introduced only by a subordinate clause, which is separated from the main clause through a comma: to intervene, if necessary, with the help of armed forces. What we all had in mind was just the case – which has never changed throughout the history of the state of siege – that our current state organs for security would not be enough to restore the state of order, and therefore special measures would become necessary – in particular the deployment of the troops of the regular army at the discretion of the president of the Reich.' This statement, which is very important for the history of the origins of Article 48, §2, implies an old constitutional idea: direct action, *vi armata procedere* [going ahead with an armed force] and any purely action-oriented approach

* Nationalversammlung, 147th session, 3 March 1920, vol. 332, p. 4642. At http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000016_00310.html

must be distinguished from a normal, formalised legal procedure. In the same session of the National Assembly, the Reich's minister of justice, Schiffer, replied to Dr Cohn, member of parliament, that no limitation was envisaged regarding the measures to be taken; that all kinds of measures and provisions would in consequence be permitted – legislative, administrative, or just purely factual; and that he himself, Dr Cohn, member of parliament, had conceded that the president of the Reich could take measures against existing laws. But Dr Cohn had always talked only about measures; and the examples he used – the bombardment of cities, the use of poisonous gases – were typical and extreme cases of *vi armata procedere*, in contrast to legally structured and formalised acts. Unfortunately the reply that the member of parliament gave to the Reich's minister of justice in that session deviated from the real point: he only emphasised that he did not consider the far-reaching authorisations of the president of the Reich to be *necessary*. But this is of no further interest here.

But it remains valid, in jurisprudence, that not every legally relevant act is a measure. Tellingly, the Reich's justice minister mentions legislative and administrative measures in his account – but not judiciary ones. To wit, the conceptual distinction that all constitutional theory must consider comes to the fore clearly here, in the domain of the administration of justice. No jurist would call a formal sentence administered by a judge and resulting from an ordinary procedure a 'measure'. It contrasts with a measure in an essential way. It is intrinsic to a measure that its course of action is defined, in its content, by a concrete [*konkret*], given situation and that the measure itself is governed by a factual [*sachlich*] goal, so that it receives a different content from case to case, according to circumstances; hence it does not have a genuine legal form. Its criterion is not a general rule for decision making [*Entscheidungsnorm*] – a rule defined in advance, as in a verdict in law, and a rule that, overall, constitutes the justice of such a verdict. Furthermore, the independence of the judge is based on the fact that he judges following a right norm and that he does not make a decision on the basis of a concrete order or in the service of a political goal. Independence from such concrete orders and dependence on predefined norms are correlates. This fundamental representation of judicial activity is compromised if the judge is used as a

means for concrete, practical political ends, and if a tribunal does not make decisions according to just norms defined in advance, but so as to serve as the most effective instrument in accomplishing a political end in the concrete situation. A measure is, by definition, dominated by the *clausula rebus sic stantibus* [the clause 'things thus standing'].[29] Its criteria – content, course of action and effectiveness – are specified from case to case, depending on the concrete situation.

A legal norm cannot be a 'measure' any more than a verdict in law can; if the legal norm aims essentially to give expression to a legal principle, in other words if, above all, it wants to be just and to be governed by the idea of law [*Rechtsidee*], then it is more than, and something different from, merely an appropriate provision made according to the circumstances of the concrete case. This orientation towards a legal principle rather than towards a concrete practicality, which is calculated from case to case, gives such a norm its particular dignity and distinguishes it from the measure. The civil code is not a measure. Its principles claim to be more than a practicality determined by the concrete situation. This is especially obvious in the guiding principles of family and inheritance law. No more can one call the constitution a measure, because in principle the constitution intends to provide the basis for the state. Consequently, the amendment of a constitution can never be a measure in the strict sense. When the procedure of an amendment of the constitution, as defined in Article 76 RV, is used for measures that breach the constitution without changing it, this leads to an enormous confusion, which will dissolve the constitutional state in the same way as an abuse of Article 48. For example, I would consider it to be unconstitutional if the Reichstag, in an exceptional case and by its own resolution, wanted to dissolve itself without changing the text of the constitution, rather than doing it in accordance with Article 25 – that is, by decree of the president of the Reich; or if the Reichstag removed the president of the Reich from his office, circumventing the procedure defined in Article 43 through some resolution based on Article 76. In this case the form of the amendment to the constitution would be abused in favour of sheer measures. And vice versa: constitutional amendments are not measures and, quite apart from other reasons, they are not permitted according to Article 48.[30]

The difference cannot be erased or rendered irrelevant just because the word 'measure' is not restricted to formal provisions in the strict sense. General provisions, too, can be made into measures, and they are permitted according to Article 48. The president of the Reich can take a measure by issuing a decree. Such decrees work just like laws insofar as they are binding orders on public authorities as well as on citizens. If they bear, even only formally, the character of a general regulation established in advance, they can also function as decision-making norms on the basis of which the judge gives his verdict. A measure can be the basis for a legal act that is no longer just a measure, because it has passed through a law-shaping procedure and therefore is freed from direct dependence upon a specific situation. Therefore, for all practical purposes, general provisions can no longer be separated as a category as far as their impact on public authorities and on the citizens is concerned. But it would be inaccurate to drop the legal category entirely because of this one single effect. In other cases it is precisely its practical significance that resurfaces (see below, p. 215): with measures that are general provisions, this practical significance shows especially in the fact that, according to Article 48, §2, the right to take such measures is not a general right to issue decrees of emergency [*Notverordnungsrecht*] – in other words it is not a provisional right to create legislation [*Gesetzgebungsrecht*]. In urgent situations, this makes it possible to issue regulations that have a provisional force of law and must be confirmed by the regular legislative bodies. It is thus possible that, for all the rush, these regulations are indeed governed by the idea of law and that we are dealing here with a fundamental standardisation – something that claims to be not only a provision but a real, substantial and definitive standardisation. Even if only provisional, the emergency provision is law in a genuine sense. It is not the purpose of §2 to give the president such a general right as the right to issue emergency provisions. However, insofar as the emergency provision is nothing but a measure – and this will be the case for the most part – the president can take that measure, irrespective of its content. But this is not a provisional legislation; it is rather the authorisation – which must be distinguished from it – to take all the measures that may be required, including general orders to public authorities and to the citizens.

According to Article 48, §2 the president of the Reich cannot give a judicial verdict, because the latter is not a measure. He could not introduce new principles of family and inheritance law, because that would exceed a measure. It would also be incorrect to assume a twofold constitutional legislator: the ordinary of Article 68 and an extraordinary of Article 48. The president of the Reich is not a legislator. He cannot carry out acts that are constitutionally bound to a certain procedure in such a way that they gain legitimacy through it [*Rechtsförmigkeit*] – so much so that they cease to be defined exclusively by concrete circumstances, in other words to be measures. He cannot establish a formal law according to Article 68 of the constitution. Moreover, he cannot, on the basis of Article 48, declare war (according to Article 45 RV), present the budget (according to Article 85) or take as a measure the constitutional law of the Reich envisaged in Article 18. The constitution itself has excluded such acts from the list of measures by formalising them. Measures that are taken for the restoration of public security and order may come close to such acts, in their practical effect and consequences, but they can never be equal to them in their legal significance and effectiveness. A declaration of war made on the basis of Article 48, §2 would not be a declaration of war in terms of international law. The president could, of course, act in such a way that in the end a war would break out. But one cannot hold this against the distinction proposed here, at least not as a legal argument, because the possibility to start a war without a formal law is also open to the government of the Reich, and even without Article 48. Any corporal who, maybe in a tense political situation, orders his men to cross the border and fire has the same possibility of starting a war in practice or in actual fact. Such objections have nothing to do with jurisprudence any more. Unpredictable consequences occur from the political exploitation of the legal possibilities of any constitutional provision, not just those of Article 48. But this does not nullify the juridical usefulness of the distinction. In law, one will never equate the result of an orderly procedure, conducted according to rules and formal criteria, with the result of a plain measure – even if in practice they coincide to a great extent. Here is an example that should clarify the legal significance this difference carries in practice: on the basis of Article 48 and despite Article 129 RV, the president of the Reich can

forbid a civil servant to exercise his/her duty and give it to other people to perform. He can suspend civil servants or dismiss them from their office – as this is called, with some imprecision. While these are only measures, they do have a practical and – as authorised measures – also a legally remarkable effect; and it goes without saying that they have a legal 'force'. But they do not have the specific legal effect and power [*Rechtskraftwirkung*] of a sentence given in a disciplinary lawsuit [*Disziplinarverfahren*]. In terms of constitutional law, a civil servant dismissed from his job through a measure taken by the president or by someone mandated by him remains in a legal civil servant relationship with the state or the community that has employed him or her. His or her legal status is in no way identical with that of a civil servant dismissed from office through a legally regulated procedure. Conversely, when people are appointed to exercise official duties on the basis of Article 48, no legal position of civil servant comes into being in the sense defined in Article 129, and there are no acquired rights. The position rests upon a measure and remains dependent on what is deemed to be appropriate in the concrete situation. Neither this dismissal nor this transfer of official duties – and no other measure – is capable of having the specific legal force of a sentence pronounced in court; of a verdict issued by an administrative or disciplinary court; or of any strictly formalised act.

The main difference between the normal occurrences related to the law [*Rechtserscheinungen*] and some related to the state of exception

The strict theoretical distinction between measures and other acts or norms governed by the idea of law and legitimacy arguably contradicts an entrenched habit of thinking in a certain way, which is not likely to surrender what, for the sake of simplicity, is called positivism. But any examination of dictatorship in terms of legal theory leads to a repetition of the old distinction, which is fundamental in constitutional thought. Moreover, as anyone would learn through acquaintance with law history, this distinction occurs each time jurists are forced to return to principles, because exceptional cases and states of exception cannot be resolved by everyday routine. At stake here is the principle of the constitutional state – and, quite simply, right itself. Even in an absolute monarchy, where everything depends indiscriminately

upon the will of the sovereign prince, legal practice, to be indeed *legal*, was forced to distinguish between measures and orders on the one hand and, on the other, norms and acts that are legal in a specific sense. This distinction is badly needed in the exceptional case, when an abnormal situation needs to be resolved through measures. From the standpoint of legal theory, it is not enough here to repeat the formula – no doubt correct – that extraordinary situations require extraordinary means. 'Being limited is, by definition, in the nature of the state of exception; its true purpose is to be dissolved, so that it remains an exception.'[31] This is true not only as a general aphorism. In every legal atom, if I may put it this way, there remains a pattern that presupposes an abnormal situation, different from the law that ought to be valid in a normal situation. At least the awareness of this difference should not be lost in jurisprudence.

Limitations of constitutional theory with respect to Article 48, §2

Apart from the fact that the authority of the president of the Reich, as defined in Article 48, §2.2, is itself limited (because obviously only the enumerated fundamental rights can be suspended) and that, insofar as a limitation of authority occurs as defined in sentence 1 (as measures that imply a suspension in the developed sense), such a suspension is only permissible for the enumerated fundamental rights (see above, p. 61); apart from all this, then, there are three types of limitation of the president's authority, as defined in Article 48, §2. These can be arrived at from the specific regulation of Article 48, §2 in terms of constitutional theory and history, as well as from law-abiding principles. One should not expect the security of a limitation – as it follows from a law that enumerates the spheres of authority matter-of-factly – from a stop-gap arrangement – a regulation such as the one discussed here. As a jurist, one is not entitled to neglect the intended specificity of this regulation and the demonstrable meaning of a constitutional provision in order to arrive at ostensibly definite limits. The unsatisfactory aspect does not relate to the legal construction, but to the nature of a provisional arrangement that has been deliberately left indefinite. There is no need to emphasise that political motifs and goals can only confuse the interpretation. Politically speaking, the meaning of Article 48 changes fundamentally depending on whether

one may wish to use it to further one's democratic or monarchic, unitarian or federal tendencies, or one may hope that its far-reaching powers can be used to further one's own politics, or one may fear that the political enemy could abuse them. Once the interpretation enters this sphere, any possibility of an understanding comes to an end. The situation is different if one insists, strictly legally, upon the idea that certain limits must exist, as a point of law and order. Here lies the right motive for an interpretation that aims to derive a general limitation from the enumeration in sentence 2. On general constitutional principles, the correct limitation would be established through the legal enumeration of all the permissible forms of authority. The error of that interpretation is that, in its need for a limitation, it hastily treats any enumerative wording of the law as Scripture and believes it has found a substitute for an enumeration that matches the constitutional regulation. An interpretation of this type cannot create a true constitutional limitation; nor can it achieve, either theoretically or practically, its proper aim of saving the constitution from an unlimited dictatorship, because the constitutional and historical specificity of the regulation created in Article 48, §2 cannot be eliminated by such constructions. It is possible to develop useful limits without ignoring this specificity. In particular, there is no doubt that the constitution cannot be lawfully dissolved by Article 48: conceptually, a dissolution of the constitution – or even just an amendment to its text – is not a means to restore public security and order; and it is not a measure in the sense we have elaborated here, either. By the way, it is not necessary to have an answer for every detail, automatically. The constitution itself has refrained from this kind of precision and has created instead means of control: the ministerial counter-signature and the parliamentary right of repeal [*Aufhebungsrecht*]. Likewise, the twofold right of suspension – either in the power of the president or in the power of the Reichstag – provides a mechanism of control against the mishandling of §4 at the hands of federal cabinets. If the positions designed for control fail in relation to both §2 and §4, and especially if parliament dissolves itself through a system of explicit or tacit delegations, it is the task of constitutional theory to recall the legal consequences of this practice of mishandling and neglect and to call a spade a spade. But it is not the business of the constitutional

structure to interpret the constitution differently as a result, possibly in order to create new guarantees through juridical exegesis. What the highest state organs in charge have omitted or neglected, constitutional theory cannot catch up on; and, in public law far more than in private law, it remains valid that *vigilantibus iura sunt scripta* [the laws are written for those who keep an eye on them].

IV

The law of implementation regarding Article 48 RV

The oft-repeated phrase that an extraordinary situation requires extraordinary means for its elimination is variously interpreted, depending on whether one anxiously expects dangerous riots or believes on the whole that peaceful times will follow. It is, however, in keeping with constitutional modes of thought in the last century to delimit the extraordinary functions as precisely as possible and, by using names such as state of war, state of siege, and state of exception, to generate a list of typical instruments that on the one hand justify special functions and, on the other, prevent an unlimited dictatorship. The Weimer Constitution could never get out of this conundrum. In 1919 the practice of 'state of war' (as in the Prussian law on the state of siege of 1815 and the Bavarian law on the state of war of 1912) was still a fresh memory; yet the situation in Germany was so endangered at that time that one had to confer far-reaching and exceptional authorisations to master it, it was the reasonable thing to do. The president of the Reich was granted dictatorial powers in Article 48. Apart from that, a definitive regulation was not agreed upon in the end; rather the peculiar intermediate state outlined above (III) was created – the stop-gap or provisional arrangement; and the last paragraph of the article envisaged a constitutional law of the Reich through which further 'details' would be defined. To date – that is, until 1927 – this provisional arrangement has lasted for seven years and has proved to be indispensable, especially during the difficult period 1920–3. If the 'detailed' regulation – the so-called law of implementation in Article 48 for the regulation of the state of exception in the German Reich – should be enacted right now, two separate legal questions arise: first, the general question of the

constitutional regulation of the state of exception; secondly, the particular question of the relationship between the so-called law of implementation and the already established provisions of Article 48. The oddity of the situation, constitution-wise, is that a part of the law regarding the state of exception is defined through constitutional law. It cannot be avoided that a 'detailed' regulation brings about limitations and changes as soon as general authorisations such as those that belong to the president by virtue of Article 48 are defined 'in greater detail'. What exists constitutionally as established law can no longer be changed through a simple law passed by the Reich – that is, through the 'law of implementation'. Moreover, a law that amends the constitution would be needed, and the necessary two-thirds majority for it stipulated by Article 76 RV is unlikely to be achieved, given the distribution of power among the parties today. Therefore the question is: How far-reaching is the detailed regulation that should be established through a simple law passed by the Reich, and where does an amendment to the constitution begin?

The general scheme for the lawful [*rechtsstaatlich*] regulation of the state of exception

The typical model for a constitutional regulation of the state of exception results from the analysis developed above in II. On the one hand, the requirements for, as well as the content of, these extraordinary capacities are defined and limited; on the other hand, a specific mechanism for control is created. But a certain flexibility must remain, or else the purpose of this institution, which is to make a resolute intervention possible, would be lost and the state and the constitution could perish in 'legality'. The *requirements* for extraordinary capacities could be limited in such a way as to name particular facts about the situation, for instance war or riots.[32] While in Article 48 dictatorial capacities would come into effect in any serious disturbance or threat to public security and order, a limitation to war and riots, or at least to the danger of war and riots, would significantly narrow the requirements. A large part of the measures prescribed since 1919 would not have been legally possible on the basis of Article 48, if a similar limitation had already existed at that time. Apart from this limitation of the factual requirements, further formal restrictions should be

mentioned – for example, an explicit and formal 'declaration' of the state of exception, which is not required according to Article 48 so far. In some federal states even the decision about requirements and the declaration of a state of exception are basically withdrawn from the dictator and placed in the hands of the parliament, in the form of law.[33]

Another constitutional restriction comes on top of this limitation of requirements, adding to it: an exact specification of the *content* of the extraordinary authorisations. The dictator receives as accurate a list as possible of the extraordinary means he is allowed to employ – whether that be to arrest people, to order house searches, to close newspapers and the like or to suspend certain fundamental rights such as the freedom of the press and the freedom of assembly. Furthermore, he can receive the function of issuing provisions and establishing extraordinary courts, which decide through summary procedures; the declaration of the state of exception can entail an extension of the punishment for certain crimes. All these lists mean that a dictator has no freedom of action beyond the listed authorisations. He is certainly not allowed to take *all* the measures he deems necessary in this case or that, as the president of the Reich can do today, according to Article 48.

The third type of constitutional guarantee consists in *controlling* the dictator and his provisions. Thus the period of the state of exception and the measures to be taken can be tied to a certain period of time, after which they are automatically suspended.[34] Furthermore, it is possible for the parliament to act as an instrument of control; this happens already according to Article 48, §3, which stipulates that the Reichstag must be informed about all the measures and can suspend them if it wishes to do so. Finally, against individual provisions issued by the dictator or by bodies delegated by him – for example against the banning of a particular newspaper, or against preventive custody – legal remedies can be used; say, a grievance can be lodged with a body of the administrative court [*verwaltungsgerichtlichen Instanz*] or with the constitutional court.

The existing constitutional law of Article 48 and 'detailed regulation'
The question of the relationship between the envisaged 'detailed regulation' and the already existing law of Article 48 might become decisive for the realisation of the intended law of implementation. Given the great disagreements that were already caused by the interpretation of Article 48, it is doubtful to what extent a law amending the constitution according to Article 76 RV is necessary, or whether a simple a law passed by the Reich is sufficient. One can assume that a constitutional definition already exists, insofar as the responsible organs are already specified by Article 48. From this it follows that only the president of the Reich (with the counter-signature of the ministers) is taken into account for the specific capacities required by the state of exception. He can be explicitly granted authorisation to permit others to use his authorisation by delegating them. But it would be an amendment to the constitution if any other body – for example the government of the Reich or the Reichstag – were given an independent authority, under any pretext whatsoever; or if the function of the federal governments, to which they are entitled according to Article 48, §4, would come to depend upon the agreement of the Reichsrat; or if the control of the Reichstag, defined in §3, and that of the president of the Reich (in relation to the federal governments) should be limited. The organisation of the state of exception, as it exists with respect to the responsible organs in Article 48, can only be amended through a law that changes the constitution, and not through a simple law of implementation.

Far more difficult is the question of the extent to which the requirements for, and the content of, the extraordinary capacities related to the far-reaching delegation of power in Article 48 can be limited by this law of implementation. Here arises for instance the question whether a simple law can replace the very general phrase 'the serious endangering of public security and order' with more precise situations, like threat of war or riots; or, further, whether the president of the Reich can be forced to declare, formally, state of exception before he takes measures on the basis of Article 48; and whether the general authorisation of the president of the Reich to take *all* the necessary measures to restore public security and order can be limited through a catalogue of precisely defined and enumerated authorisations.

The answer to these questions depends on how the already existing provisions of Article 48 concerning the state of exception are conceived. The view presented here in I attempts to interpret Article 48 on the basis of a misconceived constitutional desideratum that the president of the Reich should by no means take all the measures; rather every single provision of the constitution is an unsurpassable barrier as long as it does not concern one of the seven enumerated and suspendable fundamental rights of Article 48, §2. Ultimately, the misunderstanding stems from a misconstrual of the provisional character of Article 48, §2 and from the belief that the constitutional claims, which are no doubt justified, must be registered in Article 48 itself. But the truth is that in 1919, in view of the incredibly difficult situation, the National Assembly was concerned first of all to give as far-reaching authorisations as possible; and it left the fulfilment of the constitutional requirements to a later, 'detailed' regulation. If you want to integrate by force the typical constitutional requirements into the provisional arrangement that Article 48 represents – and hence into the constitution itself – you remove from the 'detailed' regulation any noteworthy content, and you block the way to a definitive regulation.

On a correct interpretation, the law of the Reich envisaged in §5 should put an end to the provisional arrangement of Article 48, which was kept open until today, and should provide a model for the state of exception that conforms to constitutional concepts. Here the legislator is not bound to the scheme that has regulated the state of siege so far; but he has to adopt its basic tendency to formulate in greater detail the limitation of the requirements and content of all dictatorial functions and to create, from the general delegation of power in Article 48, §2, a law that regulates the state of exception in the manner of this category of laws [= state of siege laws]. There is no need here for a law to amend the constitution, even if the requirements and the president's capacities are significantly curtailed as a result and new mechanisms for control are created. In the summer of 1919, when Article 48 came into existence, one was fully aware that Germany was in a totally abnormal situation and that, in a first step, one needed capacities that made decisive actions possible. The person who believes that the situation in Germany today is so normal

that, if I may put it this way, it's time for a normal regulation of exceptional capacities (that is, a regulation that fits in with the typical constitutional scheme) – well, such a person cannot be content with minutiae but must demand from the law of implementation a detailed enumeration of the requirements for all the dictatorial authorisations, as well as of their content. That would not be an amendment to the constitution.

Notes

Notes to Introduction

1 For biographical details, see Reinhard 2009, pp. 114–29; also Schmitt 2005.
2 For a detailed account of Schmitt's time in Munich, see Koenen 1995, pp. 27–83 and Reinhard 2009, pp. 114–29.
3 Published in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 38, 138–61. This piece can be found in Schmitt 1995, pp. 3–23.
4 Published in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 38, pp. 783–97.
5 This interpretation was in fact that of Bonald (1854). Bonald considered that Malebranche was right to assert that the nation was a creation of God, but wrong to emphasise God's causal involvement at the expense of the social and the historical and of their integrity. For Bonald, as for Schmitt, reality is in history.
6 For a discussion of Laski's influence on Schmitt and their shared views of parliamentary democracy, see Ward 2009: 44–9.
7 Liberalism pursues the values of freedom, economic freedom and the freedom of opinion; democracy pursues the values of equality. It is not that the principles based on these values are contradictory, but rather that they can make unruly bedfellows, particularly in the matter of governing state finance.
8 This problem of unitarianism versus federalism is still evident in the publication of 'German Federalism and the dictatorship of the Reichspräsident' in Vereinigung der deutschen Staatsrechtslehrer, 1924, in which the appendix of the present book first appeared (pp. 105–36). We will return to this later (p. xxi).
9 Schmitt's personal experience of summary executions and drumhead trails appears in his observations on these two processes in *Dictatorship* (pp. 182, 198, 205).

10 See Carl Schmitt, *Römischer Katholizismus und politische Form* (Hellerau: Klett & Cotta, 1923) and also his earlier essay 'Die Sichtbarkeit der Kirche. Eine scholastische Erwägung' first published in *Summa: Eine Vierteljahresschrift,* Zweites Viertel (1917), pp. 71–80. These two treatises are Schmitt's most profound ecclesiological discussions.

11 Schmitt gave expression to this aspiration in his 1928 book *Verfassungslehre*. By accepting the Weimar Constitution, the German nation does not want to disavow its identitification with the German nation of the constitution of 1871; it wants to renew its Reich. The Treatises of Versailles and Locarno have been subject to numerous academic debates, and these have obviously influenced the writing of Schmitt's *Dictatorship*. See also the excellent introduction by Jeffrey Seitzer and Christopher Thornhill to Schmitt 2008, pp. 1–50.

12 The problem of the conception of sovereignty within a pure theory of law was later discussion by Schmitt (1931) and Hans Kelsen (1931).

13 See Leibniz 1748, p. 27 (*hinc theologia iurisprudentiaque naturalis*).

14 Schmitt 1996, p. 44; compare this with Leibniz, for whom *scriptura* covers norms or tradition more widely – in religion as well as in other disciplines (*leges positivas, illic divinas, hic humanas*).

15 His understanding of secularisation is then very closely related to Max Weber's. One needs to bear in mind that the first three chapters of *Political Theology* were written as a contribution to the *Festgabe* for Max Weber; the fourth chapter was added later, to form the book. This also explains the tension between Schmitt's concept of a sociology of juridical concepts and the project of a political theology. The phrase 'political theology' is highly ambivalent and Schmitt himself never clarifies what he means by it. Interestingly, his last book, *Political Theology II*, refers back to the idea of a political theology, but it does so in a more overtly theological manner. There is a debate as to whether the phrase 'political theology' was actually coined by Carl Schmitt or not. It may have emerged from an exchange of letters between Alfred Deissmann and Valentin Schwöbel, one of his critics, who was perplexed by Deissmann's *Evangelische Wochenbriefe* and asked 'to what branch of theology' they belonged: *Ist das politische Theologie?* (see Gerber 2010: 248, with his reference to *Evangelischer Wochenbrief deise* 26.8, 1917, 3). Alternatively it may go back as far as a French mid-seventeenth-century pamphlet (Rousse 1649).

16 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1924; the keynote speakers were Gerhard Anschütz, Karl Bilfinger, Carl Schmitt and Erwin Jacobi. The author of the report of the discussion that followed Schmitt's paper states (p. 137): 'The general view of the keynote speaker [Carl Schmitt] – and, with one reservation, also that of his co-speaker [Erwin Jacobi] – concerning the significance of Article 48,

§2.4 was not shared by the majority of the participants. The majority of speakers took a different position.'

17 In ethics, Kant, much like Hume, drew the familiar distinction between *is* and *ought* (in German, *sein* and *sollen*). The methodological struggle (*Methodenstreit*) reflects the *is–ought* dichotomy in the following question: Should the law be detached from any historical, political and sociological context, or does it always emerge from and live within a concrete historical, political and sociological context? We can only understand *Dictatorship* against the background of this fundamental struggle between neo-Kantian positivism and decisionism. The struggle also reflects the conflict between theory and practice. For further details, see Larenz 2001: 69–81.

18 It should be mentioned here that after 1936, when he was questioned by the Nazi party, Schmitt stopped writing about constitutional law and turned to international law.

19 In the foreword to the second edition of *Hauptprobleme* (Kelsen 1923: vii), the author writes: 'The aim to which my *Hauptprobleme* were directed and which have governed all my work ever since is to achieve a pure theory of law as a *theory of positive law*. The purity of this theory, which consists in the autonomy of law as a discipline of scientific analysis, is something I was already concerned with in my first book; and I was keen to distinguish it from two differing views. First, it was directed against the claims of a so-called *sociological* understanding of the law, according to which law can be understood like a naturally given object and can be examined by using causal and scientific methods. Secondly, it is distinguished from *natural law*, which ignores the fundamental basis of interconnectedness [*Beziehungsgrundlage*] guaranteed only in positive law and subsequently drags the theory of law from the realm of positive legal norms [*Rechtssätze*] into the realm of ethico-political postulates.'

20 It is interesting that, during the 1968 and 1969 revolts in Germany, left-wing theorists were in conversation with Schmitt about his views of the partisan. See Schmitt 1995: 619–36; also Landois 2008: 168–74.

21 See Jeffrey Seitzer and Christopher Thornhill's Introduction to Schmitt 2008, pp. 10–14.

22 Totalitarianism means that the public directly interferes into the private and the latter is under the complete control of the former. In other words, there is no mediating civil society and no room for free assembly, freedom of speech, freedom of the press and the like.

Notes to Chapter 1

1 Here we have to take into account, above all, the numerous and significant works of Justus Lipsius, which are also important for the political

literature. Dominicus Arumäus, *Discursus academici de iure publico* (Jena, 1621–3) vol. 5, quotes frequently from Lipsius, Zasius and Rosin, as well as from Besold, Forster, Keckermann, Boulenger and others. A good overview of the classical Roman period was provided by Barnabas Brissonius, *De formulis et solemnibus populi Romani verbis libri octo* (Frankfurt, 1592), Book II, pp. 257–8.

2 The following data, which are based on the latest literature, may serve as a summary overview, since they are of interest for any further elaboration:

1 Concerning the republican dictatorship of antiquity – it remains unclear whether the first dictatorship, mentioned by Livy at 2.18, was that of M. Valerius, in 505 BC, or that of T. Larcius, in 501 BC (the latter is also mentioned by Cicero in *De republica* 2.56; Larcius is usually called the first dictator) – it seems that, according to the examples bequeathed by the *Annals*, dictatorship was an internal political instrument in the battle against the Plebeians. This is how dictatorship has normally been understood by the political literature of the seventeenth and eighteenth centuries. But according to recent analyses it is likely that the older examples of resorting to dictatorship in order to put down a rebellion (*seditionis sedandae*) are false; in particular, the dictatorship of the first *secessio plebis* [secession of commoners] in 494 BC is definitely unhistorical. According to the critical analysis of individual cases undertaken by Fritz Bandel, *Die römischen Diktaturen* (dissertation, Breslau, 1910), in the first 150 years of the Republic there is hardly any genuine case of a dictatorship that was certainly meant to squash a rebellion. The first dictators were just commanders in chief in the event of war. For the origin of dictatorship in Italic customary law [*Volksrechte*], see Arthur Rosenberg, *Der Staat der alten Italiker*, Berlin, 1913. According to W. Soltau, 'Der Ursprung der Diktatur' (*Hermes*, 49: 1914, pp. 352ff.), there was no *dictator seditionis sedandae causa* ['dictator for putting down a rebellion'] before the dictatorship of Hortensius in 272 BC. In the old Republic the dictator was the national commander [*Bundesfeldherr*], who spearheaded the national military [*Bundesheer*] into the battlefield whenever it (the *nomen latinum*) was mobilised in an emergency. For a short period of time he was the chief military officer, vested with royal *imperium* and with no other official function. This also explains the limitation of the mandate to six months – the duration of a summer campaign. Over time, the older dictatorship (not abolished by law) became impractical for various reasons. First, around 300 BC the power of the dictator, originally unconditional, was made subject to the peoples' tribune right of veto (*ius intercessionis*) and to the right of appeal to the people (*provocatio ad populum*). Secondly, the limitation of the mandate to six months

was no longer adequate under the changed military conditions, since wars were fought outside Italy. However, during the Second Punic War a dictator was appointed for special reasons, in the years 217 and 216 BC. But this did not happen in the year 211 BC in spite of the very great danger, because at that time both consuls had been present in the city. There was no dictator between 202 and 82 BC (the year of Sulla's dictatorship).

2 The 'quasi-dictatorship' introduced in haste by the *Senatus consultum ultimum* ['final decree of the Senate'] (G. Plaumann, 'Das sogenannte Senatusconsultum ultimum, die Quasidiktatur der späteren römischen Republik' [*Klio*, 13: 1913, pp. 321–86] was a substitute for the older dictatorship, which was outdated and useless. It was an instrument in the fight against the inner political enemy; it occurred for the first time in 133 BC (apart from earlier indications), during the uproar of Tiberius Gracchus; and it lasted until 40 BC. It was based on the Senate's decision to authorise the consuls to guarantee the security of the state (*rem publicam commendare*, *rem publicam defendere* ['to confide/defend the republic']) through the formula *videant consules ne quid res publica detrimenti capiat* ['the consuls should take care that the republic does not suffer any harm']. Consequently the consuls felt authorised to take action against any Roman citizens who were inimical to the existing order, irrespective of any legal restraints. According to Theodor Mommsen, *Römisches Staatsrecht* (Leipzig: Hirzel, 1887), vol. 3, p. 1242), the *Senatus consultum ultimum* coincided with the *hostis declaratio* [declaration of the enemy]. This means that the inner political enemy was declared to be outside the law and was treated like an enemy in war. (On this construction, see the discussion in Chapter 6). According to Plaumann, 'Senatusconsultum ultimum' (p. 344), the *Senatus consultum ultimum* and the *hostis declaratio* were two separate acts.

3 In 82 BC Sulla was appointed *dictator reipublicae constituendae* ['dictator for the forming of the republic'] for an indefinite period, on the basis of a specific law; Caesar was appointed dictator in 46 BC, initially for one year only; the mandate was then prolonged and finally extended to his lifetime. These dictatorships were not subject to the *ius provocationis* [right of appeal to the assembly], like the triumvirate, and they were not bound by the existing laws. They only inherited the name of the old dictatorship.

3 For Mommsen as well as for Eduard Meyer, *Caesars Monarchie und das Prinzipat des Pompejus* (2nd edn, Stuttgart, 1919), the dependence of the historical exposition on political experiences from its own time is evident without further considerations. An actualisation, like those that were popular in the seventeenth century, has been recently undertaken

by Paul Leutwein, *Der Diktator Sulla* (Berlin, 1920), who relies upon Eduard Meyer. Of interest here is that Mommsen established the distinction between republican and Caesarian dictatorship (*Staatsrecht*, vol. 2, p. 685; see also the comment by F. Haverfield, 'The abolition of dictatorship' (*The Classical Review*, 3: 1889), p. 77, and the one by Wilhelm Liebenam in his *Beiträge zur Verwaltungsgeschichte des römische Kaiserreiches* (Jena, 1886), p. 388. Adolf Nissen, *Beiträge zum römischen Staatsrecht* (Straßburg, 1885) introduces into Roman constitutional law the separation between military powers and civilian powers in a quite modern sense and thereby attempts to explain the *lex curiata*. Against this modernisation, see Otto Seek (review of Niessen's *Beiträge* in *Deutsche Literatur Zeitung* of 1887, cols 135–6), who argues that such a separation is completely alien to the Romans' conception of law. Of interest is Nissen's comment on Willems, who calls it an '*étrange système*' on the grounds that the Senate was not permitted to appoint the dictator himself (Pierre Willems, 'Le Sénat romain en l'an 65 après Jésus Christ' (*Le Musée Belge*, 4: 1900); Pierre Willems, *Le Sénat de la république romaine* (Louvain, 1878–85), vol. 2, p. 257: 'I don't think', says Nissen (*Beiträge*, p. 64, n. 2), 'that it is stranger than constitutional monarchy.' In Soltau's 1914 essay referred to above (whose scholarly relevance and justification do not suffer from it), the Roman dictator at the head of the national army looked almost like the supreme commander of the German Reich in the constitution of 1871. Seventeenth-century parallels are mentioned towards the end of the text.

4 On the derivation of the word *dictator* from *dicere* and *dictare* (in the sense of 'giving orders', *edictum*), see Albert Schwegler, *Römische Geschichte* (Tübingen, 1853–8), vol. 2, p. 122, n. 1 and Adolph Becker, *Handbuch der römischen Altertümer* (Leipzig, 1844), vol. 2.2, p. 150. According to Mommsen (*Staatsrecht*, vol. 2, p. 144), the meaning of *dictare* was never that of *regere* ['conduct', 'lead', 'rule']. Cato uses the word *dictator* generally for commander in chief. For Mommsen, this means that the dictator had no peer on his side. The Greeks (Polybius, Dionysius, Diodorus of Sicily, Plutarch) translate *dictator* with αὐτοκράτωρ, with στρατηγὸς αὐτοκράτωρ, or they just leave it untranslated – δικράτωρ. On this topic, see Liebenam, *Verwaltungsgeschichte*, p. 374.

5 The reason for this is, partly, that the word *dictator* already had a specific meaning in the common parlance of that time. The dictator was a clerk [*Kanzleibeamter*]. The meaning of Gregory VII's famous *dictatus papae* [papal edict] (Philip Jaffé, *Regesta Gregorii*, Book II, epistula 55a)* is

* Translators' Note: The *Regesta* literature (church documents) is extremely complicated. Jaffé is a fundamental authority here, but none of his works is known by this title; he has published letters of Pope Gregory VII in *Monumenta Gregoriana*, but his

based on this bureaucratic use of language [*Kanzleisprachgebrauch*]. In the margin of the document a hand has noted: '*Dictatus papae*, that is, dictated by the pope'. The staff member who had the duty of writing the document was called *dictator*. In the constitutional law of the [Holy] Roman Empire of the German nation, the word *dictator* was used to describe a specific procedure at the *Reichstag*, namely the assembly of legates [*Legationssekretäre*] and clerks [*Kanzlisten*] to whom the secretary of the prince elector of Mainz, from an elevated seat, dictated memorials, protest notes and so on that presented the rule of the Reich, '*per dictaturam publicam communicirte*'. This is why decrees of the commission, for instance, and others bear at the top the formula '*dictatum* [. . .] *per Moguntinum*' ['dictated [. . .] in front of the [prince elector] of Mainz'].

6 For example, see the comparison between the papal *legatus cardinalis* and the Roman proconsul drawn in Gulielmus Durandus, *Speculum iuris* (Frankfurt, 1592: Alexander de Nervo's edition, with additions by J. A. Baldus), De legato, §3, no. 37; and see Chapter 2 below.

7 Bernhard Schöfferlin, *Römische History* [sic] *auß T. Livio gezogen* (Straßburg, 1507), p. xlii. In his German edition of Machiavelli's *Discorsi*, Scheffner still translates *consul* as 'mayor' [*Bürgermeister*] and *tribunis* as 'master of the gild' [*Zunftmeister*], and he leaves *dictator* untranslated (*Niklas Machiavells Unterhaltungen über die erste Dekade der römischen Geschichte des T. Livius in drey Büchern*, translated from Italian by Johann George Scheffner and Friedrich Gotthilf Findeisen, Danzig, 1776).

8 S. Frank, *Chronika*, pp. lxxiv and lxxxix in the 1565 edition; p. clxxv in the 1585 edition. I do not quote Franck because of his political significance (on which see Hermann Oncken, *Historisch-politische Aufsätze und Reden*, vol. 1, Munich and Berlin, 1914, pp. 273ff.) but as an example of the constitutional and political ideas that the word dictatorship evoked in Germany during the sixteenth century.

9 F. Pollock, 'Spinoza et le Machiavellisme', *Revue politique internationale* (Lausanne 1919), p. 1.

10 Georg Ellinger, 'Die antiken Quellen der Staatslehre Machiavellis' (*Zeitschrift für die gesamte Staatswissenschaft*, 44: 1888), p. 3, talks of *collectanea*; F. Blei, 'Christian Wahnschaffe' (*Die Rettung*, 2: 1919), p. 27, of humanistic dissertations. Against such an evaluation, see A. Menzel, 'Machiavelli-Studien' (*Grünhuts Zeitschrift*, 29: 1902), p. 561.

11 Most likely for the first time with Albericus Gentilis, *De legationibus libri tres* (London, 1585), Book I, ch. 3. In Cyriacus Lentulus, *Augustus sive de convertenda in monarchiam republica* (Amsterdam, 1645), p. 112, the question of what Machiavelli really wanted is already discussed in

main edition is a monumental *Regesta pontificum romanorum*, 1885–8. The piece here could come from the *Monumenta Gregoriana*.

the form of an academic controversy. It dealt with the literature of the political *arcana*, which will be mentioned below. On Spinoza's perception of *Il Principe* as a satire, see Menzel, 'Machiavelli-Studien'. Thomasius, *Institutionum iurisprudentiae divinae libri tres* (4th edn, Halle, 1710), Book III, ch. 6, §67 states: '*Machiavelli, autor* [sic] *vel impius vel satyricus*' ['Machiavelli, an author either ungodly or given to satyre']. Rousseau, *Contrat social*, Book III, ch. 6 offers different explanations but calls *Il Principe* '*le livre des républicains*'. Montesquieu, *Esprit des lois*, Book XXIX, ch. 19 explains *Il Principe* psychologically, through Machiavelli's admiration for his ideal, the duke of Valentinois.

12 The evidence can be found in Menzel, 'Machiavelli-Studien'.

13 On the literature on Machiavelli up to the mid-nineteenth century, see Robert von Mohl, 'Die Machiavelli-Literatur' (ch. 17 in his *Geschichte und Literatur der Staatswissenschaften*, vol. 3, Erlangen, 1858), pp. 519ff. On the history of the catchphrase 'Machiavellianism', see O. Tommasini, *La vita e gli scritti di Niccolò Machiavelli*, vol. 1, Rome, 1883. For more recent literature, see Karl Heyer, *Der Machiavelismus*, Berlin, 1918 (dissertation, Munich, 1918). The quotations in the text are taken from G. Lisio's edition (*Il Principe di Niccolò Machiavelli*, Florence, 1899).

14 Martin Hobohm, *Machiavellis Rennaisance der Kriegskunst*, vols 1–2, Berlin, 1913. In his *Handbuch einer Geschichte des Kriegswesens* (Leipzig, 1880), vol. 1, pp. 449, 454, 456, 460, Max Jähns presents M[achiavelli] as 'one of the most brilliant military classics'. I cannot prove the accuracy of this judgement, but the accuracy of the text's elaborations on the technical understanding of the state does not depend on that.

15 This phrase is borrowed from the works of Otto Neurath (*Vollsozialisierung*, Jena, 1920), in which not only the methods of satisfying needs are dictated, but also their order and hierarchy.

16 Wilhelm Dilthey, *Gesammelte Schriften*, vol. 2 (Leipzig, 1911), pp. 23ff. Also Moritz Ritter, *Die Entwicklung der Geschichtswissenschaft* (München 1919), p. 203 speaks here about pessimism. More accurate, though, is Ernst Troeltsch, 'Über den Begriff einer historischen Dialektik' (*Historische Zeitschrift*, 23: 1919), p. 390, according to whom Machiavelli 'was rather content, from a psychological point of view, with the categorisation of history' as an educational tool for contemporary agency'. In fact Troeltsch calls this belief in human understanding optimism.

17 St Thomas Aquinas, *Summa theologica* (*Opera omnia*, vol. 6 of the Leonine edition: *Sancti Thomae Aquinatis doctoris angelici opera omnia iussu Leonis XIII. O. M. edita, cura et studio fratrum praedictorum*, Rome, 1882–), Pars I, quaestio I, art. 2 ad 3: '*tota irrationalis natura comparatur ad Deum sicut instrumentum ad agens principale*' ['the whole irrational nature stands to God in the same relation as a principal tool stands to the agent']. It is in the nature of the '*natura irrationalis*' to be '*quasi ab alio acta*

vel ducta est. Non potest esse voluntas in his quae carent ratione et intellectu' ['as if acted upon or led by someone else. Will cannot reside in those who lack reason and intellect'], because they do not comprehend the universal but are rather driven by a certain *appetitus* ['desire'] directed towards a particular good. Furthermore, this is important for the understanding of the concept of *volonté générale* ['general will'] in Rousseau. '*Manifestum autem est quod particulares causae moventur a causa unversali: sicut rector civitas, qui intendit bonum commune, movet suo imperio omnia particularia officia civitatas*' ['But it is clear that the specific causes are moved by a universal cause, just as the leader of a city who aims at the common good moves all the specific functions in the city through his own power'].

18 From the vast amount of examples only the following should be mentioned: St Thomas, *Summa theologica*, I, II 91.1: '*nihil aliud est lex quam quoddam dictamen practicae rationis in principe*' ['the law is nothing but some dictate of practical reason in the ruler']. He also says: '*dictamen mentis, dictamen legis naturae*' ['dictate of the mind, dictate of law']. For further references, see Ludwig Schütz, *Thomas-Lexicon* (2nd edn, Paderborn, 1894); Duns Scotus, *Opus Oxoniense* [= Oxford lectures], IV distinctio 46, quaestio I, n. 10: '*intellectus apprehendit agibile antequam voluntas illud velit; sed non apprehendit determinate hoc esse agendum, quod apprehendere dicitur dictare*' ['the intellect grasps what can be done before the will wills it; but it does not grasp in a definite manner that this has to be done – where "to grasp" means "to dictate"']; Francisco Suárez, *De legibus*, III, ch. 2, n. 2: '*dictamen rationis naturalis*' ['the dictate of natural reason']; Hugo Grotius, *De iure belli ac pacis libri tres* (2nd edn, Amsterdam 1631), I, ch. 16, §1: '*dictante naturali ratione*' ['as natural reason dictates']; Thomas Hobbes, *De cive* (below, n. 51), III, 25: '*leges naturae* [the laws of nature] are nothing but *dictata rectae rationis* [dictates of the right reason]'; *Leviathan*, ch. 12: 'every prophet must claim, that his words rest on a dictate from God or from another demon'; John Locke, *Civil Government*, II, 8: one does what 'calm reason and conscience dictate'; V, 56: Adam directed his actions 'according the dictates of the law of reason'; the declaration of the Bill of Rights of Massachusetts, 1780, Article II: 'dictates of his own conscience'; the Bill of Rights of New Hampshire, V, 1: every individual has a natural and unalienable right to worship God 'according to the dictates of his own conscience, and reason'. Even Kant still talks about the *dictamina rationis* [dictates of reason]. Already for Montesquieu and Rousseau, it is the heart that dictates. Finally, the word disintegrated itself: anything – emotion, enthusiasm – can dictate. For examples of the use of the word in positive law, see Johannes Limnaeus, *Iuris publici imperii romano-germanici* (5 vols, 3rd edn, Straßburg, 1657), vol. 1, II, ch. 8, n. 36, where the *lex coactiva* is a *lex quae poenam dictitat*; his *Capitulationes imperatorum et regum romano-germanorum* (Straßburg,

1648), p. 8, where it is said that Emperor Charles '*dictitat*' in the Golden Bull; Samuel Pufendorf, *De iure naturae et gentium libri octo* (London, 1672), VII, ch. 8, §3: '*Poene in lege dictatae*' ['Punishments dictated in law'], etc.

19 For a systematic overview, see G. Ferrari, *Histoire de la raison d'état* (Paris, 1860).

20 Fritz Wolters, *Über die theoretische Begründung des Absolutismus im 17. Jahrhundert. Festgabe für Schmoller* (Berlin, 1908), p. 210.

21 As in the reports by Hubert Languet, *Arcana seculi decimi sexti: Epistolae secretae*, edited by J. P. Ludovicus, Halle, 1699.

22 München Geheimes Staatsarchiv, K. Schw. 50/28 fol. 124 (unpublished manuscript).

23 Arnold Clapmar, *De arcanis rerumpublicarum libri sex* (Bremen, 1605; published by Clapmar's brother a year after Clapmar's death). The Elsevier edition (Amsterdam, 1644) contains not only the *Arcana* by Christopher Besold, but also Clapmar's *Conclusiones de iure publico* (on which see below).

24 This phrase is used 300 years later by Anton Menger, *Neue Staatslehre* (Jena, 1903), p. 95, also to distinguish the real from the apparent reason. The less he thinks about the connection with *arcana* literature, the more illuminating it would be to compare the political–technical understanding of the state with the socialist conception of the 'superstructure', which became dominant in the various theories of the nineteenth century, from all the political directions.

25 People in revolt must be promised anything; later on, one can withdraw one's promise: '*populo tumultuanti et feroci satius est ultro concedere vel ea quae contra bonos mores postulant, quam Rem publicam in periculum vocare. Nam postea sedate populo retractari possunt*' ['rather than inviting danger in the republic, it is preferable to promise wantonly to a menacing populace in revolt, or to grant demands that go against good habits. For these can be withdrawn later on, when the populace has been sedated'] (Arnold Clapmar, Franciscus Rosellus and Wolfgang Heinrich Ruprecht, *Conclusiones de iure publico*, 1644, 98). This statement, which genuinely expresses the overall practice of class struggle (Franz Mehring, *Geschichte der deutschen Sozialdemokratie* (4th edn, Leipzig, 1923 [*sic*]), vol. 4, p. 141, is likely to have received this formulation from Justus Lipsius, *Politicorum sive civilis doctrinae libri six qui ad principem maxime spectant* (Leyden, 1589), Book VI, p. 351 (*falle, falle potius quam caede* ['lie, lie rather than killing']).

26 '*Imprimis autem arcanum dominationis Aristocraticae sapere videtur creatio illa Dictatoris Romani post latam legem provocationis*' ['That creation of the Roman dictator after the passing of the law of appeal appears to possess a first-class understanding of the secret of aristocratic rule']: Clapmar,

De arcanis, III, ch. 19; see further comments on dictatorship in Books I, chs 11, 12; V, chs 18, 19; and in Clapmar, Rosellus and Ruprecht, *Conclusiones*, 36.

27 Clapmar, *De arcanis*, I, ch. 9; III, ch. 1; Clapmar, Rosellus and Ruprecht, *Conclusiones*, 3 ('Some say *ius publicum esse idem quod Politica, sed falso et contra sententiam Aristotelis*' ['that public law is the same as politics, but this is false and runs against Aristotle's opinion']); 50 (against Machiavelli, on the grounds that he does not distinguish between *iura dominationis* and *arcana dominationis*).

28 The following quotation, from *De arcanis*, Book IV, chs VIII and III, contains a reference to Book II of Livy's history. In times of riot the law must be placed in one man's hand; one must '*manu omnia gubernare*' ['steer all the controls with one's hand'], where *manus* designates the actual force [*Gewalt*] and the executive powers, in opposition to *ius*. In view of the whole context, this passage can only refer to Livy, II, 31 (the dictatorship of Valerius in 494 BC). Clapmar, like his contemporaries, prefers to talk of civil upheaval rather than of war. But this passage in Livius shows that, originally, the dictator was only a commander in chief of the army and that dictatorship should not be used for domestic purposes.

29 Clapmar, *De arcanis*, chs 4, 7 and 10; see also Christopher Besold, *Tractatus posthumus de origine et successione variisque Imperii Romani mutationibus* (Ingolstadt, 1646), Pars II, ch. 1, p. 150. The definition of *ius dominationis* as an exceptional right can already be found in Albericus Gentilis, *De potestate regis absoluta* (Hannover, 1605), pp. 11, 25.

30 The distinction between rights of sovereignty (*iura maiestatis*) and the mere illusion of sovereignty (*simulacra maiestatis*, which can be left to the German emperor without concern) can be found in Hippolythus a Lapide, *De ratione status in imperio nostro romano-germanico* (Amsterdam 1640), Pars II, ch. 6.

31 Therefore in his *Tractatus posthumus*, p. 150 the imperial jurist Besold says that what is written in Limnaeus' *Capitulationes* (above, n. 18) is only related to the *ordinaria administratio* ['normal administration'] and is not binding for the emperor in a state of exception. It does not apply to the *extraordinaria potestas, secundum quam utpote Imperator agere potest, quae necessitas requirit* ['the extraordinary power, according to which it would be natural for the Emperor to be able to act as necessity requires']. Besold illustrates this idea by referring to Emperor Friedrich, who outlawed Count Palatine Friedrich as a notorious rebel and transferred his electoral rights to someone else, regardless of the prescribed procedure of the Capitulations, *quia nempe pro statu rerum tum praesentium aliter fieri nequivit* ['because there was no doubt that nothing else would do in the situation prevailing at the time']. – Christian Gottlob Biener,

Bestimmungen der kaiserlichen Machtvollkommenheit in der deutschen Reichsregierung (Leipzig, 1780) also assumes that the supreme power [*Machtvollkommenheit*] was originally above ordinary powers and was 'the epitome of extraordinary measures for the maintenance of the state in cases of collision' (p. 6). Nevertheless, he disagrees with the 'Caesarians', i.e. the imperial jurists (Stamler, Multz, Lynker, Humler) who granted the emperor supreme power above ordinary powers (pp. 100ff., with further references). See also the end of the excursus on Wallenstein below (pp. 65–79).

32 Clapmar, *De arcanis*, IV, ch. 1; VI, chs 1, 21; Clapmar, Rosellus and Ruprecht, *Conclusiones*, 56 and Corollary 2. Here is Clapmar's hierarchy of the different types of law: *Ius naturae corrigitur a iure gentium, ius gentium a iure militari, ius militare a iure legationis, ius legationis a iure civili* ['Natural law will be amended by the law of peoples, the law of peoples by military law, military law by the law of diplomacy, the law of diplomacy by civil law'] – and this one again *a iure quod appello Regni sive dominationis* ['by a law that I call the law of the ruler or of government'], which he characterises quoting a remark from Cicero: '*animadverte et dicto pare*' ['listen and obey': *Pro Rabirio*; *Ad Atticum* 1.7]. Whereas of military jurisdiction Clapmar says: '*militaris iurisdictionis summa ratio pecunia*' ['the supreme reason of military jurisdiction is money'] (*De arcanis*, IV, ch. 1). Cyriacus Lentulus is outraged by the 'horrendous' consequences of such a distinction between public and private law, which in fact identifies public law with *raison d'état* and public interest: see his *Augustus* (above, n. 11), p. 83, which otherwise counts as part of the *arcana* literature. Lentulus follows Machiavelli and Clapmar in his view of dictatorship (pp. 6, 9, 10, 100, 110). Albericus Gentilis' comment in his *De legationibus* (above, n. 11), II, ch. 7 is characteristic: it is ridiculous to call the Turk a tyrant; moreover, it is difficult to distinguish between the king and the tyrant. Therefore, the question of the extent to which the enemy, as a fighting party in civil war, must be treated according to martial law will receive an answer similar to the one given by respected jurists in 1919: '*eventus iudicabit*' ['the outcome will decide'] (ch. 9).

33 Jacob Bernhard Multz, *Repraesentatio maiestatis imperatoriae* (Oettingen, 1690), Pars I, ch. 12. In this book Multz seeks to support the lost political power of the emperor with the help of conclusions about supreme power [*Machtvollkommenheit*].

34 All the quotations are taken from the Edinburgh edition of 1579. The *Vindiciae* has been chosen as an exemplary piece of evidence of the literature of the monarchomachs, not just because it is the most 'typical expression' (so Albert Elkan, *Die Publizistik der Bartholomäusnacht*, Heidelberg, 1905, p. 171) and an 'exemplary composition' and 'summary' of the whole body of literature of that kind of constitutional theory (so Ludwig

Cardauns, *Die Lehre vom Widerstandsrecht des Volkes*, dissertation, Bonn, 1903, p. 99), but especially because the other monarchomachs provide historical evidence that is based on theology and moral theology or, like Hotman and Buchanan, on the German history of law. On Althusius, see the discussion of Rousseau in Chapter 3 below.

35 Iulius Brutus is the most radical one in the sense that his argument is the most abstract. He wants to proceed *geometrarum more* and to construct the state from the principles of justice (*Vindiciae*, Foreword). The (Aristotelian) definition of law is characteristic of his rationalism: *lex est multorum prudentum in unum collecta ratio et sapientia* ['the law is the reason and knowledge of many wise people, gathered in one']: it is better to obey the law than a person, however prudent s/he may be, because the law is *ratio* ['reason'] and does not possess *cupiditas* ['greed'], whereas the human being *variis affectibus perturbatur* ['is troubled by many affections'] (pp. 115–16). Iulius Brutus' appraisal of Brutus follows without reservations the classic tradition on tyranny (p. 188). This tradition should not be ignored in a historical appraisal of the right to resist; in fact it found a sensational expression, only a few decades earlier, in the apology that Lorenzino de' Medici (Lorenzaccio) wrote in order to justify his murder of Duke Alexander of Florence (1537; *Apologia di Lorenzo de' Medici*, ed. by G. Lisio, Florence, 1957). In his vast book on the doctrine of the right to resist, Kurt Wolzendorff has shown the close connection between the teachings of the monarchomachs and the positive understanding of constitutional law at that time (*Staatsrecht und Naturrecht*, Breslau, 1916). Nevertheless, the *Vindiciae* in particular seems to step outside this connection for the most part.

36 *Vindiciae*, pp. 81–2; for further details on Roman history, see pp. 93, 121, 162, 188.

37 Certain similarities, which are definitely not absolute identities, suggest that the contradiction between justice and scientific methodology has a parallel in the contradiction that occurred in the nineteenth century between ethical (so-called 'natural law') and 'scientific' socialism. However, it is a serious objection to Carl Bergbohm's exposition that he cuts short the enormous wealth of ideas of the seventeenth century with an unmerciful and in no way clear 'yes, yes – no, no', to declare as evil whatever transcends his own (very complex and not at all analysed) historical, relativistic, positivistic self-evidence. Not even a writer of Hobbes' stature could be protected from that verdict by the sentences quoted below. Of course, especially here, when Bergbohm discusses Hobbes, Spinoza and (!) Locke, he becomes slightly unsure and talks about their 'uncertainty concerning the existence or non-existence of natural law' (*Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen*, Berlin, 1892, p. 164, n. 18).

38 At this decisive point – in other words, when the question of the content of the contract arises – there is an ambiguity in Hobbes. According to *De corpore politico*, II, 1, §2 and §3 and to *De cive*, II, 5, 6, the contract entails a renunciation by all for the benefit of the sovereign. This is therefore a devolution, a delegation from the people to the sovereign, as is assumed in the *lex regia*. But in Hobbes' system it is more consequential not to assume devolution, but rather a constitution. In *Leviathan* (chs 16 and 17) the creation of a representative organ is the essential content of the contract: everyone acts as if the actions of the sovereign would be his own. That is, the contract constitutes an absolute representation, which every individual has to accept and grant as valid; and the state emerges from this as a unity. This is something different from delegation in a sovereign dictatorship, as it forms the basis for Caesarism and it is not a *lex regia*. The diversity of the contract of the state [the social contract] in Hobbes has been demonstrated by Frédéric Atger, *Essai sur l'histoire des doctrines du contrat social* (Nîmes 1906, thèse de Montpellier), p. 176.

39 Samuel von Pufendorf, *De iure naturae et gentium* (above, n. 18), VII, §7; also §§ 8, 10, 12, 13; VIII §6; etc.

40 Ibid., VIII, §10 : '*Semper tacita haec exceptio esse intelligitur, ni salus reipublicae suprema in eiusmodi legibus lex, aliter requirat* [. . .] *nam si rex dicat, salutem populi aut insignem reipublicae utilitatem id postulare, sicuti et ea praesumptio actus regis semper comitatur, non habent cives quod regerant: quippe cum ipsis desit facultas cognoscendi*' ['This exception is always understood to be tacit, unless public safety, the highest law among those of its kind, commands the contrary [. . .] For if the king declares that the safety of the people or some great benefit to the republic demands it, just as this assumption always accompanies the acts of kings, the citizens have nothing to retort: for they lack any capacity to discern these matters'].

41 Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik* (Breslau, 1880), pp. 216–17; Wolzendorff, *Staatsrecht und Naturrecht* (above, n. 35), p. 265.

42 From these historical examples, the Balìa as a constituting Comité is of interest. It is sufficient to mention, among different cases, the characteristic one of 1530 (the overview below is taken from Simonde de Sismondi, *Histoire des républiques italiennes*, vol. 16, Paris, 1818, pp. 69ff.). After the peace treaty in virtue of which Florence submitted itself to the emperor (12 August 1530), Valori ordered the occupation of the palace (20 August) and an assembly of the 'people'. Hardly 300 men turned up. The untrustworthy ones were forced back with knives. Salvestro Aldobrandini addressed the people's assembly and asked them whether they would agree to nominate 12 men who, together, would be given as much authority and responsibility as the entire people of

Florence. The question was repeated three times and the people answered three times 'Yes'. Those 12 men were called the Balìa; a papal commissar nominated them. They disposed of the Signoria, the 10 commissars of war and other officials from their functions, they disarmed the people and they abolished the name of the republic. At least the destruction of the republic was carried out by republican commissars through republican means. The Balìa governed several months alone, as a 'depositary of sovereignty'. In October 1530 a second Balìa was established, comprising 150 members who were appointed by the first Balìa. The second Balìa included all the aristocrats loyal to the Medici. On 4 April 1532 the Balìa was forced by Valori, Guicciardini and others to establish a Comité of 12 citizens, who were to be mandated to reorganise the state of Florence. The new constitution of 27 April 1532 suppressed all the republican bodies and declared Alexander de' Medici prince of the state.

43 Jean Bodin, *Les six livres de la république*, I, ch. 8, pp. 122ff. Quotations are taken from the second French edition, Paris, 1580; for the Latin text the Paris edition of 1591 is used. Whenever other French or Latin editions are used for comparison, they will be specifically mentioned.

44 When Hermann Rehm, *Geschichte der Staatsrechtswissenschaft* (Freiburg 1896), p. 224 introduces, against Bodin, the modern distinction between sovereignty of the state and sovereignty of the organs of the state, he uses a distinction of which Bodin had no knowedge. The question is, however, whether this deficiency is based on Bodin's inability to discern adequately what was going on or on his dislike for hypostasising a feigned higher unity as the subject of a real power.

45 Albericus Gentilis, *De vi civium in regem simper iniusta* (1605), p. 120; Caesar is not a true prince. According to Arnisaeus, the dictator has *maiestas* [sovereignty] but is not *rex* [a king]: *De republica* (Frankfurt, 1615), II, ch. 2, p. 15, nn. 15–27.

46 Dominicus Arumäus, *Discursus academici de iure publico*, vol. 1 (Jena, 1616), p. 381 and vol. 2 (Jena, 1620), pp. 124, 553–4: as sole magistrate of the city, the dictator – like the proconsul in the province – had *imperium merum* ['plain power'], i.e. the authority of the criminal court [*Kriminalgerichtsbarkeit*], consisting in *ius gladii* ['the right of the sword']; but he lacked *maiestas*, because the latter was a *perpetua potestas* ['permanent power']; see also vol. 5 (Jena, 1623), p. 57. Christopher Besold, *Discursus politici* (Straßburg, 1623), I, ch. 2 finds in dictatorship an example of the fact that a democratic state (*popularis status*) is administered like a monarchy; in this he makes a distinction between *ius imperii* and the administration that he, arguing against Bodin, wishes to relate back to Aristotle (Aristotle, *Politics*, Book 4, end of ch. 5). Caesar is, for him, a sovereign prince despite the fact that he was called dictator, on the grounds this capacity did not depend on the name but on his having

plenitudo potestats; see also above, p. 237, n. 31; Theodor Reinkingk, *Tractatus de regimine seculari et ecclesiastico* (6th edn, Frankfurt, 1663), I, ii, ch. 2, p. 57; Johann Adam Osiander, *Observationes in libros tres de iure belli et pacis Hugonis Grotii* (Tübingen, 1671), pp. 485–6.

47 As a dictator, Prince Moriz of Orange is also mentioned (panegyrically) by Arumäus, *Discursus academici de iure publico*, vol. 5 (Jena, 1623), n. 2, ch. 3, p. 57; the dictator possessed the *summa belli* [leadership in war], and the prince of Nassau was, likewise, *solus terrae marisque belli arbiter constitutus* ['the only appointed arbiter of war on land and at sea'] from the unified provinces of the Netherlands. According to Bodin, the prince was not a sovereign, because his authority was derived from the states to which he had vowed loyalty, and hence those states retained sovereignty. The prince was governor *(Stadhouder)-Kapitein-Generaal* (of five provinces, in 1590) and *Admiraal-Generaal*; he was not explicitly appointed as *Kapitein-General over de legers van den Staat*, as Prince Friedrich Heinrich, Wilhelm II and Wilhelm III were later on (in 1625, 1637 and 1672 respectively), despite the fact he was called all that. The explicit appointment was also called a '*Commissie*' in the case of the princes mentioned above. The general states [*Generalstaaten*] (*eigentlich het Collegie der Gecommitterden van de nader geunieerde Provincien*) retained control over warfare; they sent commissars to the battlefield from time to time; and sometimes (as in 1600) they went *in corpora* to the war camp [*Kriegslager*] themselves. The functions of Wilhelm I of Orange, though, were following the 1575 and 1576 Acts of Agreement between Holland and Seeland. They were of such kind – not being restricted to independent warfare, complete defence of the country and the right to appoint army officers and create functions, but also extending to their jurisdiction – that he did not appear as a steward (or governor), but rather as a successor to the king. But in 1584, when Moriz of Orange, who was under age at the time, was appointed head of the executive (city council), that was done, at least in form, only for a limited period; hence he was not a hereditary successor to his father. The sovereign power exercised by Wilhelm I could not be renewed; in fact the Orange possessed the political influence of sovereign princes. For an overview and bibliography, see Jacobus Janus de la Bassecourt Caan, *De regeeringsvorm van Nederland von 1515 tot heden* (3rd edn, s'Gravenhage, 1889), pp. 57–9, 92, 114, 123, 131, 191. Furthermore, a *Recueil van verscheyde placaten, ordonanntien, resolutien, instructien [. . .] betreffende de saecken van den oorlogh*, has also been used that contains instructions for commissars of the army (1590–1681; University Library Munich 8°, Jus 2991).

48 Grotius, *De iure belli ac pacis* (above, n. 18), I, ch. 3, §8.

49 '*Quod intra tempus suum (dictator) omnes actus summi imperii exercuerit eodem iure quo qui est rex optimo iure*' ['That, during his period of rule,

the dictator carries into effect all his acts of supreme power by the same right that, in a king, is the highest right'] (ibid.); '*Duratio naturam rei non immutat*' ['Duration does not change the nature of a thing'] (§10 – and see also '*rerum moralium naturam ex operationibus cognosci*' ['to know the nature of human things from their works']). The situation is different if someone is *revocabilis*; then the *effectus* changes, and hence the *ius*.

50 When Grotius no longer speaks about the dictator, he distinguishes between *summitas imperii* [the apex of power] and *plenitudo habendi* [the fullness of having]: many *summa imperia non plene habentur* ['have the highest power, but not fully'], whereas others have *non summa plene* ['not the highest, but fully'] – as for example a margrave who can sell his function or bequeath it: this is something that a prince cannot always do (ibid., §14). According to Grotius, the dictator would not possess *plenitudo habendi*, of course. But, because it should not be possible to dismiss him before the end of his time in office, he would not be just a commissar either.

51 Thomas Hobbes, *Elementa philosophica de cive*, Amsterdam, 1647 (first printed for friends in 1642), VII, 16, p. 134.

52 Thomas Hobbes, *Leviathan*, ch. 19, pp. 95–6 of the Latin edition of 1668. F. Tönnies, *Hobbes, der Mann und das Werk* (2nd edn, Osterwieck/Leipzig 1912), p. 208 has rightly pointed out that, compared to Hobbes' earlier works, the *Leviathan* is a political treatise more than one about natural law. The passage mentioned above has been more often interpreted as a tribute of recognition to Cromwell. However, given the line of argument presented in it, this is obviously not right. On Cromwell's 'dictatorship', see Chapter 4 (pp. 112ff.).

53 Hobbes, *De cive*, X, 15, p. 182.

54 J. F. Horn, *Politicorum pars architectonica de civitate* (Utrecht, 1664), I, 19, p. 167 furthermore indicates that Hobbes only seemingly puts forward good arguments for monarchy. But in truth his teaching is seditious (*seditiosus*), because it makes single individuals the basis for the state. Yet Hobbes would not have accepted, say, a sentence such as can be found in Lorenz von Spattenbach, *Politische Philosophie* (Salzburg, 1668), p. 67, 'that for God, having created the earth, it was deemed good to choose an especially valuable and suitable matter in order to combine in it, namely in kingship, all the traits and features of his divine image, so that everyone may recognise them immediately by the mark of Cain'. Nevertheless, Spattenbach too refers to dictatorship.

55 Pufendorf, *De iure naturae et gentium* (above, n. 39), VII, ch. 6, §14.

56 Thomasius, *Institutionum iurisprudentiae divinae* (above, n. 11), III, ch. 6, §126.

57 Christian Wolff, *Ius naturae methodo scientifica pertractum: Pars octava et ultima*, Halle and Magdeburg, 1748, ch. 1, §70; there is also a reference to Grotius here.

58 See Durandus, *Speculum iuris* (above, n. 6), I, De iudice delegato, §§1ff. – the judge is active either as an *ordinarius* or as a delegated judge (on the basis of a commission) – and *De legato* §2 – *legatus vices gerit domini papae* ['the legate acts in place of the pope'], also on the basis of a *commissio*. In the chapter discussed here (*Republic*, III, 2) Bodin mainly refers to the known commentators [*Glossatoren*], Baldus and Bartolus in particular. He haughtily rejects their distinction between an ordinary and an extraordinary fulfilment of state tasks (the latter he deems to be '*odiosus*' ['hateful'], p. 380), and he criticises Govean (p. 373), Charles Sigon (pp. 374, 379) and Nicholas Grouche (p. 379) on the grounds that they fail to realise the difference between function and commission.

59 On this issue, see G. Hanotaux, *Origines de l'institution des intendants des provinces* (Paris, 1884) and Otto Hintze, *Der Commissarius und seine Bedeutung in der allgemeinen Verwaltungsgeschichte: Festgabe für Karl Zeugmer* (Weimar, 1910), pp. 506 and 514. The latter emphasises the historical significance of Bodin's chapter.

60 This formulation can be found in the French *editio princeps* of 1577, p. 275, and also in the editions of 1580 and 1583, p. 375. However, in the Latin translation the word 'occasion' is missing; see the Paris edition of 1591, p. 342; the Frankfurt edition (by N. Hoffmann) of 1619, p. 406; and Jonas' edition of 1622. Reference to *tempus*, *locus* and *res* can be found everywhere instead.

61 The fact that, according to a modern understanding, the judicial official is granted a right to his function means that he can only be dismissed against his will, under more difficult circumstances (Max von Seydel, *Bayrisches Staatsrecht*, 2nd edn, 1896, vol. 2, p. 218). The legal regulations that protect the judge from arbitrary dismissal and therefore subsequently ground his irrevocable authority form the basis of his right to the function he has. This right does not rest, of course – as it did in the medieval conception – on the private, vested right of the function holder, which was gained from tenure or through acquisition or mortgage. The private interest that the function holder had in exercising his function does not count any more, when compared to the public interest of today. Therefore it is not possible to apply without hesitation, to the concept of the constitutional state [*staatsrechtlich Begriff*], the perspective of private law – as is common in the theory of the mandate, or of authorisation. Nevertheless, the theoretical work done in the discipline of private law is not without value for public law today. It is worth considering the rationale for a differentiation of the irrevocable authority of private law, which was suggested by von Thur as appropriate for regulations concerning public law (A. von Thur, *Die unwiderrufliche Vollmacht: Straßburger Festschrift für Laband*, Tübingen, 1908, p. 52). In the discussion about the extent of irrevocable authority, von Thur

argues that an irrevocable authority is no doubt permitted to regulate the particular rights of the contractor, together with regulations that define obligations of a certain content. On the other hand there are concerns about an irrevocable authority of unlimited scope and extent, because the same reasons would apply according to which an obligation to sell future property is void (*Bürgerliches Gesetzbuch* [BGB; German Code of Civil Law], §310). Therefore the unlimited procuration [*Prokura*] is always revocable (*Handelsgesetzbuch* [HGB; German Commercial Code], §52); likewise, it is commonly accepted that a general authorisation exceeding a determined area of legal actions is revocable (von Thur, *Vollmacht*, p. 55; see also the references given in nn. 4 and 5 above and *Entscheidungen des Reichsgerichts in Zivilsachen* [*RGZ*], vol. 52, p. 96). The principle of this differentiation, which is also significant for public law, states that an empowerment or authorisation in the legal sense must be, by definition, normatively determined. An unlimited authorisation is not just a quantitative expansion of a limited authorisation; it rather is an *aliud*. The judge has a right to his function because, theoretically, he is bound by the law and he is the mouthpiece for it. The judge – like the member of the revolutionary tribunal, which should decide according to the concrete circumstances, or even should serve the achievement of a concrete end – would be, in the circumstances, a judge freed from law, who on the other hand is also an agent even more bound by orders from the powers that use him. According to more recent opinions, the greater freedom that a judge might have does not consist in greater independence from law, but rather in the dissolution [*Auflösung*] of legal norms and facts. The independence of the judicial function always correlates with the independence of the judge from law.

62 Algernon Sidney, *Discourses concerning Government* (3rd edn, London, 1751), ch. 2, §13, p. 119: 'I do therefore grant that a power like to the dictorian [. . .] kept perpetually under the supreme authority of the people, may by virtuous and well disciplined nations upon some occasions be prudently granted to a virtuous man'. The dictator has nothing to do with the monarch, 'whose power is in himself'; the power is only created in extraordinary cases, and the people always retains its power. Sidney mentions several times that the dictator is only appointed 'occasionally'. Although, in line with his sources, he calls Caesar a 'perpetual dictator', he does not realise that especially dictatorship can mediate the transition from democracy to absolutism (pp. 121, 134–8). He talks about the commission of the dictator consisting in *ne quid detrimenti*… ['lest no injury…'] (pp. 400–1). But he says, about England at that time in contrast to the rule of Caesar, 'we have no dictatorial power over us' (p. 283). By this he means a dominion independent from the will of the governed. These statements are representative of the classic tradition inherited by

the English opposition to monarchy, which was perhaps most strongly advocated by Milton.

63 John Locke, *The Second Treatise of Civil Government* (London, 1690), II, ch. 17 ('Of Tyranny').

64 The last case of a commission that violated parliamentarian principles was the commission of visitation of Magdalen College, Oxford, which was ordered by James II (Julius Hatschek, *Englisches Staatsrecht*, Tübingen, 1905, vol. 1, p. 558).

65 Locke, *Second Treatise of Civil Government*, II, 147: 'But what is to be done in reference to foreigners, depending much upon their actions and the variations of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth.'

Notes to Chapter 2

1 J. Haller, *Papsttum und Kirchenreform*, vol. 1 (Berlin, 1903), p. 26.

2 Albert Hauck, *Der Gedanke der päpstlichen Weltherrschaft* (Leipzig, 1904); Albert Hauck, *Kirchengeschichte Deutschlands*, vol. 4 (3rd/4th edn, Leipzig, 1913), pp. 714ff. See also Ernst Bernheim, *Mittelalterliche Zeitanschauungen in ihrem Einfluß auf die Politik und Geschichtsschreibung*, vol. 1 (Tübingen, 1918), p. 221.

3 *Defensor pacis*, II, ch. 23 (24), *De moribus curiae romanae*, edited by Richard Scholz, in E. von Brandenburg and G. Seeliger, eds, *Quellensammlung zur deutschen Geschichte* (Leipzig, 1914), p. 102.

4 Instead of looking up many examples, see *De potestate ecclesiastica*, II, in Jean Charlier de Gerson, *Opera omnia* (Antwerp, 1706), vol. 2, p. 240. Indeed the pope possessed *plenitudo potestatis*, though the whole church represented by the council regulated its *applicationem ad usum* [putting to use] in order to prevent abuse – or as Pierre d'Ailly (1351–1420) puts it: '*ad regulandum usum plenitudinis potestatis non expedit Ecclesiae quod ipsa regatur regimine regio puro, sed mixto cum Aristocratia et Democratia*' ['it does not help the church towards regulating the use of *plenitudo potestatis* if it is itself ruled by an unmixed royal government, but by one mixed with aristocracy and democracy']. J. B. Schwab, *Johannes Gerson, Professor der Theologie und Kanzler der Universität Paris. Eine Monographie* (Würzburg, 1859), p. 738, who cites these passages, calls the distinction between the substance of power [*Gewalt*] and its exercise the 'well-known magic wand of scholasticism'. But, if one considers the history of this distinction up to the present day – up to the German law on the worker's council [*Betriebsrätegesetz*] of 9 February 1920 – maybe this ironical view of scholasticism loses some of its superiority.

5 Albert Hauck, *Kirchengeschichte Deutschlands*, vol. 4, pp. 798–9; the statement cited by Hauck is in the same volume, at pp. 756–7.

6 Gulielmus Durandus, *Speculum iuris* (Frankfurt, 1592) De legato, §§2, 4.

7 The traditional doctrine of *aequitas* or ἐπιεικεία, which lists the cases in which one can deviate from law – see St Thomas Aquinas, *Summa theologica* (in *Opera*, vol. 9), II, II, quaestio cxxx and the commentary by Cardinal Cajetan in vol. 7, p. 187 – was adopted without hesitation for its ideas on public law. Therefore the actual question, namely who finally decides on the state of emergency, was never raised in the same way as it is raised in the modern theory of the state; see above, pp. 171 and 18–19.

8 Durandus, *Speculum*, De iudice delegato, §1: '*aliud est iurisdictionem committere, aliud remittere. Committi dicitur quando alias qui committitur non habet iurisdictionem et tunc est delegatus. Remitti dicitur quando alias habebat iurisdictionem et tunc est ordinarius*' ['It is one thing to delegate jurisdiction, another to distribute it. We call it "delegating" when the person who delegates does not have jurisdiction, and in that case he is a delegate. We call it "distributing" when he had jurisdiction, and in that case he is an ordinary']. The distribution of business among several ordinary judges is not a *commissio*. Ibid., §6: With the death of the delegate, the delegate loses his jurisdiction (see Jean Bodin, *Les six livres de la République* (Paris, 1582, 2nd edn), p. 384; on the edition used, see Ch. 1, n. 43).

9 See the [*pactum*] *commissorium* that Pope Innocent III gave to the abbot of St Emeran and others in 1205 against Bishop Konrad IV: an archdeacon complains that he finds the bishop's illegal possession of a fief granted by the church of Regensburg disruptive. It is left to the commissars' *discretio* to force the bishop, through ecclesiastic punishment, to behave lawfully (*monitione praemissa per censuram ecclesiasticam appellatione remota** *cogatis* [once the warning has been sent, you exercise constraint through ecclesiastical censorship, by distant appeal]): J.-P. Migne, *Patrologia latina* (= *Patrologiae cursus completus, Series latina*; 1844–65), vol. 217: Innocentius III, vol. 4), p. 146, n. 98; see also e.g. p. 193, n. 138, etc.

10 Durandus, *Speculum* (above, n. 6), De iudice delegato, §2 n. 9 : '*universitas caussarum audiendarum totius mundi est ipsis* [sc. *auditoribus palatii domini papae*] *commissa ut ex generali commissione audiant vice domini papae caussas appellationis*' ['all the lawsuits to be heard in the entire world

* Translators' Note: 'Ways were sought to moderate the inconveniences caused by appeals to Rome in small matters. For example, appeals in criminal cases were restricted. The popes themselves sought to restrain appeals by adding the clause *appellatione remota* to rescripts of justice.' R. H. Helmholz, *The Oxford History of the Laws of England*, vol. 1: *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press, 2004), p. 208.

are delegated to them, too [sc. the auditors in the pope's palace] in order that they grant, in the pope's name, the reasons for appeal'].

11 Hauck, *Gedanke der päpstlichen Weltherrschaft* (above, n. 2), vol. 4, pp. 799–800.

12 This explains Reinkingk's statement that the pope acts as *commissarius Christi* [Christ's commissar], but he cannot give instructions and has no mandate (Theodor Reinkingk, *Tractatus de regimine seculari et ecclesiastico*, 6th edn, Frankfurt, 1663, I, ii, ch. 4, n. 23).

13 The French *prévôts* (*praepositi*), who had judicial, military and administrative functions of a commissarial character, were established in the middle of the fifteenth century, together with the standing armies, and they were given administrative districts in which they maintained public security and order with the help of the army. They exercised the so-called 'pivotal jurisdiction' over certain crimes (robbery, forming bands and other cases of disturbance to public security). The *baillis* [bailiffs], who originally were given a certain district to administer as *missi* [envoys] of the king, also integrated themselves in part into the feudal hierarchy and became *intermédiaires* between the king and the *prévôt*. The empowerment of the different commissars of reformation and control typically stated that they were given '*plein pouvoir, autorité, commission et mandement*' ['full power, authority, commission and written mandate'] for everything they needed in order to fulfil their mandate. All the *bailiffs*, *sénéchaux* [senechals] and other *officiers* were requested to obey, and the commissar was given coercive powers [*Zwangsbefugnisse*] – of course, only *par toutes voies et manières deues et raisonnables* [by all means and in all manners due and reasonable]; complaints or appeals were not possible. See Robert Holtzmann, Georg von Below, and Friedrich Meinecke (eds), *Französische Verfassungsgeschichte von der Mitte des Neunten Jahrhunderts bis zur Revolution: Handbuch der mittelalterlichen und neueren Geschichte* (Munich / Berlin, 1910); Paul Viollet, *Histoire de institutions politiques et administrative de la France*, vol. 3 (Paris, 1903), p. 261; A. Esmein, *Cours d'histoire du droit français* (9th edn, Paris, 1908), p. 350; C.-V. Langlois, in E. Lavisse, *Histoire de France*, vol. 3.2 (Paris, 1901), p. 346; Charles Petit-Dutaillis, 'Charles VII, Louis XI et les premières années de Charles VIII', in E. Lavisse, *Histoire de France*, vol. 4.2 (Paris, 1902), p. 246; Gabriel Hanotaux, *Histoire du cardinal Richelieu*, vol. 1 (Paris, 1893), p. 263; the entries 'Bailli', 'Prévôt' (and others) in F. Rageau-Laurière, *Glossaire du droit françois* (Niort, 1882), p. 393; N. Delamare, *Traité de la police*, vol. 1 (Paris, 1705), p. 194. For developments in England, see Julius Hatschek, *Englisches Staatsrecht*, vol. 1 (Tübingen, 1905), p. 558 and Julius Hatschek in Holtzmann, von Below, and Meinecke, *Englische Verfassungsgeschichte*, p. 256 on the commissions of justice of peace; Rudolph von Gneist, *Englische Verfassungsgeschichte* (Berlin, 1882),

p. 224; Otto Hintze, 'Der Commissarius und seine Bedeutung in der allgemeinen Verwaltungsgeschichte: Eine vergleichende Studie', in *Historische Aufsätze. Karl Zeumer zum sechzigsten Geburtstag als Festgabe* (Weimar, 1910, pp. 493–528), at p. 520. On commissars as officials of tax and revenue, see W. Lotz, *Finanzwissenschaft* (Tübingen, 1917), pp. 21, 229 (with bibliography on financial issues).

14 Examples from France and Savoy can be found in Hintze, 'Der Commissarius und seine Bedeutung', pp. 522–3. A good example for commissars of organisation is Hubert Languet, *Arcana seculi decimi sexti* (Halle, 1699), Part II, Book I, Epistula 111 (dating from 1577): Bathorius of Poland uses the controversy over religion in Prussia in order to send *commissarios* [commissars] to the county of the duke of Prussia *ad constituendam administrationem, qui omnia pro abitrio ibi agere dicuntur* [to form an administration, because they say that everything is done arbitrarily there].

15 The following examples are taken from Augustin Theiner's *Codex diplomaticus dominii temporalis Sancti Sedis (1389–1792)*, vol. 3 (Rome, 1862). An allusion to the Venetian *governatori* [governors] who, with the help of Luchino I Dal Verme (1320–72), should have overpowered the uproar in Candia in 1364, can be found in A. Pertile, *Storia del diritto italiano*, 2nd edn, vol. 2 (Turin, 1897), p. 407. See also S. Romanin, *Storia documentata di Venezia*, vol. 3 (Venice, 1855), pp. 360, 402 on *provveditori* [providers] from 1426, endowed with the functions of the police.

16 *Quibuscumque constitutionibus apostolicis aut statutis et consuetudinibus dicti sancti Laurentii* [name of the monastery] *et aliorum monasteriorum* [. . .] *nec non privilegiis seu litteris apostolicis contrariis iuramento, confirmatione apostolica vel quacumque firmitate alia roboratis nequaquam obstantibus* (Theiner, *Codex diplomaticus*, p. 28, No. 12; similarly, on two cardinals mandated as *commissarii*, p. 88, No. 35).

17 Ibid., p. 91, No. 60.

18 As senator, he had jurisdiction over minor crimes: ibid., nn. 78 and 85. Sometimes the senator was given extraordinary powers, e.g. to decide in summary procedures or to raise penalties (ibid., p. 205, No. 139), with the interesting explanation that adherence to the form (*forma*) of the estates' statutes and the following of legal procedure would easily create a *materia delinquendi* [opportunity for transgression], hence many crimes will go unpunished. See also p. 281, No. 216.

19 The information in the text is mainly based on the 1419 treaty between Pope Martin V and *capitaneus* Tartallia (ibid., pp. 245–9, No. 172). The *capitaneus* of a *condotta* has to be distinguished from a *capitaneus populi Romani* such as Malatesta or Theobaldus de Hannibalis mentioned above (ibid., No. 58; from the year 1400); the latter had a police mandate to

maintain security. However, Tartallia was given such a mandate. He was, namely, to fight against robbery, as the mandate stated, but he himself was not allowed to rob or to allow others to rob, as was written into his contract. He could also grant free conduct (it was explicitly said that rebels were excluded), but this was part of military activity. It is interesting that the commissar allocated to him had to have a certain rank (of cardinal or prelate), so that Tartallia would not have to acquiesce to any commissar. Parenthetically, it should be mentioned that this treaty of 1419 does not regard the commissar of the army as a newly introduced institution. The reference made by Prince August Wilhelm of Prussia in his *Die Entwicklung der Kommissariatsbehörden in Brandenburg–Preußen* (dissertation, Straßburg, 1908), p. 24 seems to ignore this Italian development. Further examples can be found in Theiner, *Codex diplomaticus*, vol. 3, p. 205, No. 138; p. 206, No. 140; p. 258, Nos 143 and 187 (tax reform); No. 247 (commissar of control of the *capitaneus* in 1431); and above all the example from 1444 discussed below (ibid., No. 303).

20 E.g. ibid., p. 184, No. 123. Michael Cossa was appointed *capitaneus generalis* of the papal fleet in 1411 and, in order to fulfil his mandate (*quae tibi comisimus*) more effectively, he was authorised to win over the rebels, to negotiate with them, to pardon them and so on. See also p. 279, No. 212; pp. 101–2, No. 53; p. 254, No. 180; p. 261, No. 189.

21 Ibid., pp. 356–7, No. 303.

22 Pertile, *Storia del diritto italiano* (above, n. 15), vol. 2.1, p. 419. The Venetian *governatori* of 1364 were civil commissars of government [*Regierungszivilkommissar*] (see above, n. 15).

23 Theiner, *Codex diplomaticus*, vol. 3 (above, n. 15), No. 242 (1431). Here a specification is made in favour of retaining the regular powers of the *capitaneus generalis*: one should not interfere unnecessarily with his authority to command.

24 Heinrich Finke, *Acta aragonensia*, vol. 1 (Berlin and Leipzig, 1908), p. cxxiv.

25 For example, in the negotiations of the Reichsmatrikel [Reich's registration list] of 1544, the commissars of Charles V were called sometimes 'ministers', sometimes 'decreed counsellors' [*verordnete Räte*] and sometimes 'commissars' (see *Zeitschrift des historischen Vereins für Schwaben und Neuburg*, vol. 23: 1896, pp. 115ff.).

26 The acts of a commission of reformation in Styria – published by Michael Kaspar Lundorp in the supplement to his *Acta publica*, vol. 1, namely *Londorpius suppletus et continuatus, sive Acta publica* (Frankfurt, 1665–7), Part 2 – say that the rebels previously maltreated the commissars of their duke [*Landesherr*] '*obwohl doch Kommissare Jure Gentium Sancti seynd*' ['despite the fact that commissars are untouchable according to international law'] (p. 184).

27 Joseph Poetsch, *Die Reichsacht im Mittelalter und besonders in der neueren Zeit. Untersuchungen zur deutschen Staats- und Rechtsgeschichte*, edited by Otto von Gierke (Breslau, 1911), issue 105, p. 3.
28 Ibid., p. 206.
29 Friedrich Christoph Förster, *Albrecht von Wallensteins Briefe und amtliche Schreiben* (Berlin, 1828), vol. 1, p. 332, n. 179.
30 See the instruction for the *Behaimbische Ständt und Städt abgeordnete Fürstlichen* [*sic*, not imperial] *comissarii* ['princely commissars sent to the estates and towns of Bohemia'], Prague, 17 November 1620, in Bayrisches Geheimes Staatsarchiv, Karton schwarz [K. schw.] 50/28, fol. 96 (not published).
31 Poetsch, *Reichsacht im Mittelalter*, p. 126 and p. 134, n. 3.
32 Reinkingk, *Tractatus de regimine* (above, n. 12), I, v, ch. 7.
33 See Johann Christian Lünig, *Corpus iuris militaris des heiligen römischen Reiches* (Leipzig, 1723), vol. 1, pp. 52–8.
34 Concerning the issue between the Earl of Oldenburg and Lord von Kniphausen, the emperor bestowed on Christian IV a *commissio ad exequendum* [commission of execution] in 1623. Von Kniphausen was sentenced by the imperial chamber court [*Reichskammergericht*] to return a dominion. He appealed and was granted a stay of execution by Emperor Rudolf. Only when the banned Mansfeld devasted the land and the danger emerged that he would offer it to a foreign potentate, thereby taking it away from the Reich, was the imperial commission to Christian IV issued (from the '*kurtzen information*' on this commission of execution, as recorded in the acts of the Reichstag of Regensburg, 1654, vol. 7 of Bayrisches Geheimes Staatsarchiv, foll. 37ff.).
35 Eduard Eichmann, *Acht und Bann im Reichsrecht des Mittelalters* (Schriften der Görresgesellschaft, Sektion für Rechts-Sozialwissenschaft, Heft 6, Paderborn, 1909), p. 145.
36 Mandate for the execution of the ban [*Acht-Executionsmandat*] by Emperor Ferdinand I on 13 October 1563, in Friedrich Ortloff, *Geschichte Grumbachischen Händel*, vol. 1 (Jena, 1868), p. 537. The ban was seen as *ipso facto* valid; enforcement of the ban came only after several penal orders [*Pönal-Befehle*] in 1566, when the mandate was renewed. It was extended to Grumbach's followers, and the elector of Saxony was ordered to execute the ban in his capacity as the superior of the county of upper Saxony: see F. Ortloff, *Geschichte Grumbachischen Händel*, vol. 3 (Jena, 1869), p. 349. On the simultaneous appearance of commissars, heralds and trumpeters, see p. 110; on the participation of imperial commissars, see pp. 220, 340. (The elector of Saxony writes to the emperor that it is well-known how little is done by the county districts asked to enforce the execution. It is therefore in the interest of the imperial authority and majesty that the emperor send, through commissars, 2,000

horses to Gotha or to the execution and that, 'in order to increase respect and fear', he empower his commissars and renew their mandate.) The elector, as commander in chief of the army of execution, is given imperial commissars who could do everything 'necessary for the constitution of the peace of the land': for example they could demand help from county districts and the like. The county's [*Landschaft*] and the subjects' release [*Loszählung*] from obedience to the authority of the banned Duke Johann Friedrich should normally have been executed by imperial commissars. But only a messenger with the imperial letter appeared. Initially the county demanded that the imperial commissars be present; after some negotiations they agreed to accept the situation, because they thought it would be enough if the elector, as commander in chief, executed the release of a new allocation to the recent lord according to the imperial edict (ibid., p. 368). The protocol and judgement of the imprisoned Grumbach were first signed by the imperial commissars, and this was followed by the signatures of the officers and counsellors of Duke Johann Wilhelm. In his *Historica descriptio* (Gotha, 1567), Hubert Languet talks of the executive measures taken in 1567 against Grumbach by imperial *legati seu commissarii*.

37 Lundorp, *Acta publica*, suppl. vol. 1 (above, n. 26), Part 1, p. 346; and see p. 350 for a *mandatum monitorium* [warning order] to the followers of the city of Braunschweig delivered by imperial commissars. It is stated in the mandate that the commissars should be respected and obeyed by reason of the powers and orders assigned to them. Here too, the ban is *ipso facto* realised, but it is suspended as a result of the emperor's congenial clemency and benevolence.

38 In 1629 the emperor urges his commissars of execution in the county district of Swabia to be aware that the estates plead not to be 'overwhelmed with different processes of execution [*Exekutionsprozesse*]'; the commissars should stick to their instructions and, in cases where it is notorious that churches and monasteries have been confiscated according to the treaty of Passau, they should 'not act in an executive manner' ['*nicht ab executione anfahen*']. They should rather listen to the parties and obtain [*requiriren*] further imperial instructions. Moreover, they should never make any decision impetuously [*inconsulto statuieren*], so that nobody may have cause to complain that he has not been heard to a satisfactory degree (Lundorp, *Acta publica*, suppl. vol. 3, p. 124; see n. 26).

39 In what follows I discuss documents of the Bayrischen Geheimen Staatsarchiv [Central State Archive of Bavaria] on 'the rebellion that arose in the kingdom of Bohemia and for whose sake His Imperial Majesty has conferred to His Excellency Duke Maximilian in Bavaria commissions and the power to execute them', 1618–1621 (K. schw. 50/28), as well as other unpublished documents; the only exception is

the obligation of 8 October 1619, which was published in P. P. Wolf's *Geschichte Maximilians I und seiner Zeit* (introduced by C. W. F. Breyer, Munich, 1807), vol. 1, ch. 4, No. 10. I wish to express my sincere gratitude to Dr. Riedner, archivist, and to Mr. Deml, keeper of public records, for their friendly readiness to support my use of the archive.

40 The Bavarian Central Archive contains a detailed report (K. schw. 309/12) made by an expert, Dr. Wilhelm Jocher, on the elector's declaration of the ban on 26 September 1620 – a report that details the formalities of the declaration of the ban, the documents of execution, the patents and so on.

41 Bayrischen Geheimen Staatsarchiv, K. schw. 389/ 1, fol. 32.

42 See above, n. 36.

43 According to the instruction that Maximilian gave in 1610 to his legate, who was to negotiate with the papal *nuncio* [courier] and with the ambassador of Spain: Wolf, *Geschichte Maximilians I* (above, n. 39), vol. 3, p. 570. The legate was to make it clear that the 'superior of the union' [*Bundesobere*] was called *capo della lega*; this only meant that, in case action was required, he alone had to command the assembled army of the united estates – but he had no command over the estates as such. Moreover, in certain circumstances the 'superior of the union' had the power to call to a summit [*Bundesstände*] all the estates of the union, or just their adjuncts: he could do that at his discretion, when a situation of emergency was looming. But this does not imply that he had any superior status: in any *collegio* there had to be a director, but not necessarily a superior.

44 Lünig, *Corpus iuris militaris* (above, n. 33), vol. 1, p. 3.

45 That commission is not mentioned in the *Reuter Bestallung Maximilians II* of 1570: see Article 39 in Lünig, *Corpus iuris militaris* (above, n. 33), vol. 1, p. 126; see for comparison Ferdinand III's constitution for soldiers and mercenaries [*Artikelbrief*], 1642 (revised 1665): Article 15, ibid., p. 824; the constitution for soldiers and mercenaries, 1658: Article 11, ibid., p. 671; the constitution for soldiers and mercenaries, Hamburg 1688: ibid., II, p. 1243; the constitution for soldiers and mercenaries, Lübeck 1692: ibid., I, p. 1249; the constitution for soldiers and mercenaries, Bavaria 1717: ibid., II, p. 788. According to the Bavarian constitution of 1672, the soldier has nothing to do with the commissar directly; in the Saxonian constitution of 1700 the title commissar is not mentioned either (II, p. 816). On the other hand, the constitution of the electorate of Mainz demanded respect for and obedience to the commissars, but not to the oath of allegiance (Article 58, II, p. 750); and the oath of the imperial militia of 1697 and 1711 did exactly the same (II, pp. 707, 721, 726, 729).

46 a Control through the commissars of a physical test of fitness, of the company, of horses and equipment, according to the *Reuter Bestallung*

Maximilians II of 1570, Articles 2, 10, 13, 34, 38. Wallenstein's army was organised in the second general register [*Generaletat*] in such a way that the 'headquarter' ['*Generalkanzlei*'] – the centre of war planning and administration – was divided into two sections: the war office [*Kriegskanzlei*], which was in charge of the administration and allocation of regiments to their senior commanders; and the central commissariat [*Generalkommissariat*], which was in charge of the subsistence and maintenance of the army. A county commissariat of war [*Landes-Kriegskommissariat*] was established for every province in the countries of the Austrian crown [*Erblande*], and for Bohemia a supreme commissariat. These commissariats of war negotiated the acquisition of what was needed for war with the estates that had to contribute to the war expenses. The control of mandatory contributions to the Reich was also overseen by the commissars of war. The chief of Wallenstein's central commissars, the imperial privy councillor Paul Graf zu Michner-Weitzhof, who was at the same time general land commissar of war [*General-Kriegs-Landeskommissar*] in Bohemia, was also called senior quartermaster and commissar of the exchequer [*Zahlungskommissar*]. A head commissariat [*Oberkommissariat*] organised relations between the three directorates of the artillery [*Generalfeldzeugstelle*] and the central office [*Generalkanzlei*] (B. Dudik, *Waldstein* [sic] *von seiner Enthebung bis zur abermaligen Übernahme des Armee-Ober-Commandos vom 13. August 1630 bis 13. April 1632*, Vienna, 1858, pp. 185–6; according to Victor Löwe, *Die Organisation und Verwaltung der Wallensteinschen Heere*, Freiburg, 1895, p. 32, '[a] clear and consistant organisation of the commissariats did not exist yet').

b The commissars in Tilly's army were subject to the general commissars [*Generalkommissare*] and to those commissars decreed by the general commissariat [*Generalkommissariat*]. They had to report to the general and to the prince about complaints and scarcities. Articulated instructions for the Bavarian commissars for physical examination [*Musterkommissar*] and for the sub-commisars in Tilly's army are in Lünig, *Corpus iuris militaris* (above, n. 33), vol. 2, p. 711.

c Initially the princely commissars of Brandenburg were not substantially different from commissars of other army administrations. In 1630 a war council – that is, an office comprising several princely councils – was established for the 'expedition of munitions', in other words for the acquisition of maintenance both for the imperial troops stationed in the country and for the troops of Brandenburg, their quartering, troop movements, negotiations with Wallenstein's commissars and so on. After the introduction of the standing army the commissars became permanent commissars of service [*Dienstkommissare*]

and the administration of the army was organised and centralised. For the struggle of the princely commissars with the land commissars [*Landeskommissare*] – who were appointed by the estates and who would represent the pecuniary interests of the taxpaying estates – and for the victory of princely absolutism with the help of the commissars, see discussions in K. Breysig's article in *Forschungen zur brandenburgischen und preußischen Geschichte*, 5: 1892, pp. 135ff.; G. von Schmoller, 'Die Entstehung des preußischen Heeres von 1640 bis 1740', in *Deutsche Rundschau*, 12: 1877, p. 261; G. von Schmoller, 'Behördenorganisationen', in *Acta Borussica: Die Behördenorganisation und die allgemeine Staatsverwaltung Preussens im 18. Jahrundert* (Berlin, 1892), vol. 1, p. 95; and Prince August Wilhelm of Prussia, *Entwicklung der Kommissariatsbehörden* (above, n. 19). The field of activity of the central commissariat of Brandenburg is distinguished from that of centres of commissariat [*Kommissariatszentren*] in other counties by the fact that the administration of the army was linked to a permanent administration of taxation and finances, which worked in the interest of the army. In 1684 a collegiate office was established; it was called the 'war Chamber' ['*Kriegskammer*'], and it included a special consultant on the fiscal system. In the same year a collegiate princely commisariat was formed in Cleve. The institutions were different in different parts of the country. Special delegates were sent out wherever provincial commissariats did not exist – in the Kurmark, for example – in order to represent the interests of the prince elector before the estates in matters of taxation, whereas in the Kurmark military the business of the commissariat was dealt with by the central office (Breysig in the *Forschungen* article, p. 144). The real achievement of the administration of commissariats [*Kommissariatsverwaltung*] was the establishment of a regulated system of cash management and budget planning [*Kasen- und Etatswesens*]. A central war chest [*Generalfeldkriegskasse*] was founded – in 1674 according to Breysig (ibid., p. 149) or in 1676 according to Siegfried Isaaksohn (*Geschichte des preußischen Beamtentums*, vol. 2, Berlin, 1878, p. 184). The development of what was simply an office of war into an office of finance becomes evident in the instruction given to Danckelmann on 1 May 1688 and published in *Acta Borussica* (vol. 1, p. 181, n. 60), which differs from previous instructions of a purely military character: he should first of all oversee that regiments receive their monthly assignations correctly; that the senior and junior receptors [*Receptores*] make the payment correctly and are not corrupt; that the rules for quartering are obeyed and those accommodated are not molested; that the benevolent contributors do not face unnecessary procedures; that the militia has undergone physical examinations, that the process goes well, and that the instructions

are followed by every commissar; that no smuggling occurs; that poor people are not troubled during marches, that they are paid everything in cash, and that nothing is extorted from them. To that extent, normal issues for the administration of the army are paramount. Furthermore, financial cadastres and registers [*Anlagenkataster und Matrikel*] should be revised diligently and, if necessary, they should be created. In consequence special commissars should be appointed, to make it possible that all the specific county taxes [*Partikulair-Kreiseinnehmerrechnungen*] are registered; the *octroi* [*Accise*] of cities should be controlled, fraud [*Durchstecherei*] should be looked at carefully, recipients, visitors and gatekeepers [*Torschreiber*] should be controlled by commissars of taxation [*Steuerkommissarien*], all the receipts should be checked and kept in every city, etc. By these means the authority and sphere of competence of that body were extended beyond the main aim of administering the army, to that of tax administration. In issues concerning the army [*Heeresangelegenheiten*], the boundaries between the authority of the commissariat and that of leader of the troops – that is, between the administration of the army [*Heeresverwaltung*] and the headquarter of the army [*Heereskommando*] – were blurred. Under Platen (d. 1669) conflicts emerged frequently, though Platen was formally subordinate to Sparr, the army's *capo*, who was called 'field marshal general of equipment' [*Generalfeldzeugmeister*]. Danckelmann was ordered to follow in every detail his instructions for the preservation of the army and the state's security – for instance to keep the troops and the equipment in a good state or to organise and direct operations planned according to the reason of war [*Kriegsraison*] – in short, as Breysig says, 'he was at the same time chief of staff [*Generalstabschef*], minister of war and chancellor of the exchequer'. However, the troops' commanders as well as the organs of the army's administration were subordinate to the field marshal (Meyer-Courbière, *Militärverwaltung*, Berlin, 1908, p. 9). In 1709, when Danckelmann died, the central commissariat of war of Brandenburg–Prussia was already a *officium formatum* [completed service], equipped with everything that was necessary: 'a sufficient number of reliable officials, a sound budget, reliable servants in dealing with the budget, well advanced commissariats in provinces' (Breysig in *Forschungen* 5, p. 1555; cf. Prince August Wilhelm, *Entwicklung der Kommissariatsbehörden*, p. 35). The regulations for the central collegium of commissariats [*Generalkommissariats-Kollegium*] from 7 March 1712 state that, by the enhancement of the 'equipment and service' ['*Armatur*'], the business of the central commissariat [*Generalkommissariat*] has broadened and has become more difficult, therefore it should now be transformed into a collegium (*Acta Borussica*, vol. 1, p. 184). Directors are given privileges by appointment

[*Betallungspatente*], permanent assessors are employed, a rule of procedures is issued and so on. In order to prevent clashes with other collegia [*Kollegien*], performance 'should remain within the limits which we have determined'; by the means of special decrees it should be defined just 'how far the power and jurisdiction of every single college should pertain'. The constitution from 25 April 1713 (*Acta Borussica*, vol. 1, p. 515) defines further principles for the prevention of clashes between the judicial colleges [*Justizkollegien*] and the commissariats. This settled the development towards *trait perpétuel*. It was, of course, in accordance with the nature of the absolutist regime that the king frequently intervened in administration by direct command, asking to receive reports directly, rendering obsolete orders of the senior general finance, war and territory directorate [*General-Oberst-Finanz-Kriegs-und Domänen-Directoriums*] through orders of the cabinet [*Kabinettsordre*], on the basis of his sovereign authority [*landesherrliche Autorität*] and in the interest of the common good (examples are documented in *Acta Borussica*, vol. 8, pp. 78–9, for 1748).

d Contrary to these princely commissars, the later war councillors [*Kriegsräte*] in the army of the Reich wanted to control the commanders of the army in the interest of the estates. According to the instruction of 1664 for the army in Hungary (Lünig, *Corpus iuris militaris* [above, n. 33], vol. 1, pp. 92, 95), the war councillors should deliberate [*deliberieren*] with the emperor, take care of the privileges of the Reich's estates, instruct the Reich's generals to obey imperial orders and, in short, do everything necessary to represent the interests of the Reich. The old respect for the estates is most evident in the 1720 regulations and ordinance of Charles VI for the militia stationed in Hungary. The commander in chief is instructed to the last detail on quartering, planning of routes, and the basis for consulting with the senior and junior commissars of war, who themselves are subject to the exact instructions of the central imperial commissariat of war [*General-Kriegs-Kommissariat*]. The army is not permitted to demand anything directly; instead it has to consult the commissar, who negotiates with the senior officials of the county. More on this will be found below.

47 Hermann Hallwich, *Geschichte Wallensteins* (Leipzig, 1910), vol. 3, No. 139, p. 133; No. 140, p. 135 (for 1626).

48 For example in Article 3, Lünig, *Corpus iuris militaris* (above, n. 33), vol. 2, p. 797.

49 A particularly interesting example illustrating the legal situation can be found in Hermann Hallwich, *Briefe und Akten zur Geschichte Wallensteins (1630–1634)* (Fontes rerum austriacarum, Series 2, vol. 64, II, Vienna, 1912), p. 503, n. 947: Wallenstein's patent of 18 June 1632 for all the

'honourable people' [*Standespersonen*] of Bohemia – inhabitants and, in particular, senior and junior commissars appointed by the imperial army. The council [*Landtag*] of Budweis has decided to continue to pay the contribution due every five months, therefore all the 'honourable people' are requested to comply. Commissars should be in charge of the allocation of contributions to counties and ensure that these are collected in wheat, oat or meat (and, if meat is not feasible, then in money); they should not get involved in complaints or *abbekanthnusbrief* . Moreover, they should *exegiren einnahmen und zusammenbringen* ['collect and exact']; when the subject is not capable, they should seek payment from the authorities; and, in case of refusal, they should request military measures against the tardy ones, because the demand is one pertaining to the *bonum publicum*. A case mentioned in a letter by Aldringens to Wallenstein dating from 5 June 1632 (ibid., p. 477, n. 929) sheds specific light on the treatment of commissars by the supreme authorities: the colonel of Ossa orders the lancing of a commissar because, as he explains, the commissar attempted to run away with the money.

50 In the 1720 ordinance and regulations of Charles VI (Lünig, *Corpus iuris militaris* [above, n. 33], vol. 2, p. 731) it is stated that no colonel [*Oberst*], lieutenant colonel [*Oberstleutnant*] or *Oberstwachtmeister* [sergeant major] is allowed to change the position assigned to him by the order or allowance of the imperial war council through the general commissariat of war [*Generalkriegskommissariat*]. Exemptions from personal billeting have to be respected, etc. This is followed by the organisational structure of maintenance, which involves the general staff [*Generalstab*] – a *Feldkriegskanzlei*, a *General-Kriegs-Kommissariats-Kanzlei* (with a *Generalkriegskommissarius* and its attached staff for registration and administration [*Registratur-und Kanzleipersonal*]) – as well as an office of supplies [*Proviantamt*] and a commissar of supplies [*Proviantkommissarius*]. The execution of a debt collector [*morosos*] is carried out by the nearest companies or regiments, following a request from the general commissariat of war [*Generalkriegskommissariat*], and not a request from an individual commissar. The debtors [*Restanten*] are declared by the county authority [*Landesobrigkeit*] or by senior commissars of war [*Oberkriegskommissaren*], so their execution can take place. If the county authority is reluctant and the debtors are in consequence not known, then the commissar of war should be given the power to send to the local authority [*Landesstelle*] a militia recruited from the troops present; the former then sends the militia to the debtors' estates, where it should collect the costs of the execution. In the 1713 regulations [*Marschordnung*] for the imperial troops of the Oberrhein (ibid., p. 729) it is specified that, before the departure, the colonel or commander of the regiment [*Regimentskommandant*] sends an officer whose order is to

obtain a proper plan for the daily subsistence of men and horses [*Mund- und Pferdeportionen*] – a plan authorised by a senior commissar, by an adjunct commissar, or by a commissar of war. The route for the march that is agreed among the estates must be approved by the officer and followed meticulously.

51 In the *Grumbachischen Händeln* (above, n. 36), the prince elector of Saxony is named, most of the time, commander in chief, and therefore he is distinguished from any commissars. In most cases only sub-delegates are called commissars, for example in the *Straßburger Kirchensache* of 1628, in which the Archduke Leopold of Austria is given an imperial commission to sustain good relations, and, because he cannot come in persona, he sends sub-delegates who are called commissars. But he is not called commissar at all (Lundorp, *Acta publica* (above, n. 26), suppl. vol. 3, p. 30). Throughout the eighteenth century the title 'commissar' was used at imperial assemblies [*Reichsversammlungen*] only for the emperor's representative, who usually ordered the principal commissar [*Principal-Kommissarius*] to disseminate petitions, decrees and so on. Therefore this person held an office similar to that of the commissar delegated by the king or by government at negotiations with the people's respresentatives in the modern world.

52 See Hintze, 'Der Commissarius und seine Bedeutung' (above, n. 13), pp. 494–5.

53 See Lundorp, *Acta publica* (above, n. 26), suppl. vol. 1, Part 2, p. 179, in which nine such commissions of reformation are documented. The reformation and counter-reformation had taken place in very different ways, depending on the reaction of the population and on the standpoint of the territorial prince (*dominus territorialis*). To a greater or lesser extent, even genuine military expeditions took place against villages that had to be reformed. In cases of this sort, the military seizure was followed by a formal and detailed criminal procedure of rebellion and uproar (e.g. in Electoral Trier). Sometimes, when the duty was extensive, a regular apparatus of officials, including regular commissars of service, was constituted; such was, for example, the commission on religion in Salzburg between 1686 and 1800, which consisted of two consistorial councillors [*Konsistorialrat*] and two privy councillors [*Hofrat*], along with the 'secret deputation' for extraordinary measures created by the princely decree of 16 August of 1713; the latter was only active until 1747. There are special studies on important material on legal history; see the proceedings of the Society for the History of Reformation [Verein zur Reformationsgeschichte], especially H. Ziegler, *Die Gegenreformation in Schlesien* (Halle, 1888; No. 24); Freiherr von Winzingerroda-Knorr on Eichsfeld (Nos 36 and 42); H. von Wiese on Grafschaft Glatz (No. 54); F. Arnold on Salzburg (Nos 67 and 69); J. Ney on Trier (No. 88/89).

54 When the pagan population appealed to religious peace [*Religionsfriede*], the commissars replied that that was impossible because religious peace only pertained to members of the Roman Reich, but only the local prince was seen immediately as a member of the Roman Reich, and not the pagan population: Lundorp, *Acta publica* (above, n. 26), suppl. vol. 1, Part 2, p. 178.

55 Here is an overview of the main literature cited: Peter Philip Wolf, *Geschichte Maximilians I. und seine Zeit*, vols 1–4 and 2 (Munich, 1807, 1809, 1811; vol. 4 continued by Carl Wilhelm Friedrich Breyer); C. Gustav Helbig, *Wallenstein und Arnim 1632–1634* (Dresden, 1850); Friedrich von Hurter, *Zur Geschichte Wallensteins* (Schaffhausen, 1855); Friedrich von Hurter, *Wallensteins vier letzte Lebensjahre* (Vienna, 1872); Otto Krabbe, *Aus dem kirchlichen und wissenschaftlichen Leben Rostocks, zur Geschichte Wallensteins und des dreißigjährigen Krieges* (Berlin, 1863); B. Dudik, *Waldstein von seiner Enthebung bis zur abermaligen Übernahme des Armee-Ober-Commandos vom 13. August 1630 bis 13. April 1632* (Vienna, 1858); Anton Gindely, *Geschichte des dreißigjährigen Krieges*, vols 1–4 (Prague, 1869, 1878, 1880); Anton Gindely, *Waldsteins Vertrag mit dem Kaiser*, Abhandlungen der königlichen böhmischen Gesellschaft der Wissenschaften, Series 7, vol. 3, philosophisch–historische Classe, 4 (Prague, 1889); Anton Gindely, *Waldstein während seines ersten Generalats*, vols 1–2 (Prague and Leipzig, 1886); Hermann Hallwich, *Wallensteins Ende, ungedruckte Briefe und Acten*, vols 1–2 (Leipzig, 1879); Hermann Hallwich, *Fünf Bücher Geschichte Wallensteins*, vols 1–3 (Leipzig, 1910); Hermann Hallwich, *Briefe und Akten zur Geschichte Wallensteins (1630–1634)*, Fontes Rerum Austriacarum, Österreichische Geschichtsquellen, Series 2 (Diplomaria et acta), Nos 63–6 (Vienna, 1912); Edmund Schebek, *Wallensteiniana in Memoiren, Briefen und Urkunden* (Prague, 1875); Edmund Schebek, *Die Lösung der Wallensteinfrage* (Berlin, 1881); Edmund Schebek, 'Die Capitulation Wallensteins' (*Österreichische–Ungarische Revue*, 11: 1891); Richard Wapler, *Wallensteins letzte Tage* (Leipzig, 1884); Wolfgang Michael, 'Wallensteins Vertrag mit dem Kaiser im Jahre 1632' (*Historische Zeitschrift* [= *HZ*], 88: 1912, pp. 385–435); Moriz Ritter, 'Der Untergang Wallensteins' (*HZ*, 97: 1906, pp. 237–88); *Briefe und Akten zur Geschichte dreißigjährigen Krieges in den Zeiten des vorwaltenden Einflusses der Wittelsbacher*, edited by W. Goetz with Fritz Endres (Leipzig, 1918). Also Friedrich Förster, *Albrechts von Wallenstein, des Herzogs von Friedland und Mecklenburg, ungedruckte, eigenhändige vertrauliche Briefe und amtliche Schreiben aus den Jahren 1627 bis 1634*, 3 vols (Berlin, 1828–1829); Leopold von Ranke, *Geschichte Wallensteins* (Leipzig, 1869); Onno Klopp, *Tilly im dreißigjährigen Kriege*, vol. 3.2 (Stuttgart, 1861).

56 See von Hurter, *Letzte Lebensjahre*, p. 1; J. O. Opel, *Wallenstein im Stift Halberstadt 1625–1626* (Halle, 1866), pp. 5, 21 etc. It is understandable that the literary and psychological interpretation (e.g. by Ricarda Huch) should not wish to relinquish the word 'dictatorship'. Even Moriz Ritter uses the word in a confused, general sense. In his *Deutsche Geschichte im Zeitalter der Gegenreformation und des dreißigjährigen Krieges* (Stuttgart and Berlin, 1908) he talks for instance of the dictatorship of the Spanish delegate Oñate in relation to his 'commanding style of discussing [*Mitraten*]' questions of imperial politics (1620; p. 128); of the Swedish dictatorship of Gustav Adolf in relation to the one-sided conditions he imposed on the prince elector of Saxony, under threat of open violence (p. 489); of the 'Austrian dictatorship in Europe' in his *Entwicklung der Geschichtswissenschaft* (München and Berlin, 1919), p. 200, in his appreciation of Chemnitius; and in his 'Untergang Wallensteins' (*HZ*, 97), p. 237, with respect to Wallenstein's second generalship, he states that Wallenstein 'acted with true dictatorial power to an even higher degree' than in his first.

57 *Commentatorium de rebus Suecicis libri 26* (Utrecht, 1686), I §56: the princes complain that the Friedländer [= Wallenstein] '*insolita fortuna ebrius, velut dictatorem ageret, nec Caesaris mandatis nisi quantum ipsi collibitum pareret*' ['his unusual luck gone to his head, behaves like a dictator, he submits neither to the emperor's mandate nor to his person, when he is not in the mood'] (p. 21). Ibid., §58: at the 1630 Reichstag of Regensburg complaints were raised '*de iniuriis et oppressionibus Caesareani exercitus ac insolentia Fridlandi, eiiusque dictatorial potestate*' ['about the acts of injustice and oppression perpetrated by the imperial army and about Fridlandus' insolence and dictatorial authority']. Chemnitius, *Belli sueco-germanici*, vol. 1 (Stettin, 1648) calls Wallenstein *summus Caesariae militiae imperator* [supreme commander of the imperial army] (p. 10) and says that, during his second generalship, he demanded an '*absolutissima nullisve regulis limitata potestas*' ['completely unconditional authority, not bound by any rules whatsoever'] (p. 242); yet he does not call him dictator. In his book *De ratione status*, ch. 10, p. 146, Chemnitius refers to Wallenstein as *supremus exercitus dux cum summa potestate* [the highest military leader, endowed with supreme authority], but he conceives of him as a tool of imperial power. The prince elector of Mainz talks about the yoke of Friedländer's dominion. Apparently none of these expressions refers to a specific concept in constitutional law.

58 First published by Hermann Hallwich in *Zeitschrift für allgemeine Geschichte*, 1: 1884, pp. 119–20, from the text in the Duxer Archiv; see also von Hurter, *Geschichte Wallensteins*, p. 153; Gindely, *Waldstein*, vol. 1, pp. 47ff.; and Hallwich, *Geschichte Wallensteins*, vol. 3, No. 6, p. 12.

59 *Zeitschrift für allgemeine Geschichte*, 1: 1884, p. 120.

60 Duke Maximilian was called *capo della lega* (see above, p. 56); examples in Hallwich, *Geschichte Wallensteins*, vol. 3, No. 139, p. 135 (the *capo* of provisions, *Feldproviantwesens*); or vol. 1, p. 510.
61 Ibid., vol. 3, No. 6, p. 12.
62 Published for the first time by Hermann Hallwich in *Zeitschrift für allgemeine Geschichte*, 1: 1884, p. 122, with corrections in Hallwich, *Geschichte Wallensteins*, vol. 1, p. 212 and vol. 3, No. 6, p. 12. According to Klopp, *Tilly im Dreißigjähriger Kriege* (above, n. 55), vol. 2, p. 472, the cited words 'to serve unconditionally' and so on are a 'strange addition' [*fremdartiger Zusatz*]; *contra*, Hallwich, *Geschichte Wallensteins*, vol. 1, p. 213, n. 425, accepts them as genuine; and so too Gindely, *Waldstein*, vol. 2, p. 387.
63 In Hallwich, *Geschichte Wallensteins*, vol. 3, No. 365, p. 329.
64 Ibid., No. 20, p. 20: the emperor's letter to Wallenstein dating from 24 December 1625, in which Wallenstein is exhorted to maintain good correspondence with Tilly, makes a reference to the instruction, yet the emperor does not deem it necessary to continue his interposition. Cf. further examples in Ritter, *Deutsche Geschichte* (above, n. 56), vol. 3, pp. 298–9, 352, 361, 419. Formally, Duke Rudolf Maximilian of Sachsen-Lauenburg's order to stop (for the time being) the muster of the newly recruited people was not issued by Wallenstein but by the imperial war council [*Hofkriegsrat*] (Hallwich, *Geschichte Wallensteins*, vol. 1, pp. 518, 566). The assertion, made in Caraffas reports, that Wallenstein does everything according to his own will (Gindely, *Waldstein*, vol. 1, pp. 120–2) is to be understood pragmatically, as intended to prompt the emperor to release Wallenstein from his command. In general one should pay heed to the fact that it is not possible to apply to Wallenstein's army a modern understanding of military discipline. Instances occurred in which officers declared that they were only following orders coming from the superior of their regiment, but would not accept orders given directly by the general; but see e.g. Opel, *Wallenstein im Stift Halberstadt* (above, n. 56), p. 45.
65 For example, Wallenstein's instruction for the general commissar of his army on how to organise the move into winter quarters; the instruction dates from September 1626 (Hallwich, *Geschichte Wallensteins*, vol. 1, p. 619). These matters were later regulated by the commission of 21 April 1628.
66 Commissars who were sent by Wallenstein as military commanders must be distinguished from the commissars – among them the superior St Julian, in particular – whom he sent in his capacity as territorial lord [*Landesherr*] to receive the tribute paid by the estates. The commissars who were sent by Wallenstein to seal 'contracts' ['*Traktierung*'] with the estates received an imperial authorisation from him. See for example Förster, *Briefe* (above, n. 55), vol. 1, p. 102; for Wallenstein's commissars

in Mecklenburg, ibid., p. 327, and Krabbe, *Zur Geschichte Wallensteins* (above, n. 55), p. 99.

67 Hallwich, *Geschichte Wallensteins*, vol. 1, p. 283.

68 E.g. the imperial decree of authorisation for Wallenstein and Tilly to conduct peace negotiations, dating from 19 December 1628 (ibid., vol. 3, No. 456, p. 426).

69 Hallwich, *Fünf Bücher* (above, n. 55), vol. 1, No. 44, p. 75.

70 Ibid., No. 53, p. 94.

71 Michael Kaspar Lundorp, *Acta publica*, 18 vols (4th edn, Frankfurt, 1668–1721), vol. 4: 1668, p. 52 (petition of 16 July 1630).

72 Hallwich, *Briefe und Akten*, vol. 1, No. 50, p. 90; for the reply from the Catholic prince electors and princes of 14 September 1630, ibid., No. 60, p. 111.

73 Ranke, *Geschichte Wallensteins* (above, n. 55), pp. 199 and 202; Gindely, *Waldsteins*, vol. 2, p. 267.

74 Dudik, *Waldstein* (above, n. 46), pp. 177 and 443: Ranke, *Geschichte Wallensteins*, p. 234; Gindely, *Walldsteins Vertrag* (above, n. 55), p. 12; Ritter, 'Der Untergang Wallensteins' (above, n. 55), p. 240; Karl Wittich, 'Zur Geschichte Wallensteins', *Historische Zeitschrift*, 68: 1892, p. 255. The expression *in absolutissima forma* proves very little by itself. At that time it was used for any position that was free from any inherent dependency. The phrase *summa belli* does not necessarily mean *summum imperium*, because the *summitas* [supreme hight] was also used in combination with other words than *imperium*. For example the princely councillors held a *summum officium*, but they had neither *imperium* nor *facultas decernendi* [capacity to decide] (Horn, *Architectonica de civitate*, Book II, ch. 7, §3, n. 2). *Comissio in absolutissima forma* is also used in the *Relation auß Parnasso* of 1634 (see Wapler, *Wallensteins letzte Tage* (above, n. 55), p. xvii) and in *Eyndliche Abbildung und Beschreibung deß Egerischen Pankkets* 1634 (ibid., p. xxix); see also Schebek, *Wallensteiniana* (above, n. 55), p. 568.

75 No. 4. Eur. [= ?] 362/32; see Johann Christoph von Aretin, *Urkunden* [= ?], No. 19). Schebek, *Wallensteiniana*, p. 127, n. 1 mentions an edition in the library of the University of Prague that was not accessible to me. However, the copy of the city library of Hamburg (LA II[a] 65 Kps. 4) has been taken into account because of its partly clearer expression. Michael, 'Wallensteins Vertrag mit dem Kaiser' (above, n. 55) prefers the formulation of the *Theatrum Europaeum* of 1633, which he replicates (pp. 393–4). Ritter, 'Der Untergang Wallensteins', rejects the edition of 1632 as a basis for the historical examination of Wallenstein's responsibilities (p. 267). However, from what follows, it should be obvious that, to some extent, the adverse evaluation stems from the constitutional [*staatsrechtlich*] mistake of interpreting the book as an 'employment contract'.

76 Ranke, *Geschichte Wallensteins*, p. 235. On 18 January 1632, through a military order from Wallenstein, Aldringen received the command of the imperial officers and soldiers stationed in the Reich; but he had still to show respect for Earl Tilly, to confer with him in the all issues concerning the German Reich and its loyal members, and to follow his instructions (Hallwich, *Briefe und Akten*, vol. 2, No. 563, p. 66); see also the negotiations with von Rupp, general commissar of Bavaria (Nos 861, 865/6, 898, 904, and vol. 3, No. 1807) and, above all, Wallenstein's letter to Aldringen of 18 February 1632 (vol. 2, No. 639, p. 151). In it Tilly is requested to administer justice by applying the martial law when the offender would not submit to Aldringen's command. Wallenstein himself distinguishes between the ordinances issued by the Pappenheim, prince elector of Bavaria, and his own decrees of request; he also mentions that he has 'compared' [*vergliechen*] himself with the prince elector. See Hallwich, *Wallensteins Ende*, vol. 1, Nos 493 and 494, p. 411; No. 397, p. 331; Ranke, *Geschichte Wallensteins*, p. 472; Michael, 'Wallensteins Vertrag mit dem Kaiser', p. 406. According to Ritter, the respect for Wallenstein displayed around the issue of the Spanish troops passing through was only a respect for his actual power and cannot be ascribed to the regulations of any 'contract of employment' ('Der Untergang Wallensteins', pp. 246–57).

77 On 9 December 1633 the privy concillor [*Geheime Rat*], Earl Trautmannsdorf, coveys to Wallenstein a 'final and altogether measured imperial decision' ['*endlich und ganz gemessene kaiserliche Resolution*'] to confront the duke of Weimar immediately (Hallwich, *Wallensteins Ende*, vol. 2, Nos 965–966, p. 153). The phrase '*endlicher Will und Bevelch*' ['definite will and order'] was already used in the instruction of August 1633 to Schlick (see K. Jacob, *Von Lützen bis Nördlingen*, Straßburg, 1904, note at p. 35). The three kinds and stages distinguished by Ritter in the development of imperial orders until 1633 ('Der Untergang Wallensteins', p. 241) do not relate to legal developments. Wallenstein's complaining, in Pilsen, about the emperor's order to besiege Regensburg did not happen as if a right to neglect such orders had existed; see J. Majláth, *Geschichte des österreichischen Kaiserstaates*, vol. 5 (Hamburg, 1835–50), vol. 3, p. 346; Friedrich Förster, *Wallensteins Prozeß vor der Schranken des Weltgerichts und des K. K. Fiscus zu Prag* (Leipzig, 1844), p. 112; and Hallwich, *Wallensteins Ende*, vol. 2, No. 187, p. 241 (on the February 1632 military command from Eger). The defence of Schaffgotsch (J. G. Thomas, *Hans Ulrich Schaff-Gotsche*, Hirschberg, 1829, p. 17) states that the emperor had given Wallenstein 'such enormous powers' ['*so groß Gewalt*'], but it does not report the event in Pilsen any differently. For examples of direct orders from the emperor to his commanders [*Unterführer*] Gallas, Ossa and others, see Ritter, 'Der Untergang Wallensteins', pp. 240–1.

78 Point 5 of the letter to the prince of Poland dating from 18 June 1632: Hallwich, *Briefe und Akten*, vol. 2, No. 946, pp. 500, 502; see also Dudik, *Waldstein*, p. 182. The colonel was in charge of the composition of the military company.

79 From this it is evident that the text quoted above is more accurate than the edition of the 1633 *Theatrum Europeaum*, in which only J.K.M. is mentioned; the Hamburg edition explicitly refers to the 'Hungarian King Ferdinandus III' [*Ungarischer König Ferdinandus III*].

80 For the concept of *dignitas regalis*, see Dominicus Arumäus, *Discursus academici de iure publico*, vol. 3 (Jena 1621), Discursus 14 (Koch), 'De regali dignitate et feudis regalem dignitatem annexam habentibus', and Discursus 15 (Konrad and Benedikt Carpzow), 'Die regalibus', with ch. 2 on the emperor's right to grant electoral dignity; Theodor von Reinkingk, *De regimine seculari et ecclesiastico* (Frankfurt, 1659), I, iv, ch. 16, Nos 5–8. One can also find there references to the literature of the seventeenth century. Arnisaeus (*De republica*, II, ch. 2, p. 7, n. 33) mentions the distinction between *feuda regalia* and *feuda alteri subiecta* within the context of the question of divisibility (the *feuda regalia* are indivisible). During the eighteenth century the idea of the modern understanding of territorial sovereignty [*Landeshoheit*] disappeared. The electoral dignity remained, however, as a recognised fiefdom; see Johann Jacob Moser, *Teutsche Lebens-Verfassung* (Frankfurt/Leipzig, 1774), p. 163. When Ritter, 'Der Untergang Wallensteins', p. 262, n. 2 states that Wallenstein is reported to have received the highest kind of royal rights 'of *the*' [*von* den], i.e. of all the occupied countries, this is not a compelling interpretation if you pay heed to the text. 'From [*von*] the occupied countries' means 'from/out of [*aus*] the occupied countries', with reference to the countries that have been conquered during the war. See above, p. 56, n. 41.

81 Sub-delegation of 24 November 1633 (Hallwich, *Wallensteins Ende*, vol. 2, No. 329, p. 120): 'Wallenstein declares that, since the emperor has given him, by way of cover for the needs of warfare, all the goods taken as penalty [*alle in Strafe verfallenen Güter*], he does have the power to accept such goods [*verfallenheiten*] from the cadastral register [*Landtafel*] in Bohemia or elsewhere, or to send authorised persons to do so. The commissars should take "in our name" [*an Statt Unnser*] any action that the business demands, "without distinctions about judging it and dealing with it, as if we were to do it ourselves".'

82 Schebek, *Lösung der Wallensteinfrage* (above, n. 55), p. 568; Michael, 'Wallensteins Vertrag mit dem Kaiser', p. 412; Ritter, 'Der Untergang Wallensteins', p. 283. See above, p. 71, n. 79.

83 He was given a special authority for negotiations with the electoral Saxony: Förster, *Briefe*, vol. 2, Nos 327 and 329; Dudik, *Waldstein*, p. 470; Helbig, *Wallenstein und Arnim* (above, n. 55), p. 11. See also

Wittich, 'Zur Geschichte Wallensteins' (above, n. 74), pp. 255, 385. But Philipp of Spain, too, had granted Wallenstein various forms of authority with the promise of ratification (Ritter, 'Der Untergang Wallensteins', p. 252).

84 Leopold von Ranke, *Die römischen Päpste in den letzten vier Jahrhunderten*, vol. 4: *Analekten* (Leipzig, 1900), p. 513. From this same resolution – which is No. 5 in von Ranke's *Analekten* – it is evident that all of Wallenstein's negotiations depended on imperial ratification; the '*illimitirte Gewalt circa belli administrationem*' was not fundamental for peace treaties.

85 Hallwich, *Fünf Bücher*, vol. 3, No. 12, p. 16.

86 The text of the 1668 edition (Wiener Hofbiliothek [today: National Library of Vienna]) is reproduced in Oswald Redlich's essay 'Sonderausgabe', published in the fifth issue of the Viennese monthly *Monatsblatt des Vereins für Landeskunde von Niederösterreich* for 1906 (pp. 9ff.).

87 Johannes Limnaeus, *Iuris publici imperii romano-germanici* (5 vols, 3rd edn, Straßburg, 1640), vol. 5 had already polemicised against Reinkingk and denied the emperor's *plenitudo potestas* (see also vol. 1, II, chs 10 and 8 on *plenitudo potestatis*). The text cited can be found in Limnaeus' *Capitulationes imperatorum et regum romano-germanorum* (Straßburg, 1648), p. 696, and in Christoph Ziegler, *Wahl-Capitulationes* (Frankfurt, 1711), p. 140. Nevertheless, Ferdinand II was portrayed as a tyrant by Hippolithus a Lapide [= Philip von Chemnitz], and a case of legitimate resistance was raised against him on account of a violation of the constitution (*De ratione status*, Pars I, ch. 7. Against Ferdinand, with reference to the complaint made by the prince elector, see Johannes Henricus Stammler, *De reservatis imperatoris*, Giessen, 1658, §24).

Notes to Chapter 3

1 Gabriel Hanotaux, *Origines de l'institution des intendants* (Paris, 1884); Adhémar Esmein, *Cours elémentaire d'histoire du droit français* (9th edn, Paris, 1908), p. 590; Ernest Lavisse, *Histoire de France depuis les origines jusqu'à la Révolution*, vol. 8.1: Philippe Sagnac et Alexandre de Saint-Léger, *Louis XIV: La fin du règne (1685–1715)* (Paris, 1908), p. 151; Robert Holtzmann, *Französische Verfassungsgeschichte von der Mitte des neunten Jahrhunderts bis zur Revolution* (Munich/Berlin, 1910), pp. 396f. Initially the appellation 'intendants' was given to functionaries in the French treasury (*trésorerie de France*) installed under Franz I; they were either members of the Conseil or uniformed people in their entourage (*à la suite*). Their business was mainly in the nature of control and accountancy, although the *trésorerie* was also in charge of ordinary and extraordinary matters pertaining to war administration, artillery, the

navy, the administration of the royal court, etc. The exercise of control was gradually extended to organisational functions. The authority of the *commissaries départis* and intendants, as well as that of their subordinates, was suspended by law in 26 June 1790, at the very moment when the new administrative function of departments and districts came into effect (J. B. Duvergier, *Collection complète des lois, décrets, ordonnances, réglements, et avis du Conseil d'Etat*, Paris, 1824, vol. 1, p. 262 [for this collection, see Translators' Note in Ch. 5, n. 1]). Through a decree of the National Convention of 24 November 1793 (4 Frimaire II) all former intendants were arrested and made to give an account of their activities [*Rechnungslegung*] (ibid., vol. 6, p. 373).

2 See Émilien Petit, *Droit public ou gouvernment des colonies françoises* [1771], in the edition prepared by A. Girault (Paris, 1911).

3 Intendants in the capacity of *commissairies* must be distinguished from the *commissionaires* of the privileged assemblies of corn [*Getreidegesellschaften*]. The latter are imprecisely called 'commissars' also in F. Wolters, *Studien über Agrarzustände und Agrarprobleme in Frankreich von 1700 bis 1790. Staats- und Sozialwissenschaftliche Forschungen*, edited by Schmoller and Sering (vol. 22.5, Leipzig, 1905), p. 277.

4 The wording of the commission was as follows: '*Commet le prévôt de la maréchausée et son lieutenant pour connaître des emotions et attroupements qui pourraient survenir à l'occasion des grains; ordonne que par eux le process sera fait et parfait, jugé prévôtalement et en dernier resort; interdit S.M. à tout cours de justice d'en prendre connaissance.*' ['Instruct the provost of the marshalcy [= gendarmery] and his lieutenant to come to have knowledge of the states of mind and the forms of gathering that may occur around harvest; give orders that the process be done and perfected through them, judged in a manner suitable to the quality of provost, and without possibility of appeal; and forbid His Majesty to learn about it through any court of law']. Homes were arbitrarily entered, people arrested, and so on; but an ordinance was in place prescribing that the arrested person had to be questioned by a judge within twenty-four hours. With regard to this ordonance, Tocqueville remarks in *L'ancien régime et la révolution* (Paris, 1856, p. 292) that '*cette disposition n'était ni mons formelle ni plus respectée que de nos jours*' ['this order was neither less formal nor more respected than it is in our own days'].

5 Émile Levasseur, *Histoire des classes ouvrières avant 1789* (2nd edn, vol. 2, Paris, 1901), pp. 805–15, describes numerous cases of unrest among craftsmen's assistants [*Gesellen*] and workers, and the reader is told that a report in which special decrees against riotous assemblies and special authorities for their implementation were requested was marked in the margins by the phrase *il n'y a rien à faire* ['nothing can be done about it'].

6 Louis-Auguste de Bonald, *Théorie du pouvoir politique et religieux* (1796;

written in 1794), vol. 3, §2 ('La théorie de l'adminstration civile'), in *Œuvres*, vol. 16, p. 116.

7 The [Assemblée] Constituante retained these commissars temporarily in their function; they were distinguished from the *commissaires additionels*, who participated in administration *sous le bon plaisir du Roi* [at the King's whim]: Decree of 12 December 1789, in Duvergier's collection (above, n. 1), vol. 1, p. 73; also pp. 75, 106, 109, 181. This office ceased on 31 December 1790.

8 See Adalbert Wahl, *Vorgeschichte der Französischen Revolution* (Tübingen, 1905), vol. 1, pp. 8–9, with a reference to Pierre Dubuc, *L'Intendance de Soissons sous Louis XIV, 1643–1715* (Paris, 1902; not accessible to me); P. Ardascheff, 'Les Intendants de province à la fin de l'Ancien Régime', *Revue d'histoire moderne et contemporaine*, 5: 1903, pp. 5–38; Jacques Necker, *Traîté de l'administration des finances en France* (Paris, 1784), vol. 3, p. 380.

9 Here we find all the 'organic' images that were so popular with Rousseau and the Revolution: the indentants are the king's or the Conseil's eyes, the Conseil itself is *la pensée* or *la volonté*, the intendant is the arm or hand of the king insofar as he has authority to act [*Aktionsbefugnisse*] – and so on.

10 See pp. 35f. above.

11 In Heinrich Höffer's 1672 dissertation *De duplici maiestatis subiecto*, which was supervised by Thomasius – and which Gierke does not mention in his outline of this doctrine (Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, Breslau, 1880, p. 168), although it is of great interest for the organic theory of the state [*rechtsstaatliche Organtheorie*] – Grotius is once again revisited, namely in his idea that a people can transfer its entire rights to someone else. Here is what one reads in §18 (following Johann Adam Osiander, *Observationes maximam in partem theologicae in libros tres de iure belli et pacis Hugonis Grotii*, Tübingen, 1671, p. 468, who repeats an argument brought forward by James I of England against Bellarmine): the monarchomachs, just like Althusius, confused *populus* with *civitas* and contrasted the people and the king, as if these were two separate things and the king were outside the state, when in fact one should say of the *civitas* that *eam tamquam totum complecti in se regem* ['it encloses the king within it, as it were, in his entirety']. Hence the idea that the state comprises both king and people was already formulated in the seventeenth century; and the priority in this regard that H. O. Meisner, *Die Lehre vom monarchischen Prinzip* (Breslau, 1913), p. 226, n. 3 and p. 230, n. 4, vindicates for Keßler – a deputy [*Abgeordneter*] of Württemberg in 1819 – on the strength of one statement (a 'completely new and groundbreaking statement') is questionable.

12 *Le Roy est au Royaume*, as it appears in the parliament resolution of 20 December 1527 – a formula cited in the *Remontrances* of the parliament of 9 April 1753 (Utrecht, 1753), p. 11, and in M. T. Flammermont, *Remontrances du parlement de Paris au XVIIIe siècle: Collection de documents inédits sur l'histoire de France* (Paris, 1888), vol. 1, No. 56, p. 568. There one can also find a distinction drawn between the sovereign, whose areas of authority should be limited, and sovereignty. By the way, the king replied with the same 'unity'. He issued threats against anyone who dared to cut him off from the nation as a *corps séparé*, and he emphasised that he and the people form a unity. These are his famous words from the *lit de justice* of 1766. From this unity, though, he concluded that the *plénitude* of his authority must be unlimited. Therefore the question was who was identified with the unity and who could enforce this identification politically; the problem is not resolved by saying either that 'both' or that 'no one, but a superior all-embracing third party' occupied this position.

13 One can find nice examples of this in Franz Funck-Brentano, *L'ancienne France: Le roi* (2nd edn, Paris, 1912).

14 Montesquieu, *Esprit des lois* (Geneva, 1749), Book II, ch. 4: '*les pouvoirs intermediaires, subordonnés et dépendants,* constituent la nature du government monarchique, c'est à dire de celui où un seul gouverne par des lois fondamentales. *J'ai dit les pouvoirs intermediaries, subordonnés et dependants: en effet, dans la monarchie, le prince est la source de tout pouvoir politique et civil*. Ces lois *fondamentales* supposent nécessairement des canaux moyens par où coule la puissance etc. Le conseil du monarque n'a *point à un assez haut degré* la confiance du people. ['the intermediary powers, subordinate and dependent, *constitute the nature of the monarchic government, that is, the government where just one rules through fundamental laws*. I said intermediary powers, subordinate and dependent: in fact, in a monarchy, the prince is the source of all political and civilian power. These *fundamental* laws necessarily presuppose middle channels through which power flows etc. *The monarch's council* does not at all enjoy *the trust of the public* to a sufficiently high degree.'] (The passages in plain text are so-called *cartons*, that is, amendments introduced by the censor; for a comparison of this passage, see Louis Vian, *Histoire de Montesquieu*, Paris, 1878, p. 261. The changes show how the absolutist government of the state tried to weaken the ideas of the estates.)

15 W. Hasbach has pointed out this fact, which is usually overlooked in German literature (apart from his major works, he did so mainly in the essay 'Gewaltentrennung, Gewaltenteilung und gemischte Staatsformen', *Vierterljahresschrift für Sozial- und Wirtschaftsgeschichte*, 13: 1916, pp. 562–607). A particularly striking example of such a misunderstanding is the controversy between H. Rehm and G. Jellinek (see Hermann Rehm,

Allgemeine Staatslehre, Tübingen, 1899, p. 233, and G. Jellinek, 'Eine neue Theorie über die Lehre Montesquieus von den Staatsgewalten', *Zeitschrift für das Privat- und öffentliche Recht*, 30: 1903, pp. 1–2; also response by Rehm, *Staatslehre*, pp. 417–18, and rejoinder by Jellinek, *Zeitschrift*, p. 419). The simile of the scale, used since the seventeenth century in the English, the American (in the *Federalist Papers*) and the French discussion of political problems arising from the relationship between the legislative and the executive – parliament and king or governor, federal state and individual state, the House of Lords [*Oberhaus*] and the House of Commons [*Unterhaus*] – was attacked in the literature of the Restoration as a rationalistic idea.

16 This is expressed in the nineteenth century by F. J. Stahl, 'Diktatur der Stände' (in *Die Philosophie des Rechts nach geschichtlicher Ansicht*, Heidelberg, 1833, vol. 2), p. 351; see also his *Das monarchische Prinzip* (Heidelberg, 1845), pp. 15, 23, and *Die gegenwärtigen Parteien in Staat und Kirche*, 2nd edn (Berlin, 1868), p. 126.

17 Constantin Frantz, *Die Naturlehre des Staates als Grundlage aller Staatswissenschaft*, Leipzig and Heidelberg, 1870, pp. 216f.

18 After the 1713 Peace Treaty of Utrecht, at the time when Addison's *Cato* was staged in London (14 April same year), Bolingbroke organised a political demonstration in which he used the classical pathos of freedom in the play as a protest 'for defending the causes of liberty against a perpetual dictator' – that is, against Malborough, who was then supposed to be captain general for life. On these events, see A. W. Ward, *History of English Dramatic Literature* (vol. 3, London, 1889), pp. 440, 441; T. B. Macaulay's *The Life and Writings of Addison* (London, 1843); and the biography of Bolingbroke in *Nat. Biogr. L.* [= ?] p. 133. Of particular interest among Henry St John Bolingbroke's works are 'A dissertation upon parties' (published in *The Craftsman*, 1733/4) and 'The idea of a patriot king' (published in London, 1749).

19 So in Montesquieu's dialogue *Sylla et Eucrate* (1722), as well as in chs 8 and the 13 of his *Considérations sur les causes de la grandeur des romains et de leur décadence* (1721). In ch. 8 the *dictateur* appears as a political instrument in the struggle between patricians and plebeians. Montesquieu does not mention the fact that the dictator was a military commander.

20 Montesquieu, *Esprit des lois* XII, 19: '*l'usage des peoples les plus libres qui aient jamais été sur la terre me fait croire qu'il y a des cas où il faut mettre pour un moment un voile sur la liberté, comme l'on cache les statues des dieux*' ['the behaviour of the most free peoples that have ever lived on earth makes me think that there are cases where you should cover freedom under a veil for a while, just as you hide the statues of gods'].

21 The repercussions of the Aristotelian–scholastic understanding of *lex* as a universal are not at stake here.

22 The important evidence supplied by E. Buß ('Montesquieu und Cartesius: Ein Beitrag zur Geschichte der französischen Aufklärungsliteratur', *Philosophische Monatshefte*, 4: 1869/70, p. 19) who demonstrates the exact congruence between central sentences in Montesquieu and in Malebranche, is frequently overlooked, whereas all kinds of dependence of Montesquieu's ideas on those of Aristotle, Machiavelli, Bodin, Vico and Bolinbroke – and connections between them – are usually emphasised.

23 When Descartes writes to Mersenne '*c'est Dieu qui a établi ces lois en nature ainsi qu'un roi établit les lois en son royaume*' ['it is God who has laid down these laws in nature, just as a king lays down laws in his kingdom'], this is no accidental comment (*The philosophical writings of Descartes*, vol 3: 'The Correspondence', translated by John Cottingham et al., Cambridge, 1991, p. 23). Here is the basis of the occasionalism of Malebranche, who had a great influence not only on Montesquieu, but also on Rousseau: there must be occasional causes that set the *loi générales* [general laws] in motion, otherwise God would have to set them in motion, and that could only happen by a *volonté particulière* [particular will]. One must grasp this metaphysics in order to understand the argument of the *Contrat social*. By the way, it should be mentioned that the image of the *balance des passions* [balance of passions] can already be found in Malebranche. The idea that only God has a *volonté générale et immutable* [general an immutable will] and that every *volonté particulière* is against his dignity dominates the philosophy of the seventeenth and eighteenth century like an axiom, from Descartes and Malebranche down to Leibniz. Erich Kaufmann has the merit of having demonstrated with great clarity how a theory of the state is connected to the philosophy of its time: see his *Studien zur Staatslehre des monarchischen Prinzips* (Halle, 1906); his *Über den Begriff des Organismus in der Staatslehre des neunzehnten Jahrundert* (Heidelberg, 1908); and also his comments in his work *Clausula rebus sic stantibus* (Tübingen, 1913), pp. 93f. On the abstract concept of law in the eighteenth century, see Emil Lask, *Fichtes Geschichtsphilosophie* (Tübingen, 1902).

24 Otto Mayer, *Deutsches Verwaltungsrecht* (2nd edn, Leipzig, 1914), p. 47; F. Fleiner, *Institutionen des deutschen Verwaltungsrechts* (3rd edn, Tübingen, 1913), p. 39.

25 Erich Kaufmann, 'Verwaltung, Verwaltungsrecht', §5, in K. Stengel and M. Fleischmann's *Wörterbuch des Staats- und Verwaltungsrechts* (vol. 3, Tübingen, 1914), p. 692 interprets the passage this way; see also his *Auswärtige Gewalt und Kolonialgewalt in den Vereinigten Staaten von Amerika* (Staats- und Völkerrechtliche Abhandlungen, 7.1, edited by G. Jellinek and G. Meyer, Leipzig, 1908), p. 33.

26 See on *esprit des lois* and *Parlement de France* François Marie Arouet Voltaire, *Dictionnaire philosophique portatif* (London, 1765), s.v. 'Des lois', pp. 231–9, at 236.

27 See 'Démocratie' ibid.; also the clause '*si l'homme est né mechant*' ['if man is born bad'] in Voltaire's *Dialogues et entretiens philosophiques*. There is no specific entry on dictatorship in the *Dictionnaire philosophique*.
28 I have used the edition of Eugène Daire, *Physiocrates* (2 vols, Paris, 1846), and that of the *Collection des economistes et des réformateurs sociaux de la France* (Paris, 1910)
29 Here we have to consider his *Droit naturel* and his *Maximes generales*.
30 See Dupont de Nemours' correspondence with J. B. Jay (in L. F. E. Daire, *Physiocrates*, Paris, 1846) and his *De l'origine et des progrès d'une science nouvelle* [1768], edited by A. Dubois (Paris, 1910). Dupont de Nemours was, together with the older Mirabeau and Baudeau, co-editor of the newspaper *Ephémérides du citoyen ou chronique de l'esprit national* (1765–72), which Mably considers to be the most important document for the *despotisme légal* ['legal despotism' of the physiocrats], alongside the book of Mercier de la Rivière.
31 Nicolas Baudeau, *Première introduction à la philosophie économique* [1767], edited by A. Dubois (Paris, 1910).
32 Gabriel Sénac de Meilhan, *Œuvres philosophiques et litéraires* (Hamburg, 1795). Sénac de Meilhan, too, was a *maître des requêtes* ['master of requests'] and an intendant.
33 Paul Henri Dietrich d'Holbach, *Système social ou principes naturels de la morale et de la politique* (3 vols, London, 1773). Here too the sovereign is the head who sets in motion all other forces [*Triebkräfte*] in the political body: Book II, ch. 7, §10.
34 The ideal country is China, with its bureaucracy of learned mandarins. Peter the Great's methods of government are also praised, as well as those of Catherine II. Voltaire had already defended Russia against Montesquieu and rejected the accusation that it was a dictatorship, although not entirely for factual reasons but also out of his respect for Catherine II. Examples of the idealisation of China in the eighteenth century can be found in the *Festschrift zu Gustav Schmollers 70* (Berlin, 1908), pp. 184f.; and see also de Tocqueville, *Ancien régime* (above, n. 4), II, ch. 3.
35 Pierre-Paul Le Mercier de La Rivière, *L'Ordre naturel et essentiel des sociétés politiques* [1767], edited by E. Depitre (Paris, 1910), vol. 1, chs 21–2 (at pp. 122ff., or 265–300 in the first edition).
36 *Ordre naturel et essentiel*, vol. 1, ch. 24 (at p. 142 Depitre): '*Euclide est un véritable despote et les vérités géométriques qu'il nous a transmises sont les lois véritablement despotiques. Leur despotisme légal et le despotisme personnel de ce Législateur n'en font qu'un, celui de la force irrésistible de l'évidence*' ['Euclid is a true despot and the geometric truths he has handed down to us are the truly despotic rules. Their legal despotism and the personal despotism of this legislator amount to one and the same – that of the irresistible force of evidence'].

37 Joseph Antoine Joachim Cerutti, *Memoire pour le peuple français* (1788), at p. 70 in the copy held in the Staatsbibliothek in Berlin. See also the king as a mandatary of the nation versus '*le despotisme de la classe dominante*' ['the despotism of the ruling class'].

38 Étienne-Gabriel Morelly, *Code de la nature, ou le véritable esprit de ses lois* [1755], edited by Édouard Dolléans (Paris, 1910); the quotation given above is taken from p. 98.

39 Gabriel Bonnot de Mably, *Doutes proposés aux philosophes économists sur l'ordre naturel et essentiel des sociétés*, in *Oeuvres complètes* (Paris, 1794/5), edited by Peter Friedmann, vol. 11. The citation on the duties of the lawgiver given before can be found in vol. 9 of this edition of Mably's works (pp. 92, 115, 240).

40 Thomas Paine, *Common Sense: Addressed to the Inhabitants of America, on the Following Interesting Subjects* [1776], edited by Isaac Kramnick (New York, 1987), ch. 1.

41 Mably, *Oeuvres complètes*, vol. 4, pp. 8 and 230. For Mably's statements quoted previously, see vol. 11, p. 235; vol. 9, p. 183; vol. 15, pp. 154 and 224.

42 Ibid., vol. 4, p. 296. One might be reminded of the Marxist theory of the state when coming across such comments in Mably and in others – which suggest that political reforms are fruitless without the abolishment of private property, regarded as the genuine means of power that creates inequality. Nevertheless, even leaving aside Mably's Spartan ideal of a society, the difference remains essential, because Mably cannot overcome his abstract rationalism. The greatest hindrance to a correct understanding of the essence of society was in his view the method, which always began with subordinate elements (*parties subalternes*) like trade, finance, war, police or commerce. For Mably, the correct examination of these elements remains dependent on predetermined principles, according to which the matter is categorised whether one is aware of them or not. Those principles must be recognised in their pure form, but one should not get stuck in the details (*ramper dans les détails*).

43 See Louis de Jaucourt's article 'Dictature' in Diderot and D'Alembert's *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers*, vol. 4 (2nd edn, Paris, 1759), pp. 794–5. The phrase 'the laws speak or are silent' was very popular at that time. We can find it for instance in Montesquieu, when he claims that the judge is the mouthpiece of the law, and also in the comments made by Fridrich II of Prussia: '*je me suis résolu de ne jamais troubler le cours de procedure: c'est dans les tribunaux où les lois doivent parler et où le soverain doit se taire*' ['I have decided never to disturb the course of proceedings: it is in law courts that the laws must speak, and the king must be quiet'] (*Acta Borussica, ecclesiastica, civilia et literaria oder Sorgfältige Sammlung Allerhand zur Geschichte des Landes Preussen*

gehöriger Nachrichten, Urkunden, Schriften und Dokumenten (Königsberg/Leipzig, 1730–2), Behördenorganisation, IX, p. 329). For Mably's views on Roman dictatorship, see his 'Observations sur les Romains', in *Oeuvres complètes*, vol. 4, pp. 296 and 338 (on Sulla's the *dictature perpétuelle* [perpetual dictatorship]).

44 In the forthcoming references to Rousseau's *Contrat social*, the Roman numeral in round brackets indicates the book, the Arabic numeral indicates the chapter, and the number separated from it through full stop indicates the passage.

45 The truth is that the *senatus consultum ultimum* [final decree of the Senate], with its formal *videant consules* [the consuls should see that…], was used because the old dictatorship no longer had a dramatic effect; it suffered throughout history an inflation [*Abschwächung*], which was due to its frequent use in periods of civil war, when it was needed to maintain the power of the Senate. See above, ch. 1, n. 2 (pp. 2–3).

46 Johannes Althusius, *Politica methodice digesta* (4th edn, Herborn, 1625), ch. 19 ('De regni sive universalis imperii commissione'), p. 329.

47 Samuel von Pufendorf, *De iure naturae et gentium libri* octo (London, 1672), VII, ch. 6, §10 (at the end).

Notes to Chapter 4

1 R. Gneist, *Englische Verfassungsgeschichte* (Berlin, 1882), p. 578 observes that this revolution left no trace in the country's administration either.

2 Samuel Rawson Gardiner, *History of the Great Civil War, 1642–1649* (London, 1898), vol. 3, p. 392; also see Samuel Rawson Gardiner, *The Constitutional Documents of the Puritan Revolution, 1625–1660* (Oxford, 1889) p. 333; G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (3rd edn, Munich and Leipzig, 1919), p. 78; W. Rotschild, *Der Gedanke der geschriebenen Verfassung in der englischen Revolution* (Tübingen, 1903), p. 92; and Egon Zweig, *Die Lehre vom pouvoir constituant* (Tübingen, 1909), p. 38.

3 G. P. Gooch, *The History of English Democratic Ideals in the Seventeenth Century* (Cambridge, 1898).

4 Oliver Cromwell and Thomas Carlyle's *Letters and Speeches* of 1845: vol. 3, p. 304 in the new edition prepared by S. C. Lomas and C. H. Firth (*Letters and Speeches of Oliver Cromwell*, London, 1904); p. 374 in the German translation of M. Stähelin (Basel, 1911).

5 On the historical development, see the essay by W. Michael, 'Oliver Cromwell und die Auflösung des Langen Parlaments', *Historisches Zeitschrift*, 63: 1889, p. 56 (which includes further literature) and W. Michael, *Cromwell*, vol. 1 (Berlin, 1907), p. 274.

6 Heinrich Rudolf Hermann Friedrich von Gneist, *Englische Verfassungsgeschichte* (Berlin, 1882), p. 580. The phrase is general and very unclear. See Samuel Rawson Gardiner, *History of the Commonwealth and Protectorate, 1649–1660*, vol. 2 (London, 1894), p. 282; Adhémar Esmein, *Les Constitutions du protectorat de Cromwell* (Paris, 1900; from *Revue du droit public et de la science politique*, Sept./Oct. and Nov./Dec.: 1899), p. 194; Michael, *Cromwell*, vol. 2, p. 5; Zweig, *Lehre vom pouvoir constituant*, p. 47 (on military oligarchy); Julius Hatschek, *Englische Verfassungsgeschichte bis zum Regierungsantritt der Königin Viktoria* (Munich, 1913), p. 339; G. Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), p. 675, n. 1.

7 Samuel Rawson Gardiner, *Oliver Cromwell* (London, 1901), vol. 2, p. 167 (p. 178 of A. Kirchner's 1903 German translation in *Historische Bibliothek* 17).

8 In the orientation of all public [*staatlich*] life towards *salus publica* [public safety], K. Wolzendorff, *Der Polizeigedanke des modernen Staates* (Breslau, 1918) sees an element that the modern idea of the state would share with the police. The unique executive character of *salus publica* implies 'the tendency to grow both in intension and in extension' (p. 11). Therefore those territories subject to the regulations of the police 'are in constant growth', while on the other hand, through the 'objective preservation of state order', the police state has already contained the masterminding moment of the unified will of the state – that 'abstract and absolute strive for the preservation of the authority' (p. 31). In fact this touches upon the 'focal points' ['*Kristallisationspunkte*'] of the modern state; but they appear in a different context if one bears in mind that the tendency of *salus publica* [commonwealth] to expand is not a genuine law of development, but rather the simple expression of the relation between concrete ends and appropriate means. The logical nature of this relation cannot be described definitively while showing the same striving for expansion in its practical application everywhere. The latter is illustrated by the example of the Prussian military agreement mentioned above; see pp. 17–18. Wonderful examples of instrumental reasoning in jurisprudence [*juridische Zwecklogik*] can be found in Christian Wolff, *Ius naturae, methodo scientifica pertractum* (Magdeburg, 1740–2), Book VIII, §§ 110ff.

9 Esmein, *Constitutions du protectorat*, p. 209. In his biography of Cromwell, Gardiner states that neither Cromwell nor Milton gave the nation such a right; if the will of the nation did not coincide with the will of God, then so much the worse for the nation.

10 Iulius Brutus, *Vindiciae contra tyrannos*, p. 68 (on the edition used, see Ch. 1, n. 34). The most read monarchomachic work at that time was George Buchanan's *De iure regni apud scotos* (1579). In 1648 his English translation of the *Vindiciae* was also published (Michael, *Cromwell*, vol. 1, p. 184; see also Zweig, *Lehre vom pouvoir constituant*, p. 31).

11 So Donoso Cortés in his great speech of 4 January 1849 in the Spanish Chamber of Representatives (French translation by Louis Veuillot; German translation by Hans Abel, in the series of the association *Glaube und Treue*, Issue 1, Munich, 1920).

12 Émile Boutmy, *Études de droit constitutionnel: France, Angleterre, États-Unis* (Paris, 1909), p. 241. Whenever in the monarchomachic literature the *potestas constituens* is mentioned in contrast to the *potestas constituta*, the fact that the people itself is constituted by God is hardly ever omitted; Johannes Althusius, *Politica methodice digesta* (4th edn, Herborn, 1625), ch. XVIII, p. 93; XIX, pp. 19ff.

13 In the constitutions of the nineteenth century the idea is still evident (especially in the oath of the deputies and in the opening of regional parliaments) that the prince is personally represented by a commissar of the people's assembly [*Volksversammlung*]; see the Constitution of Hesse, Articles 62, 81, 85, 88–9, 96, 98, 101 (Felix Stoerck, *Handbuch der deutschen Verfassungen*, Leipzig 1884, pp. 195–201); [the Constitution of] the Principality of Reuss-Gera Younger Line, §§ 88–9, 91 (ibid., p. 315); the Constitution of Saxony, §§ 133, 135 (ibid., p. 343; Otto Mayer, *Das Staatsrecht des Königreichs Sachsen*, Tübingen, 1909, p. 146); Saxony-Altenburg, §§ 221–2, 232–4, 242 (Stoerck, *Handbuch*, pp. 383, 386); Coburg and Gotha, § 77 (ibid., p. 401); Saxony-Meiningen, Articles 92, 94 (ibid., pp. 431–2); Saxony–Weimar–Eisenach, §§ 27, 29 (ibid., p. 440); Schaumburg-Lippe, Articles 23, 25–6 (ibid., p. 451); Schwarzburg-Sonderhausen, § 66 (here neither commissars nor mandatories are mentioned, but only 'delegated officers': ibid., p. 478); Waldeck, §§ 56, 63 (ibid., p. 488); Anhalt (1895), § 24 (ibid., p. 64); Baden, §§ 68, 76–7 (ibid., pp. 84–6); Bavaria VII, § 22 (ibid., p. 103; on commissars or regional parliaments according to the Geschäftsg.-Ges. zum bayerischen Landtag [= ?] of 25 July 1850, Articles 10, 14, see Sax von Seydel and Rohert Piloty, *Bayerisches Staatsrecht*, Tübingen, 1913, p. 302); Braunschweig, § 131 (Stoerck, *Handbuch*, p. 131); Lübeck, Article 61 (ibid., p. 230, on commissars of the senate; Hamburg and Bremen, by contrast, do not know any such commissars); Lippe, § 27 (ibid., p. 206); Oldenburg, Articles 151, 156 (ibid., p. 256); Prussia, Article 77; Reuss-Gera Older Line, §§ 64, 78, para 3. The title 'commissar' is retained when the representatives of the government stand in for the minister in a commissarial capacity and partake in negotiations with the parliament. The answer to the question whether the governmental commissar [*Regierungskommissar*] is subject to parliamentary discipline depends on whether the commissar in the traditional sense is a personal representative of the prince or not. In a republic, when ministers let themselves be represented by commissars (see Article 6, § 2 of the French law of 16 July 1785 *sur les rapports des pouvoirs publiques* [on

the relations between public powers], which is substantially derived from Article 69 of the Constitution of 1848), the governmental commissars [*Regierungskommissare*] are only assistants to the minister, and they are restricted to representing the position of the government in parliament; they are only *porte-parole* [spokespeople]; the minister alone carries the responsibility (Léon Duguit, *Traité de droit constitutionel*, Paris, 1859, vol. 2, pp. 316, 319, 498). On the constitution of the *Reich* [*Reichsverfasssung*] of 1871, see Kurt Perels, *Archiv für öffentliches Recht*, vol. 19, pp. 1–31, at pp. 14–15.

14 Jean Bodin, *Les six livres de la république*, p. 389 (on the edition used, see Ch. 1, n. 43).

15 Émmanuel-Joseph Sieyès, *Qu'est que le Tiers Etat?* [1789], ch. 5 (I am referring to C. F. Cramer's edition of this pamphlet in his *Collection des écrits d'Emmanuel Sieyès*, rev. edn, vol. 1, Paris 1796); and see also Sieyès' treatise on the declaration of human rights.

16 G. Jellinek, *Das System der subjektiven öffentlichen Rechte* (Freiburg, 1892), pp. 228, 231, 225, 229. Jellinek completely contradicts his own theory of organicism when he quotes (p. 229) Blackstone's statement that the king is always present in his courts even if he himself cannot execute the law; and this remains true even if Jellinek links his own theory with this idea of the king being omnipresent through his officials, because Blackstone's statement has to be understood in light of the old idea of a personal representative, *qui vices gerit* [someone who acts in the place of], and not in light of a theory of the 'competent' organ, which does not represent a particular will but produces it in the first place.

17 Zweig, *Lehre vom pouvoir constituant* (above, n. 2), p. 4.

18 According to Kurt Wolzendorff, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes gegen rechtswidrige Ausübung der Staatsgewalt* (Breslau, 1916), p. 390 who has compendiously acknowledged Condorcet's beliefs and ideas and has demonstrated their great historical significance, Condorcet 're-directed' the right of resistance, transforming it into a legal organisation. But one must not forget that the liberal principle of distribution between individuals as entities in principle unlimited and the state as an entity in principle limited (see above, pp. 98–99) is superseded, and that, from humanitarian right and right to freedom, the right to resistance has become a sphere of authority – in other words a civil right conceded by the state. Insofar as one 'organises' it, one denaturalises it; as soon as one rationalises it, it remains rationed.

19 Speech dating from 7 September 1789: *Archives Parlementaires*, 8: 1875, p. 532 [= ?].

20 Charles Borgeaud, *Établissement et révision des constitutions* (Paris, 1893), p. 409.

21 Only because of this, and not because of the 'actual power that maintains the unity of the state', as G. Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), p. 491 would have it.

22 Two ideas are present here whose further development will lead to ninteenth-century political philosophy: that of the people and that of historical progress. Even earlier, the educational despotism of the Enlightenment made itself dependent on the fulfilment of a task. It was based on the belief in the perfectibility of the human race, which led to a philosophy of history [*Geschichtsphilosophie*] that reached beyond the individual human being. This theory of a philosophy of history was systematically grounded in two entirely independent systems of the nineteenth century: Hegel's and Comte's. But Turgot (1727–81) had already articulated what became known as Comte's (1798–1857) law of the three stages in the development of mankind – the theological, the metaphysical–abstract and the positive – and the idea of each individual's social dependence on the environment. And Condorcet's *Tableau historique des progrès de l'esprit humain* already goes beyond the rationalism of the eighteenth century to such an extent that Bonald calls it, not without justification, the 'apocalypse of the Enlightenment'. In this context, however, progress is unfailingly the fruit of conscious human activity, and hence the content of the dictator's task is to facilitate this progress in a positive manner, contrary to the immanentist understanding of progress in the nineteenth century. This is a contradiction that Renouvier has highlighted very aptly. The elements of a philosophy of history in Kantian philosophy have been abundantly outlined. At this point it is of great importance what Erich Kaufmann has shown – namely that Kant had a concept of 'organism' that was antithetic to eighteenth-century mechanism. This is indeed a decisive turn. For the rest, Kant's philosophy of right is the sum of rational natural law, which begins with coexistence among humans and is developed to the highest conclusion and with wonderful clarity. Therefore neither emergency law [*Notrecht*] nor grace are possible for Kant (for him emergency law is coercion without right). By comparison, the transition to a philosophy of history is more clearly visible in Fichte. One could mention here, for that matter, Emil Lask's account, but with one addition: the cardinal point is the concept of dictator – an 'oppressor' ['*Zwingherr*'] whose 'insights are ahead of his time and people'; not someone with a 'mere calculating, arbitrary will', who would put into practice a 'freaky idea' ['*Grille*'], like Napoleon, but someone possessed of 'enthusiasm' and an 'absolute' will. He is the 'oppressor invested by God', 'formally a tyrant and usurper', who first shapes the people and then re-appoints the constrained as his judges (this is an exceptionally important rendition of the idea of a sovereign dictorship); mankind, as a 'reluctant nature', will be

'forced to become subject to the rule of right and higher insight, without either mercy or clemency, whether it understands it or not'. Admittedly, insofar as the state cannot become a 'fabric of children' ['*Kinderfabrik*'], it cannot govern nature; but it should become instead a 'fabric of education' ['*Bildungsfabrik*']. (The quotations come from Emil Lask, *Werke*, VII [*sic*], pp. 576ff., 435ff.) The point at which the legal despotism of the Enlightenment turns into a philosophy of history cannot be specified with any greater accuracy. In Hegel's philosophy there is room for dictatorship only insofar as the later could be the world-historical [*weltgeschichtliche*] function of a 'world-historical personality' (like Napoleon); but the obstructing circumstances to be eliminated by the dictator are in themselves a negation, just a moment within the immanent process of the logical self-development of the spirit/mind [*Geist*]. A clear concept of dictatorship cannot be deduced from this. More interesting, though, is the view on dictatorship proposed by Catholic political philosophers like Bonald, Görres and Donoso Cortés, since they regard the centralisation created by the Jacobines and by absolutism – and hence the modern state, which appears in its essence to be a form of dictatorship – as a fruit of rationalism that, to be sure, can only be overcome by dictatorship itself. This is why the arguments of these great Catholics coincide in detail with those of the advocates of a dictatorship of the proletariat. The essence of the concept of dictatorship is that it constitutes an exception to organic development in order to justify the task of eliminating any mechanical hindrance that obstructs the immanent flow of history. Through this concept, of an immanent historical development, an opposition arises to the mechanistic and centralising state. The idea that the people assumes a *pouvoir constituant* remains in force, the only difference being that the proletariat is identified with the people. Later on, with Georges Sorel, combatting intellectual–mechanic rationalism through a philosophy of the irrational [*Irrationalitätsphilosophie*] will lead to anarchistic results. These yield a more significantly philosophical basis for the thoughts of Bakunin and Kropotkin. Any organisation structured so as to reflect the priorities of a strategic plan appears to be an attempt to intervene from the outside, cerebrally [*intellektualistisch*], in the process of development and receives the name 'dictatorship'; and so the organisation of the Catholic church, with its separation of a theological clergy from the laity under its leadership, is called a dictatorship – while in Sorel, when he launches into the critique of the modern state, one comes across sentences that could have featured word for word in the historical–political publications of the 1930s. But, for Sorel, the most basic way of putting into practice the idea of dictatorship was the performance of the National Convention of 1793, which he considers to be a typically rationalistic dictatorship;

and he distinguishes it from the '*violence créatrice*' ['creative violence'] of the proletariat, in dealing with which he demonstrates an intuition of its historical significance.

I have given here this short survey, which is only sketched out in the most general outline, in anticipation of a more detailed exposition, to call attention to the systematic context within which the concept of dictatorship of the proletariat can be grasped appropriately, on its own. A critique of the views of Marx, Engels, Lenin and Trotsky such as Hans Kelsen has recently published, which is by far the best – *Sozialismus und Staat: Eine Untersuchung der politischen Theorie des Marxismus* (Leipzig, 1920) – despite the valuble clarification that any contribution of this scholar no doubt brings, fails to touch the kernel of the problem because it ignores the wider context of ideas. The fact that the anthropological argument from the nature of man occurs in Kelsen's treatise (p. 56) is of particular interest, because now of a sudden it should serve democracy, whereas in the rest of his history an absolutist form of state has made a major use of it (see his comments at p. 9 and 111ff.).

23 F. A. Aulard, *Histoire politique de la révolution française: Origines et développement de la démocratie et de la République (1789–1804)* (4th edn, Paris, 1913), p. 215 in the 4th edn.

24 My view – which I have previously expressed in my essay 'Diktatur und Belagerungszustand', in *Zeitschrift für die gesamte Staatswissenschaft*, 38: 1916, pp. 138ff. – dominates the debate on the Constituent Assembly and later corporations. R. Redslob has offered a clear overview of the Constituent Assembly in *Die Staatstheorien der französischen Nationalversammlung von 1789* (Leipzig, 1912): see p. 151 on views about constitutional power and pp. 221 ff. on the separation of powers. As for the concept of dictatorship, particularly important are the discussions of moderate conservatives and liberals that reiterate arguments influenced by the American constitutions; these discussions were published by Hamilton, Jay and Madison in the *Federalist Papers*. The great significance of this influence – which Lord Acton has pointed out in his *Lectures on the French Revolution* (London, 1910), p. 37 – is particularly evident in the discussions on the king's veto, on the two-chamber system, and on the federalist decentralisation of France (the contradiction between federalism and Jacobine dictatorship will be discussed in the following chapter): namely in statements from people like Malouet (*Archives Parlementaires*, 8: 1875, p. 590); Mounier, who refers to Delolme (ibid., pp. 410, 416); Lally-Tollendal, who refers to Blackstone (ibid., pp. 514–15) – and so on. At later times Robespierre, Marat, Danton, Couthon, Custine and so on – the names are countless – are called dictators. Even the name *triumvirat des dictateurs* was in circulation (Aulard, *Histoire*, pp. 203, 263), along with 'collective dictatorship' – of the Convention, of the

Paris commune, of the electorial sections and suchlike (see the interesting article by Gustave Gautherot, 'Bourmont à Waterloo', *Revue des questions historiques*, 93: 1922, p. 466). When Robespierre was overthrown people shouted: 'Down with the tyrant!' – and on 18 Brumaire, before the successful *coup d'état*: 'Down with the dictator!' The fact that Marat asks for dictatorship – Marat, who was portrayed almost as an anarchist *à la* Bakunin and Sorel in Kropotkin's history of the French Revolution – is particularly intriguing; see Aulard, *Histoire*, p. 263, and above all Marat's speech of 25 September 1792 before the Convention. There he speaks against the *mouvements impétueux et désordonnés du peuple* [impetuous and chaotic movements of the people], which should be under the direction of a wise man.

25 Condorcet, *Œuvres* (Paris, 1804), vol. 18, pp. 18, 20. Zweig, *Lehre vom pouvoir constituant* (above, n. 2), p. 392 calls the *gouvernement révolutionnaire* [revolutionary government] the 'great nothingness' and the 'rule of Robespierre' a 'collegial dictatorship of the Comité de salut public' (p. 369). He then mentions the dictatorship of the Convention, too (*Archives Parlementaires*, 66: 1901, p. 674; Zweig, *Lehre vom pouvoir constituant*, p. 386, n. 4). Zweig's idea, unfortunately not elaborated upon, is important for political science: 'If one wishes to apply constitutional categories at all, then one is inclined to say that in those days the formal regulations for state needs were exclusively promulgated through administrative decree (in the widest sense). The complete lack of a more real – that is, more general – legislature [*Rechtssetzung*], and of substitutes for it deriving from an administrative act linked to the circumstances of the case, is the true characteristic of this revolutionary regime – as well as of others'.

26 Together with *loi agraire*, '*maratisme*' and '*d'Orléans sera Roi*'.

27 See Ch. 3, n. 43. On 6 April 1793 Marat tried to demonstrate that the Comité de salut public was not a dictatorship because – as he argued – during a dictatorship the laws are silent or keep quiet (*les lois se taisent*). At the same time he seeks to restrict the concept of dictatorship on the grounds that it can only be mandated to one single, individual human being – an argument that, incidentally, Kautsky still employs in *Terrorismus und Kommunismus* (Berlin, 1919), p. 28.

28 Duguit, *Traité* (above, n. 13), vol. 2, p. 342. Using the very same terminology, R. Hübner, *Die parlamentarische Regierungsweise Englands* (Tübingen, 1918), p. 38 could say that the developing English Cabinet, which followed 'the law of restrictions' [*Gesetz der Verengerung*], was the bearer of an 'absolute, even dictatorial state power', and then again he could speak of a 'bold dictatorship' on the grounds that, once 'the commissioned has outgrown the commissioner by far', the prime minister had became a crucial figure.

Notes to Chapter 5

1 In the material that follows there will be no specific reference to places in the *Bulletin des lois*, the *Archives Parlamentaires* and the *Moniteur* when such places are easy to find from the date. On the other hand, there will be frequent references to J. B. Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du conseil d'état* (Paris, 1788–1949; henceforth Duvergier), because in my experience this collection is more readily available in German libraries and it also contains references to other collections. In a few cases Baudouin's collection* will also be brought in. The numbers in the *Bulletin des lois de la République française* (previously *Bulletin des lois du Royaume de France*; henceforth *Bulletin*) refer not to the pieces in the collection but to laws and regulations, which are numbered consecutively.

2 Where the Constituent Assembly is concerned, here are some examples: decrees by which the municipal authority [*Stadtbehörde*] is entitled to take up bonds, to swear in units of troops and offices, to control prisons and to number their prisoners (Duvergier, vol. 1, p. 109), to organise the festivities for 17 June 1790 (Duvergier, vol. 1, p. 255), to issue instruc-

* Translators' Note: Carl Schmitt's references to the Duvergier–Baudouin collection in Chapters 5–6 are an insoluble puzzle; much depends on what might have been available in German libraries of his day, and in what form. There is no 'Baudouin collection' independent of the one generally placed under Duvergier's editorship; the name of Baudouin apparently occurs only as that of a publisher, in the subtitle to some of the Duvergier volumes, in the form 'publiée sur les éditions officielles du Louvre; de l'imprimerie nationale par Baudouin; et du Bulletin des lois de 1788 à 1824 inclusivement' (so for instance vols 9 and 10 of 1825, vol. 12 of 1826, or vol. 22 of 1828). Why Schmitt treats Duvergier and Baudouin as separate collections and refers to them side by side is a mystery. The situation is complicated by the fact that the volumes of the Duvergier collection were not published either sequentially or in chronological order; many of them are reprints, and the year of first publication is not easy to find (this is especially true of the first nine volumes); and each volume gives on the front page a summary of the period covered (e.g. 'De 1788 à 1824 inclusivement'). Not surprisingly, this period is sometimes taken to represent the publication date itself (so one finds in the literature references to a Duvergier published in 'Paris, 1834–63'); and references are riddled with errors and confusions. For instance Schmitt's reference in Ch. 3, n. 1 to a Duvergier, 'vol. 1', of 'Paris, 1824' must be erroneous, because no volume seems to have been published at all between 1818 and 1825, whereas volume 1 appeared (originally or not) in 1790. The most reliable record of the entire collection can be found on the site of Gallica, at http://gallica.bnf.fr/ark:/12148/cb375780597/date.r=La+liquidation+des+biens+du+clergé+sous+la+révolution+dans+le+district+d%27Is-sur-Tille.langFR. For those interested, there is also a digitised version of an entire volume (vol. 12, Paris, 1826) at http://archive.org/stream/collectioncompl29frangoog/collectioncompl29frangoog_djvu.txt.

tions for the authorities in the event of unrest in the cities (Duvergier, vol. 1, p. 243, vol. 2, p. 327), to withdraw civil rights and to summon individual people to report to the *Rechtsbank* [bar] of the Assembly (Duvergier, vol. 1, p. 252); a decree issued on 24 February 1791, forbidding the municipal authority of Arnay de Duc to oppose in future the transit of *Mesdames tantes du Roi* [their ladyship, the king's aunts] (Duvergier, vol. 1, p. 247); the assessment of single official acts as *attentatoires à la souveraineté nationale et à la puissance legislative* [harmful to national sovereignty and legislative power] (Duvergier, vol. 1, p. 465); a decree according to which the judgement of the municipal authority of Strassbourgh in the matter of the rebellion in Schlettstadt should be considered a court of last resort (Duvergier, vol. 1, p. 421); instructions concerning the criminal prosecution and judicial sentencing of individual insurgents (Duvergier, vol. 1, p. 246). Most resolutions, though, follow a procedure in which the Assembly, through its president, appeals to the king to take further measures (Duvergier, vol. 1, pp. 47, 242/3, 289), especially about the riots in some cities (Duvergier, vol. 2, pp. 360, 459). In the decree of 22 March 1791 it is decided, with regard to the riots in the former province of Maconnais, that neither civil nor criminal prosecutions should take place (Duvergier, vol. 2, p. 387). Dupont de Nemours in particular declared himself vehemently against interfering in administration, in the interest of a strong executive. The fact that a law such as *volonté générale* [general will] should always be of a universal nature was, of course, practically ignored by the Constituent Assembly. The most salient example to illustrate this might be the Hunting Act of 30 April 1790, in which it is stated that a *loi particulière* [specific law] remained reserved for the *conservation des plaisirs personelles du Roi* [preservation of the king's personal pleasures] (Duvergier, vol. 1, p. 168). This was then issued on 14 September 1790 (Duvergier, vol. 1, p. 418). Such a practice of lawmaking must have provoked the outrage of true rationalists like Condorcet, producing the conviction that monarchy was an institution irreconcilable with the rational organisation of the affairs of state. And here are some examples where the Legislative Assembly is concerned (but not the authorisation to take up bonds): numerous legal accusations against individual citizens (Duvergier, vol. 4, pp. 71, 115, 123, etc.); intervention in riots (Duvergier, vol. 4, pp. 83, 307); decisions concerning the appointment of civil servants (Duvergier, vol. 4, p. 85); demands of reports and accountability from the executive (Duvergier, vol. 4, pp. 215, 276, 289, 291). The legislative governed after the suspension of the king on 10 August 1792; on this see further in the text.

3 Decree issued by the National Convention, edited by François Victor Alphonse Aulard in *Recueil des actes et documentes inédits du Comité de salut public* (Paris, 1889–1913; henceforth *Recueil*), vol. 1, pp. 271, 332; on the

activity of the national commissars and their cooperation with military officials, see vol. 2, pp. 419–37; on the cooperation with the commissars of the National Convention, see vol. 2, p. 17.

4 During the riots in Elsaß in June 1791, royal commissars were dispatched on the basis of a decree issued by the National Assembly in order to reinstall public tranquillity and order; the king was requested to send the troops as needed (Duvergier, vol. 2, pp. 205, 235; Baudouin, vol. 20, p. 206; vol. 11, p. 185); see also the decrees concerning the sending of three commissars into the department of Gard for reestablishing public security. Another decree, dating from 12 December 1790, was issued against the disturbance of public tranquillity that might have been caused by Belgian troops stationed earlier. This decree asked the king that all the commanding officers take the necessary measures to put an end to chaos, even with the help of the National Guards if need be. It also requested that the administrative unit, through the military commanders or the directors of the arsenal, supply arms so that the National Guard be up to the task of protecting private property and securing public order (Duvergier, vol. 2, p. 109; vol. 9, p. 140). On 2 April 1791 civil commissars with special authorisation are sent to Aiy (Duvergier, vol. 2, p. 341; Baudouin, vol. 13, p. 8). With respect to the colonies: through the decree of 29 November 1790 concerning the riots in the Antilles, the king was requested to send four commissars to those colonies in order (a) to gather information; and (b) to organise a provisional domestic administration, the police force and public order. For those tasks they were entitled to make use of all regular troops, the militia, the national guards and the entire naval army, which had to intervene when the commissars commanded. The commissars could, when necessary, suspend the colonial assemblies. With the arrival of the commissars, all the authorities and powers hitherto became void until they were confirmed by the commissars. The king should provide troops and liners for the governor of the island or for a mandated officer, who should act in agreement with the civil commissar (Duvergier, vol. 2, p. 71; Baudouin, vol. 8, p. 235; further examples in Duvergier, vol. 2, pp. 250, 350).

5 Duvergier, vol. 1, pp. 45, 59, 70, 78.

6 Duvergier, vol. 1, pp. 180, 187, 223, 320; vol. 2, pp. 332, 341 (decree of 18 March 1792: the king appoints six and the National Assembly three commissars to the *trésor public*).

7 Decree of 21 June 1791: Duvergier, vol. 3, pp. 60–3; decree of 22 June 1791: Duvergier, vol. 3, p. 72.

8 Decree of 22 June 1791: Duvergier, vol. 3, p. 64; Baudouin, vol. 15, p. 338.

9 Decree of 22/23 June 1791: Duvergier, vol. 3, p. 64; Baudouin, vol. 15, p. 357; *Moniteur* of 24 June 1791; *Archives Parlamentaires*, 27, p. 428.

10 Decree of 22 June 1791: Duvergier, vol. 3, p. 72.
11 Decree of 26th June 1791: Duvergier, vol. 4, p. 77; Baudouin, vol. 15, p. 441.
12 Duvergier, vol. 4, pp. 83, 98, 101, 114n.
13 Decrees of 28 March, 11 May, 25 June and 22 June 1792: Duvergier, vol. 4, pp. 107, 177, 253, 263, 277, 283.
14 Duvergier, vol. 4, p. 330; Baudouin, vol. 23, p. 180.
15 Duvergier, vol. 4, p. 374; Baudouin, vol. 24, p. 33. On the same day (Duvergier, vol. 4, p. 376) the powers of the colonial commissars were confirmed and the opponents were declared traitors of the motherland.
16 Duvergier, vol. 4, p. 431; Baudouin, vol. 24, p. 240.
17 Decree of 28 August 1792: Duvergier, vol. 4, p. 445.
18 Decree of 29 August 1792: Duvergier, vol. 4, p. 450. The instruction concerning the appointment of four commissars to monitor the prosecution of the theft at the furniture storehouse (17 September 1792) (Baudouin, vol. 24, p. 154), mentioned by Alphonse Aulard in *Histoire politique de la révolution française: Origines et dévelopement de la démocratie et de la République (1789–1804)* (4th edn, Paris, 1913), p. 343, does not seem to be typical of the development outlined here; similar commissars had been appointed by the Constituent Assembly previously.
19 Decrees of 20 and 21 September 1792: Duvergier, vol. 5, pp. 1, 2; Baudouin, vol. 24, pp. 3, 4.
20 For example the commissars to arrest Paoli, 2 April 1793: see *Recueil* (above, n. 3), vol. 3, p. 35.
21 Decree of 4 April 1793: *Recueil*, vol. 3, p. 63; see vol. 1, p. 356, and vol. 2, p. 45.
22 Ibid., vol. 3, p. 63.
23 Ibid., vol. 1, pp. 171, 246, 250; vol. 3, pp. 49, 64 (of Charles-François du Périer Dumouriez: vol. 3, p. 49; François Christophe Kellermann: vol. 1, pp. 121, 138, 164; of Adam Philippe, Comte de Custine: vol. 4, p. 16, etc.).
24 Ibid., vol. 3, pp. 111, 120–1; vol. 2, pp. 45–6, 54; vol. 3, p. 62.
25 Ibid., vol. 1, pp. 243, 265, 309, 404; vol. 2, p. 12. By the decree of 16 April 1793 the Convention dismissed all the commissars in administration and replaced them with 390 new ones (see vol. 4, p. 30).
26 Ibid., vol. 1, pp. 211, 264, 352, 364; vol. 3, pp. 23, 40–1, 52, 76–7.
27 Ibid., vol. 1, p. 277; vol. 2, pp. 31–2.
28 Ibid., vol. 1, pp. 245, 265, 271, 291, 404.
29 Ibid., vol. 1, pp. 113, 238; vol. 2, p. 577.
30 Ibid., vol. 1, pp. 828, 341: decree of the National Convention of 30 November 1792.
31 Ibid., vol. 3, p. 62: decrees of the conventions of 24 September 1792 and 4 April 1793. These were ordinary requests for measures directed at

reestablishing public tranquillity (vol. 2, p. 4; vol. 3, p. 10); at drawing up and submitting lists of suspects, and even of 'lazy' and 'indifferent people' (vol. 3, p. 41); at conducting strict passport controls (vol. 1, p. 253) on authorities in the military administration, especially on army commissars; then requests made to the general – to convene meetings of the general staff (vol. 3, p. 38), to forbid the military band to play royalist songs (vol. 1, p. 375), or to delegate cases to the military court (vol. 1, p. 442) when royalist leaflets were circulated; requests made to the revolutionary tribunal (vol. 4, p. 16: Custine); or qualified requests, i.e. those that bore an authorisation from the body responsible for their execution (vol. 3, p. 13: expulsions).

32 Originally the commissars had a special authorisation, although they also acted without one (ibid., vol. 1, pp. 178, 198, 201, 226, 245, 263, 310, 351–2, 362; vol. 2, pp. 4, 17). The general capacity to dismiss people from office was created through the decree of 26 January 1793 (vol. 1, p. 503; vol. 2, p. 15); from time to time dismissals were also made through a resolution of the Convention (vol. 3, p. 47); and dismissals could combine with the arrest of the dismissed official (vol. 2, p. 387).

33 In emergencies, this had already happened in October 1792 (ibid., vol. 1, p. 195). After Dumouriez's treason, the commissars of the army instantly mandated a new general with the supreme command (vol. 3, p. 66); for the 'completion' ['*Completierung*'] of municipalities, see vol. 3, p. 8. General authorisation to make new appointments was given only on the basis of the decree of 21 January 1793 (vol. 1, p. 503), and without the right to re-appoint those who had been dismissed (decree of 1 April 1793: vol. 3, p.7); the newly appointed had to be people of reliable *civisme* (vol. 3, p. 7).

34 Decree of the Convention of 26 January 1793 (ibid., vol. 2, p. 15) and 1 April 1793 (vol. 3, pp. 47–8): *tous gens suspects qui pourront troubler la tranquillité publique* [all the suspicious people, who could in principle upset public peace of mind]. One had the obligation to report to the Convention within twenty-four hours. For general instructions on the procedure of arrest, see e.g. vol. 3, p. 41 against all the sacristans in all the churches where the bells were rung. In this context we also find numerous orders of expulsion, limitations on residence permits, etc. In some cases the commissar also acts as a judge, in order to satisfy the law according to which an arrested person has to be interrogated within twenty-four hours; see the interesting report by Joseph Fouché* (vol. 2, p. 431).

35 Measures (*mesures*) and decisions (*arrêtés*) could be taken in the interest of *sûreté* [security], *tranquillité* [peace of mind] and *ordre public* [public

* Translators' Note: First Duc d'Otrante, minister under Napoleon. Interested readers may want to look up his book *La Police secrète du premier Empire* (Paris, 1913).

order]; *ce que les circonstances rendront nécessaire* [that which circumstances will render necessary] (ibid., vol. 1, pp. 60, 503; vol. 2, p. 15) or *qu'ils jugeront nécessaires* [the things they will deem necessary] (vol. 1, p. 118) or *qui leur paraîtront nécessaires et urgentes pour le salut de l'État* [the things that will appear to them to be necessary for the salvation of the state] (vol. 1, pp. 351, 355; vol. 2, p. 4; vol. 3, p. 61), they should take the best and most secure measures possible (vol. 2, p. 46), etc.

36 The decree of 13 December 1793 (ibid., vol. 2, p. 41) already mentions all necessary means, *même celles de sûreté générale* [even those concerning general security] – which gives them a *pouvoir illimité* [unlimited power]; see, moreover, the instruction of 7 May 1793 (vol. 4, p. 23).

37 Decree of 13 December 1793 (ibid., vol. 1, p. 322). For the explicit prohibition to give orders at the expense of the treasury, or to allow expenditures at the expense of the state, see vol. 1, p. 259; this is the reason for the appeal to the Convention to pass such regulations (vol. 1, p. 124; see also vol. 6, p. 321).

38 Apart from supremacy of the Commune of Paris, the phrase *dictature parisienne* designates opposition, on the part of the centralised rule of the Comité du salut public, to any kind of local authority and federalism. The phrase is used here in the same way as in a federal state – for example in the United States of America, where the phrase *dictate laws* is used very succinctly when the state as a whole implements a regulation that transcends the sovereignty of individual federal states and ignores the intermediate existence of such a state.

39 Decree of 5 Frimaire, II; see the phrase *mandat impératif* in the decree of 16 August 1793 (ibid., vol. 6, p. 327).

40 Tallien of Chinon's report of 15 May 1793 (ibid., vol. 4, p. 212) states: *je n'étais point à Chinon, lorsque la commission centrale* [see the instruction of 7 May 1793 mentioned above, n. 36] *fit une adresse pour me demander que je restasse près de ce department. Lorsque j'en* [*pris*] *connaissance, je la désapprouvais hautement. Je dis au département, que dans une République, il était dangéreux de donner tant d'importance à un home* [...] [I was not at all at Chinon, when the general commission gave an address to ask me to stay close to this ministry. When I found out about this, I strongly disapproved. I told the ministry that it was dangerous in a republic to accord so much importance to an individual ...].

41 Every issue of the *Moniteur*, from January until March 1814, is almost filled with news on the activity of these extraordinary imperial commissars.

42 *Bulletin* (above, n. 1), 5.1 (= 5th series, vol. 1; Paris, 1814), No. 49.

43 Ibid., 6: 1815, No. 110.

44 Royal order of 7 July 1815: ibid., 1.7: [= ?], No. 3.

45 Ibid., 1.7, No. 18.

Notes to Chapter 6

1 See Chapter 3, n. 4.
2 Charles M. Clode, *The Administration of Justice under Military and Martial Law* (London, 1872).
3 Gustav Noske during the 9 March 1919 session of the German National Assembly. Noske himself characterised his own order during the Berlin fights of March 1919 – 'every armed person opposing the troops of the government has to be shot immediately' – as an 'instruction based on martial law' [*Standrechtserlaß*] (Gustav Noske, *Von Kiel bis Kapp: Zur Geschichte der deutschen Revolution*, Berlin, 1920, pp. 109–10).
4 Clode, *Administration of Justice*, p. 165: 'when it is impossible, said the late Sir James Mackintosh, for Courts of Law to sit or enforce the execution of their judgements, then it becomes necessary to find some rude substitute for them and to employ for that purpose the Military, which is the only remaining force in the community'.
5 James W. Garner, 'Le Pouvoir exécutif en temps de guerre aux États-Unis' (*Revue du droit public*, 35: 1918), p. 16.
6 Here are some cases in which the president resorted to the law of 1795: hostile invasion, 1812; civil war, April 1861; Mexican raids, 1916; the war against Germany, 1917; see Garner, 'Pouvoir exécutif'.
7 Clode, *Administration of Justice*, p. 182, gives the following quotations from Napier and Wellington: 'The union of Legislative, Judicial and Executive Power in one person is, as the late Sir Charles aptly expressed it, "the essence of Martial Law"; or, as the Duke of Wellington explained to Mr Stuart (when it was suggested that he should govern Portugal under it), "it is neither more nor less than the will of the General of the Army. He punishes, either with or without trial, for Crimes either to be declared to be such or not so declared by any existing Law or by his own orders."' And [further on the same page he quotes Wellington] on Article 3 of war instruction issued by the American administration for April 1863: 'Martial law in a hostile country consists in the suspension by the occupying Military Authority of the Criminal and Civil Law and the domestic Administration and Government and in the substitution of Military rule and force for the same, as well as in the dictation of general laws, as far as Military necessity requires this suspension, substitution or dictation.'
8 W. Winthrop, *An Abridgement of Military Law* (2nd edn, New York, 1893), p. 329; W. E. Birkheimer, *Military Government and Martial Law* (Washington, DC, 1894).
9 This is because the place of jurisdiction for soldiers was considered to be a privileged place of jurisdiction [*Gerichtsstand*]; for the eighteenth century, see Johann Christian Lünig, *Corpus iuris militaris des heiligen römischen Reiches* (Leipzig, 1723), vol. 2, p. 1415. See also I. F. Ludovici, *Einleitung*

zum Kriegs-Prozess (10th edn, Halle, 1771), p. 124 and G. Ludwig Winckler, *Opuscula minora*, vol. 1 (Dresden, 1792), pp. 125–6, where the combination of legal aspects and practicalities appears in typical form, for disciplinary reasons. When these works speak about upheavals and insurrection, too, what they really mean is soldiers' mutinies.

10 So according to Joseph II's scrupulous court orders [*Gerichtsordnung*] of 1788, and subsequently according to the 1803 Austrian penal code, §500. See G. A. Kleinschrod, *Über das Standrecht als kriminalrechtliches Verfahren* (Halle, 1827, Neues Archiv des Criminalrechts, 9), p. 275; the sources supplied there are used again in K. Buchner's entry 'Standrecht' in vol. 12 of the *Rotteck-Welckersche Staatslexikon* (Halle, 1826), p. 241.

11 According to §132, Art. 2 of the Prussian law on the general administration of the state, against the allocation and execution of a coercive measure there is, in all cases, only a complaint in place of something done in a supervisory capacity, whereas against the *directive* of a coercive measure the same legal remedies [*Rechtsmittel*] are given as against the directive with which the enforcement deals in a coercive manner. Now, if the police uses direct coercion against the will of the person concerned, without having previously given this person a constraining order to capitulate, then 'the actual creation of the requested condition contains, along with the implementation of the coercive measure, also the order – expressed through the deed – for that creation'; this means in practice that the person concerned must forfeit any legal remedy as a result of the fact that the police immediately acts in advance, *via facti*. Decision by the Prussian administrative appeals tribunal [*Oberverwaltungsgericht*] of 30 March 1911, *Preußisches Verwaltungsblatt*, 33: 1912, p. 199, also the decision of 24 September 1909, *Preußisches Verwaltungsblatt*, 32: 1911, pp. 346–8; M. von Brauchtisch, *Verwaltungsgesetze des Bundes und der Lände*, vol. 1 (22nd edn, Berlin, 1918), n. 10 to §132 (p. 263).

12 So runs the claim against Dumouriez: see François Victor Alphonse Aulard, *Recueil des actes et documentes inédits du Comité de salut public* (Paris, 1889–1913; henceforth *Recueil*), vol. 3, p. 32.

13 Ludovici, *Einleitung zum Kriegs-Prozess*, pp. 143–4, cites Ferdinand II's military regulation [*Artikelsbrief*]: 'If someone deserts with his wages, he should be outlawed without trial, be considered a criminal, and have no freedom, no safety and no escort'. ['*Wer mit Löhnung entläuft, soll ohne Urteil und Recht jedem gut preis sein, er soll zum Schelm gemacht und keine Freiheit, Sicherheit und Geleit mehr haben*']. The treatment of a felon in English law – one who can be killed without consequences if his running away cannot be prevented in any other way – is an example of the consequences of the idea that one can divest oneself of rights by one's own deeds. August Wilfling, *Der administrative Waffengebrauch* (Vienna, 1909), pp. 106–7.

14 Wilfling, *Der administrative Waffengebrauch*, §2, pp. 7ff.

15 In the 1634 pleading entitled *Ausführliche und gründliche Bericht der vorgewesenen Friedtländischen und seiner Adhaerenten abschewlichen Prodition* [Detailed and Thorough Report of Friedtland and his followers abhorrent treason], it is stated: *Gestallt dann alle vernünfftige Rechte, zuvorderst aber auch des Heiligen Römischen Reichs Satzungen, in dergleichen Criminibus Proditionis, Perduellionis et laesae Majestatis notorijs actu permanentibus, wie diese unwidersprechlich gewesen vnnd wo die Rei zum Standt Rechtens nicht leichtlich zu bringen, oder sonst wegen des Verzugs das allgemeine Wesen in gefahr stehen müste, einigen andern Process oder Sentenz, als allein die Execution selbsten,* quae hic instar sententiae esten*, nicht erfordern, einem jedwedern auch dißfalls erlaubt,* contra publicum hostem Patriae … *die Execution vorzunehmen* ['Despite all given reasonable rights, and above all the laws of the Holy Roman Empire, [they must be suspended] in such criminal cases of treason and permanent high treason against the Majesty in particular, which cannot be denied and where the case cannot have been easily prosecuted; because of the delay, the commonwealth would have been endangered, no other process or judgement was possible than the execution itself, *quae hic instar sententiae esten*. Everyone is therefore entitled to undertake the execution of a public enemy of the Motherland']. As an answer to this, see the interesting reply in the *Relation auß Parnasso* (above, Excursus, n. 55), p. XXIII: it would be against all international law to deploy subordinates as prosecutors, judges and executors of their superiors, lest 'charge and execution would be simultaneous, in fact the execution would have preceded the charge'.

16 On 29 March 1920, in the 157th session of the German National Assembly, Geßler, the minister of defence for the Reich, communicated the proclamation made in Duisburg on 25 March by the communist revolutionary leadership. The proclamation stated: 'The maintenance of order and security is conducted by the revolutionary people's militia [*Volkswehr*]. Whoever is seen engaged in activities such as robbery, looting, theft, or usury will be sentenced by being court-martialled and shot.' The minister of defence of the Reich comments: 'Here you can see the new constitutional law': 'one might think that in this case the execution precedes the sentence'. But this may have been meant simply as a combined official act [*zusammengesetzte Amtshandlung*], indistinguishable from an unauthorised assumption of authority [*Amtsanmaßung*], since one cannot distinguish between immediate execution and murder. In the darkness of a juridical night composed of official acts, all cows are black, and the act, too, quite possibly entailed, among other things, an immediate new appointment to some office. See F. Fleiner, *Institutionen des deutschen Verwaltungsrechts* (3rd edn, Tübingen, 1913), p. 181, n. 2.

17 The comment by A. Steinlein, *Die Form der Kriegserklärung: Eine völkerrechtliche Untersuchung* Munich, 1917, p. 144 is splendid: 'The emphasis rests on the form of the declaration … Whoever has killed a person cannot claim that it was a duel in which the first stroke was the challenge to the duel.'

18 J. B. Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du conseil d'état* (Paris, 1788–1949; henceforth Duvergier), vol. 1, p. 62; Baudouin, vol. 1, p. 142 (for Baudouin, see Translators' Note to Chapter 5, n. 1). Drafts by Mirabeau and Target in *Archives Parlamentaires* de 1787 à 1860: *Recueil complet des débats législatifs et politiques des Chambres françaises,* vol. 9 (Paris, 1877), pp. 444, 452, 472, 474.

19 The proposal to form a tribunal recruited from within the National Convention in order to judge such cases, which was discussed in October 1789, together with the *loi martiale*, was rejected because of constitutional concerns arising from the doctrine of the separation of powers. Robespierre considered those concerns irrelevant (*Archives Parlamentaires*, vol. 9, p. 474). On the other hand, by the decree of 21 October 1787 (Duvergier, vol. 1, p. 63), the [staff of the] Châtelet of Paris was given the authority to decide all charges of *lèse nation* without appeal, until a special tribunal was established; incidentaly, this 'commission' also entailed the trial of authors of inflammatory pamphlets (decree of 31 July 1790; Duvergier, vol. 1, p. 308; see also the delegation of the trial of certain delicts to the authority of the tribunal of Orléans for a final verdict and decision, decree of 5 March 1791; Duvergier, vol. 2, p. 289). Through the decree of 2 July 1790, mentioned earlier, a number of presidential courts [*Präsidialgericht*] were mandated to act as courts of first and last resort and were obliged to present the findings of the investigation and all the evidence to the National Assembly.

20 See above, p. 132. In such cases the commissar of the department was given the authority to command the police in a certain city and to monitor the execution of the laws (decree of 8 June 1790 concerning the riots in Schlettstadt; Duvergier, vol. 1, p. 243). In cities where they met with resistance or where the authorities were violently interfered with in the exercise of their official duties, royal commissars were explicitly authorised to request armed forces and to initiate the criminal prosecution of the rebellion's leaders (decree of 8 July; Duvergier, vol. 1, p. 274).

21 Duvergier, vol. 3, p. 162; Baudouin, vol. 15, p. 306: Every citizen must obey in assisting and aiding any depositary, who represented public authority, when he was resisted and claimed: '*force à la loi*'. Then everyone was obliged to respond and offer help, according to the decree of 28 February 1791 (Duvergier, vol. 2, p. 250) – here again following the English example.

22 Article 11: *Les places de guerre et postes militaires seront en état de siège* [Fighting zones and military outposts will be under siege].

23 The Act of 26 May 1792 (Duvergier, vol. 4, p. 208) declared state of war (not of siege) in a number of areas, with the formula *elles seront comme étant en état de guerre* [they will be as if they were in state of war]; further, it declared that the general could represent a fortification to *be placed* under siege. The king had authority to add new areas to those named in the Act of 1791, if they were deemed to be in a state of war owing to their location (*position*). In Article 3, the general of the army was authorised *à declarer et à faire proclamer que tels ou tels postes qu'ils occuperont sont en état de guerre* [to declare and to have it proclaimed that such and such positions that they were going to occupy will be in a state of war], when he considered that to be necessary either for security or for the military police. The purely technical–military [*militärtechnische*] treatment of the issue was implicit in the fact that the law had been transferred without any political debate to the committee in charge of military affairs (*Archives Parlamentaires*, vol. 43, pp. 617–18).

24 It is telling that Bonald, in his capacity as *maîre* [mayor] of Milhau (Rovergue), organised the battle of the local communities against the insurgents and was commended for that by the National Assembly (21 August 1789; *Archives Parlamentaires*, vol. 8, pp. 466–7). Robespierre opposed *loi martiale* (*Archives Parlamentaires*, vol. 11, p. 474). Louis Blanc reports that only one person protested against this cruel law: Marat, who was of the view that, as long as the people were still engaged in the struggle to break their chains, such a law was out of order. Peter A. Kropotkin, *Die französische Revolution von 1789–1793*, vol. 1 (Leipzig, 1909), p. 155 (in G. Landauer's German version), accuses Robespierre of not having opposed *loi martiale* in principle – he simply called for a courthouse (compare p. 178). In contrast, Philipp Bounarotti in his *Observations sur Maximilien Robespierre* (1842; published by Charles Vellay in *Revue historique de la Révolution française*, vol. 3, Paris, 1912, p. 478) praises Robespierre because he rejected the brutal *loi martiale*. During the food riots [*Lebensmittelunruhen*], says Fabre de l'Herault on 30 October 1792 (*Recueil*, vol. 1, p. 211), one had to inform and enlighten the population, not proclaim *loi martiale*.

25 *La Convention nationale décrète que la loi martiale est abolie* [The National Convention decrees that martial law is abolished] (Duvergier, vol. 5, p. 435; Baudouin, vol. 31, p. 200). On 24 July 1793 the representative of the National Convention, Albitte, wrote in a report that the perfidious Mirabeau created the *loi martiale* at the bosom of a free people; that it is now up to us to abolish this disgraceful law which befouls our rights; that *loi martiale* should be cursed, the red flag should be torn apart, and so on (*Recueil*, vol. 5, pp. 73–4).

26 The official documentation supporting this fact consists in the law passed on 18 Fructidor V, by which the directorate was empowered to send the troops to the *rayon constitutionnel*, and in the law of 19 Fructidor, which confirmed that the general of the home army had rendered outstanding services to his nation.

27 Philippe-Antoine Merlin de Douai, *Répertoire universel et raisonné de jurisprudence*, 3rd edn, vol. 4 (Paris, 1808), p. 777; M. Teyssier-Desfarges, 'De l'état de siège', in *Revue de droit français et étranger*, 5: 1848, p. 504.

28 The decisions mentioned by Teyssier-Desfarges, 'État de siège', at page 501 about the state of siege in the villages of Alençon on 17 Prairial, VIII and in Sarlat, Bergerac and Ostende concerned the *suspension* of the state of siege.

29 The policing functions, especially the *état de surveillance*, that he and the extraordinary courts had at hand were adequate measures that do not need to be discussed in detail here. See 'Militärischer Belagerungszustand in den Plätzen Antwerpen und Brest durch kaiserliches Dekret vom 26. März 1807', *Bulletin des lois de la République française* (previously *Bulletin des lois du Royaume de France*; henceforth *Bulletin*), 4.3 (= 4th series, vol. 3; 1807), Nos 2238–39 (at pp. 65–6).

30 Article 103: *Dans l'état de siège, le gouverneur ou commandant détermine le service des troupes, de la garde nationale et celui des autorités civiles et militaries, sans autre règle, que ses instructions secretes, les mouvements de l'ennemi et les travaux de l'assiégeant* [In the state of siege, the governor or commander establishes the service of troops, of the national guard and of the civilian and military authorities, following no other rule apart from his secret instructions, the movements of the enemy and the efforts of besiegers].

31 The violation of judicial independence is explicitly mentioned in this *acte de déchéance* [act of forfeiture], and so are the emperor's unconstitutional declarations of war (against Article 50 of the Constitution of Year VIII – on which Merlin commented in 1807, *Répertoire*, vol. 3, p. 327: *ces dispositions ne subsistent plus* [these dispositions no longer remain in force], because they are suspended implicitly [*implicite*] by the senatus consultum of Year X, Article 58, and of Floréal, Year XII, Article 27). It was imputed to the emperor that he had *confondu les pouvoirs* [mixed up the powers], postponed the people's assembly [*Volksvertretung*] without a recall, and so on. Théodore Reinach, *L'État de siège* (Paris, 1885), p. 102 states that the decree of 24 December 1811 offered grounds for dismissal, although it was not mentioned in the official text of the act of dismissal.

32 *La ville de Paris est en état de siege* [The city of Paris is under siege], *Bulletin*, 6: 1815, Nos 305 and 304 (at pp. 291–4). Article 52bis of the draft of the constitution of 29 July 1815 states that, by law, only the capital can be declared to be under siege; hence, in a hostile invasion, the people's assembly should also have a say (*Le Moniteur*, 1 July 1815).

33 See my essay 'Diktatur und Belagerungzustand: Eine staatsrechtliche Studie', in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 38: 1917), pp. 138–62.

34 The equality between civil and military positions could suggest that no transition of executing power had occurred. But the actual course of events showed the opposite; see Salviac de Viel-Caste, *Histoire de la Restauration*, vol. 5 (Paris, 1862), pp. 91ff.; Jean-Baptiste Honoré Capefigue, *Histoire de la Restauration*, vol. 2 (3rd edn, Paris, 1841), ch. 11, p. 119. The state of siege was not mentioned at all in *Le Moniteur*; and the uprising in Grenoble was only mentioned on 10 May 1816, when peace had been restored and the military occupation of highways only had now the purpose of 'securing an exemplary punishment for the guilty'. One can get a good idea of how unclear the legal situation was during the Restoration from the fact that in 1789 it was still up for discussion whether *loi martiale* was in practice or not; its validity was confirmed by the Chambers of Deputies in June 1820. Duvergier (vol. 1, note to p. 62) suggested that it would be wise to reintroduce it if it did not exist any longer.

35 *Le Roi est le chef suprême de l'état, il commande les forces de terre et mer, déclare la guerre* [. . .] *et fait les règlements et ordonnances nécessaries pour l'exécution des lois et la sûreté de l'état* [The king is the supreme chief of the state, he leads the terrestrial and maritime powers, he declares war [. . .] and he makes the rules and regulations that are needed for law implementation and for the security of the state].

36 On the occasion of the meeting between H. O. Meisner, *Über die Lehre vom monarchischen Prinzip* (Breslau, 1913), and H. Maier, *Die geistegeschchitlichen Grundlagen der konstitutionellen Theorie* (Tübingen, 1914), Kurt Wolzendorff made a statement concerning the systematic and methodological contradiction between a state-theoretical construct and political ideas ('Staatstheoretische Formen für politische Ideen', in *Archiv des öffentlichen Rechts*, 34: 1915, pp. 477–90). His comments are of fundamental significance, although they are limited to a sketch, as was appropriate for the occasion.

37 The report is published in Jean-Baptiste Honoré Capefigue, *L'Europe depuis l'avènement du Rois Louis-Philippe II* (Brussels, 1845), vol. 2, p. 4; for the concept of *pouvoir constituant*, see p. 72.

38 The mention of antecedents to June 1832 in the king's speech at the opening of the parliamentary session on 19 November 1832 caused enthusiastic acclamations (*Archives Parlamentaires*, vol. 77, pp. 667–8). The royalists called the state of siege a government dictatorship. In his speech of 4 January 1849, which was held in the Spanish House of Deputies, Donoso Cortés said that dictatorship was stuck in Article 14 of the Restoration charter; in the introduction of the charter from 1830; and the republic of 1848 was nothing but a dictatorship in republican disguise.

39 Laval [in Mayenne, Pays de La Loire]; Château-Gontier; and Vitré – see *Bulletin* (above, n. 29), 9.4: 1832, No. 4202 (at p. 661: Ordonnance du roi qui déclare en état de siége les communes comprises dans les arrondissemens de Laval, Château-Goutier et Vitré).
40 Maine-et-Loire; Vendée; Loire-Inférieure [= Loire-Atlantique]; and Deux-Sèvres: ibid., No. 4203 (at pp. 661–2: Ordonnance du roi qui déclare en état de siège les communes comprises dans les départments de Maine-et-Loire, de la Vendée, de la Loire-Inferieure et des Deux-Sévres).
41 Ibid., No. 4204 (at p. 662: Ordonnance du roi qui met la ville de Paris en état de siège).
42 Decision of 30 June 1832 in the *Geoffroy* case (Geoffroy was sentenced to death by a military court and subsequently made a plea for a trial in a court of cassation); for other similar decisions, see Teyssier-Desfarges, 'De l'état de siège' (above, n. 27), p. 507; Reinach, *L'État de siège* (above, n. 31), p. 107.
43 *Bulletin*, 8.1: 1824, No. 506 (at p. 571).
44 Ibid., Nos 508, 509 and 511 (at pp. 571–3).
45 *Bulletin*, 10.2: 1848, No. 793 at p. 539.
46 Reinach, *L'État de siège* (above, n. 31), p. 105.
47 *Bulletin*, 10.1: 1848, No. 513 at p. 574; see also No. 510 at p. 572. It also decided that the *pouvoir constituant* could thereby excercise an unlimited authority through the assembly: see Teyssier-Desfarges, 'De l'état de siège' (above, n. 27), p. 513; Reinach, *L'État de siège* (above, n. 31), pp. 110–11.
48 Its 107th session of 3 March 1920.
49 *De la République, ou Un Roi est-il nécessaire à la conservation de la Liberté?* (12 July 1791; in Jean-Antoine Nicolas de Caritat, Marquis de Condorcet, *Œuvres*, Brunswick/Paris, 1804, vol. 17, p. 18). This speech explains the legislative practice of the right of associations [*Koalitionsrecht*] as well as the tremendous appreciation for the freedom of the press as a guarantee of unimpeded public opinion – which, as it is said, should be the best way to control the government. If there had been only one newspaper, says Condorcet, then Cromwell would not have been Lord Protector. The fact that control means political power – and hence it instantly generates the problem of organising this power – was still completely alien to Condorcet.

Notes to Appendix

1 So most explicitly Richard Grau, *Die Diktaturgewalt des Reichspräsidenten und der Landesregierungen aufgrund des Artikels 48 der Reichsverfassung* (Berlin, 1922), §7 ('Die Unantastbarkeit der Reichsverfassung'),

pp. 50–1: 'The addition of sentence (2) can only mean that the president of the Reich is granted an authority not yet included in the power to take the necessary measures. Hence it signifies (!) an exception from a restriction.' See also Karl Strupp, 'Das Ausnahmerecht der Länder nach Art. 48 IV der Reichsverfassung' (*Archiv des öffentlichen Rechts*, 5: 1923), p. 201; Hugo Preuß, 'Reichsverfassungsmäßige Diktatur' (*Zeitschrift für Politik*, 13: 1924), p. 110; L. R. G. Maercker, *Vom Kaiserheer zur Reichswehr: Ein Beitrag zur Geschichte der deutschen Revolution* (Leipzig, 1921), p. 367; C. Staff, 'Das Ermächtigungsgesetz und Artikel 48', *Der Tag*, 27 October 1923 (with reference to Grau).

2 I deliberately put aside the question of how the political influence on the declaration and execution of the state of exception is distributed between the Reich's president and government. On that matter, see Joseph Engels, *Die Zuständigkeit des Reichspräsidenten zur Verhängung und Aufhebung des Ausnahmezustandes* (doctoral dissertation, Bonn, 1923).

3 See above, Chapter 6, p. 171 [194].

4 *Entscheidungen des Reichsgerichts in Strafsachen* [*RGStr*] 56, p. 151. With respect to the question of the interpretation of Art. 105 regarding whether the extraordinary courts of the state of exception are permissible, one should compare the count of Dohna in the 47th session of the National Assembly; Gerhard Anschütz, *Die Verfassung des deutschen Reiches Vom 11. August 1919* (Berlin, 1926), commentary to Article 48, n. 4; Richard Grau, *Die Diktaturgewalt des Reichspräsidenten und der Landesregierungen aufgrund des Artikels 48 der Reichsverfassung* (Berlin, 1926), p. 129; Hartmann in *Preußisches Verwaltungsblatt* of 1922, p. 588; Pencker in *Preußisches Verwaltungsblatt* of 1921, p. 79; Felix Halle, *Deutsche Sondergerichtsbarkeit 1918–1921* (Berlin, 1922), pp. 37f.; E. Kern, *Ausnahmegerichte* (Tübingen, 1924).

5 See the verdict of the Hanseatic Higher Regional Court [*Oberlandesgericht*] of 7 September 1923 (R. [= ?] II 157/23) concerning the regulation of 12 October 1922 issued by the Reich's president.

6 Art. 114: an encroachment upon or withdrawal of personal freedom is only admissible *on the basis of laws* (the addition of §2 is, by comparison, of lesser practical significance). Art. 115: he regards the residence of any German as a sanctuary and an inviolable place; exceptions are only admissible *on the basis of laws*. Art. 117: the privacy of correspondence, of the post, of the telegraph, and of the telephone are all inviolable; exceptions are only to be admitted *on the basis of a constitutional law* [*Reichsgesetz*]; Art. 118: every German has the right to express his/her free opinion *within the boundaries of general laws*. Arthur von Lilienthal, *Deutsche Strafrechtszeitung* (Berlin, 1921), col. 274 (concerning the regulation of 26 September 1921) is correct here: the suspension was neither necessary nor useful.

7 So the chancellor of the Reich [*Reichskanzler*], in the 4 December 1923 session of Assembly of the Reich [*Reichstagssitzung*]; these words were repeated by the Reich's minister of internal affairs (Dr. Jarres, Reichsminister des Inneren) on 5 March 1924 (the 405th session: *Stenographischen Berichte* [*SB*], pp. 12595–6). [At http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00860.html]

8 On details of procedure, see the memorandum of the government of Thuringia on the military state of exception in Thuringia, especially on 12 December 1923; also the speech delivered by Thuringia's governor [*Ministerpräsident*], Fröhlich, on 22 November 1923, in the 329th session of the Reichstag (*SB*, p. 12212) [http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00477.html], the speech delivered by Saxonia's governor , Fellisch, in the same session (p. 12219), and the speech delivered by the minister of the Reich for defence [*Reichswehrminister*], Geßler on 23 November 1923 (393rd session, p. 12255) [http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00520.html].

9 On this interpretation, Thuringia's proposal in the Reichsrat [Council of the Reich] (No. 385 of 10 November 1923) should be considered reasonable. The Reichsrat wanted to clarify 'that the regulation issued by the president of the Reich on 29 October 1923, *RGBl* 1, p. 995 is incompatible with the constitution of the Reich'.

10 In the heading of the regulation (*RGBl* 1, 1923, p. 995), the government of the Reich has appealed to Article 48, §2 despite some ambiguity in the justification. Paragraph 1 would require a county [*Land*] to have neglected the duties set up for it by the Reich. A simple threat would not be enough to justify an execution by the Reich. See Hugo Preuß in the 8 p.m. Evening News of 30 October 1923 and also Hugo Preuß, *Um die Reichverfassung von Weimar* (Berlin, 1924), p. 40: one cannot plead a violation of the Reich's constitution on the grounds that the federal government of Saxonia has not complied with the call for a voluntary resignation issued by the Reich's commissar Heinze, because the government of the Reich did not have any constitutional right to make such a call; the call could only be a measure of the execution itself. The appeal to article 17 is meaningless – the government of the Reich cannot decide on whether a federal government [*Landesregierung*] has the trust of the popular government [*Volksregierung*] or not; therefore the procedure cannot only be supported by an appeal to §2. Besides, this is why the government of the Reich, through a regulation issued by its president, granted the chancellor extraordinary powers. See also *Vossische Zeitung* of 31 October 1923: the *Berliner Volkszeitung* has been prohibited by Geßler, the Reich's minister for defence, because the measures taken by the Reich's government against Saxonia were called there a *coup d'état* and a breach of the constitution. On this matter, see *Vossische Zeitung*: the course of action

adopted is not compatible in every respect with the wording and meaning of the Weimar Constitution (this is followed by a reference to the article by Preuß); one can only appeal to Article 48, §2, although that article mentions no transition of executive power to the military chief.

11 The wording of the regulation issued on 26 September 1923 is exactly correct, §1: 'Articles 114 etc. are suspended for the time being. Therefore restrictions to personal freedom, the right of free speech [. . .] even beyond the legal boundaries that normally apply here, are permissible.'

12 According to the history of origins, the authority to intervene into the freedom of contract and freedom of commerce (pp. 151, 152) through a general regulation should be granted in virtue of the fact that Article 153 was included in the enumeration of suspendable rights. See the discussion on the inclusion of Article 153 (then 150) during the 47th session of the National Assembly of 5 July 1919. Heine, the Prussian minister, says that the appeal to this article was intended to make interventions into food prices and the sale thereof possible. The language used by these decisive gentlemen is also quite characteristic: Minister Heine says that 'the holder of executive power' should be given this possibility; Preuß says 'the administrative authority' [*Behörde*]. The president of the Reich is not mentioned. The reason for this choice of words will become apparent from the examination of the history of origins in what follows.

13 *SB*, p. 288 [*sic*]. I don't believe that the statement made by Preuß provides a basis for Rosenfeld's claim (393rd session of the Reichstag, 23 November 1923; *SB*, p. 12264) [at http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00529.html] that, according to Article 48, a military state of exception is generally inadmissible. See also *Vossische Zeitung* of 31 October 1923, in which the actions taken against Saxonia are declared to be unconstitutional: in a civilian [*bürgerlich*] republic, orders given by a general to the government of a federal state or to the representatives of a federal state are an absurdity.

14 Von Delbrück: the 46th and 47th sessions (*SB*, vol. 327, pp. 1304 and 1335) [http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00575.html]; the count of Dohna: ibid., p. 1338 [http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00609.html]; Martin Spahn, 118th session (25 November 1919; *SB*, vol. 331, p. 3743) [at http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000015_00149.html]: here he assumes that previous laws concerning the state of siege are still valid until the constitutional law [*Reichsgesetz*] has been promulgated; and he explicitly requests such a law in the session of 3 March 1920 (*SB*, vol. 332, p. 4642–3) [http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000016_00310.html]; Haas, 112th session (29 October 1919; *SB*, vol. 330, p. 3563) [http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000014_00703.html].

15 See Z. Giacometti, 'Das Verfassungsleben der schweizerischen Eidgenossenschaft in den Jahren 1914–1921' (*Jahrbuch des öffentlichen Rechts*, 11: 1922), p. 340; Manfredi Siotto-Pintór, 'Das Verfassungsrechtsleben in Italien in den Jahren 1913–1922' (*Jahrbuch des öffentlichen Rechts*, 11: 1922), p. 159; Maurice Hariou, *Précis de droit constitutionnel* (Paris, 1923), pp. 499ff.; R. Hoerni, *De l'état de nécessité en droit public fédéral suisse* (Geneva, 1917), challenges the idea that there is a gap within constitutional emergency law. His argument goes as follows: '*L'execice du droit de nécessité n'a pas besoin d'être mentionné à l'avance par la constitution pour être possible et légitime. Il est justifié par les circonstances ellesmêmes qui donnent naissance à un droit nouveau dont la vigueur prime celui du droit existant* [. . .] *L'absence de texte précis prévoyant dans la constitution l'éventualité de l'état de nécessité n'offre pas d'inconvénients juridiques.* Il n'ya pas de lacune dans la constitution *en ce sens qu'une telle disposition ne ferait que confirmer un droit que l'État possède déjà par le simple fait qu'il existe*' ['The exercise of the right of necessity need not be mentioned beforehand in the constitution in order to be possible and legitimate. It is justified by the conditions themselves, which give rise to a new right; and this right takes precedence over the existing one by virtue of its strength. [. . .] The lack of a precise text that foresees in the constitution the possibility of the state of necessity does not present inconveniences from a legal point of view. *There is no lacuna in the constitution*, in the sense that such a disposition would only confirm a right that the state possesses in virtue of its own existence'].

16 A fine example is Carl von Kaltenborn, *Einleitung in das konstitutionelle Verfassungsrecht* (Leipzig, 1863), vol. 1, p. 347: formal law has a reasonable claim to validity in life if and only if it rests on the entire soul of the nation; and it follows from this that, if a constitution was wrested from the sovereign of a federal state [*Landesherr*] during a period when popular sentiment ran high, he is entitled to suspend it again if its continuance poses a threat to the existence of the state; the state's government, as bearer of that state's continuous being, should rather commit a breach of formal law than allow the dissolution of people and state out of mere respect for formal law. 'Then this [breach] would be an act of self-defence on the part of the state and its personal representatives; one could speak here of the so-called constitutional emergency law.' But the government must really have the power required for this *coup d'état* [*Staatsstreich*], otherwise the effects are exactly the opposite of what was intended.

17 This can be seen with characteristic clarity in the struggles over Article 14 of the *charte constitutionelle* [constitutional charter] of 4 June 1814: '*le roi est le chef supreme de l'État, il* [. . .] *fait les règlements et ordonnances necessaries pour l'exécution des lois et la sureté de l'État*' ('the king is the supreme head of state; he [. . .] gives the rules and regulations needed to put the

laws into practice and to assure the safety of the state'); see above, Chapter 6, pp. 167ff.

18 On the relation between the concept of sovereignty and an answer to the question whether the extreme case of emergency, which separates the existence of the state from its legal order, is given, see my *Politische Theologie* (Munich/Leipzig, 1922), p. 11.

19 On the general juridical character of the Prussian constitution, see L. K. Aegidi, ed., *Zeitschrift für deutsches Staatsrecht und deutsche Verfassungeschichte* (Berlin, 1867), p. 192.

20 As it is attempted by the suggested construction of Grau, *Diktaturgewalt* (above, n. 1), p. 105.

21 See above, Chapter 4, pp. 112ff., and also the excellent analysis by Erich Kaufmann, *Staatsgerichtshof und Untersuchungsausschuß* (Berlin, 1920).

22 See above, Chapter 3, pp. 85–6 and 92–3 and Chapter 4, pp. 127ff.

23 For details of this development, see above, Chapter 6, pp. 153ff.

24 See also the comment made by the representative Haas in the 112th session of the National Assembly of 29 October 1919, which is an example of a particularly clear statement (*SB*, vol. 330, p. 3563) [at http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000014_00703.html]. Also apposite is *RGStr.*, 57, p. 190: 'Since [. . .] the provisions of Article 48, §2–5 not only imply a statement of goal [*Programmsatz*], but also create legislation straightaway, and even give unlimited authorisations to the Reich's president and to the federal bodies, it is not the task of the constitutional law [*Reichsgesetz*] under discussion to provide a rationale for the authorisations mentioned in Article 48 or to create new ones alongside those. Rather its task is to reduce and limit the dictatorial power conferred, which is virtually unlimited until the promulgation of the constitutional law.' Also right is Halle, *Deutsche Sondergerichtsbarkeit* (above, n. 4), pp. 38–9; Grau, *Diktaturgewalt* (above, n. 1), p. 110 is wrong.

25 *Die Diktatur des Reichspräsidenten*, *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* (Berlin and Leipzig), 1924, Book 1, p. 109.

26 It should be mentioned in passing that the principles developed in the theory and practice of administrative law for the course of action of the police are not decisive for dictatorship. This applies especially to the principle that the action can only be directed against the disturbers, or – for aspects of the state of emergency related to police law – to the principle of proportionality (if this is to be more than a banality), to the distinction between individual and general danger, and the like. It makes a difference whether we are dealing with the requirement for an assessable procedure – like in the case of police actions according to *Allgemeines Landrecht für die preussischen Staaten* [*ALR*] (Berlin, 1796), §10, II, 17 – or with requirements for a procedure in which anything that a particular situation

needs can occur. The fact that this difference of principle between policing and dictatorial functions is misconstrued makes R. Grau's book limited in its own way. An essay in *Kölnische Zeitung* of 23 February 1924 should be mentioned here as a matter of curiosity: in it a jurist declares that the provisions of 8 December 1923 concerning a modification to the law of contributions under occupation [*Okkupationsleistungsgesetz*] are void, because those affected are not the disturbers. In 'a far-reaching, most worrying interpretation of Article 48 of the RV, which finds no support either in the text or in history', perhaps the Reich's president will also be allowed to increase 'the duties of the citizens who do not cause any disturbance', but this is just as invalid in this context – and so on.

27 Beyerle, in the 407th session of the Reichsstag of 7 March 1924 (*SB*, p. 12676) [http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00941.html]: 'A couple of months ago, when everything was charging towards dictatorship, for a while we seriously entertained the idea that the Reich's president is entitled to write a brand new constitution, simply as a restriction order [*Maßregel*] of the state of exception in Article 48 of the RV. This is rightly denied from a constitutional angle [*staatsrechtlicher Seite*].'

28 See the decision agreed upon by the Reichstag on 7 July 1923 (*Drucksache* [= ?], No. 6100), which was based on Koenen's proposal: provisions made by the federal states [*Länder*] on the basis of emergency provisions [*Ausnahmeverordnungen*] cannot be applied to representatives [*Abgeordnete*]. During the adjournment of the Reichstag, its representatives should not be hindered by any measures of the police in the exercise of their mandate – which includes reporting to the voters about the exercise of their mandate. For the rest, by invoking the character of a parliamentary state, the Reichstag requests that the representatives should not be hindered by measures of the police in the exercise of their mandate (including during meetings conducted by electoral campaigns for coverage and reporting).

29 Since legal practice and literature of the past few years have been filled with innumerable occasional comments on the *clausula rebus sic stantibus*, we should mention here at least one truly systematic discussion of this problem – Erich Kaufmann's book *Die clausula rebus sic stantibus und das Wesen des Völkerrechts* (Tübingen, 1911).

30 Therefore it is also impossible – even if it seems necessary for reasons of foreign politics – to suspend for example Articles 83, 88 or 89 of the RV on the basis of Article 48, in order to execute a plan of reparation for which no majority in favour of a constitutional change can be found.

31 So the chancellor of the Reich on 22 November 1923, in the 392nd session of the Reichstag (*SB*, p. 12191) [at http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00456.html]; also the Reich's minister of

domestic affairs on 5 March 1924 (405th session; *SB*, p. 12595) [at http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000045_00860.html]: 'It is taken for granted that the state of exception, by its very definition, must remain an exception and therefore has to be reduced as soon as the circumstances allow it.' Here again the question is, of course, who is going to decide what the circumstances allow.

32 French law of 3 April 1878, Article 1, §1: *L'état de siège ne peut être déclaré qu'en cas de péril imminent, résultant d'une guerre étrangère ou d'une insurrection à main armée* ['The state of siege can only be declared in case of imminent danger resulting either from a foreign war or from an armed insurrection'].

33 French law of 3 April 1878, Article 1, §2: *Une loi peut seule déclarer l'état de siège* [A law can declare state of siege just by itself]. According to Adolph Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechtes' (*Jahrbuch für Philosophie und phänomenologische Forschung*, 1.2: 1923, pp. 685–847), this belongs to a liberal [*freiheitlich*] state; see Article 106 of the constitution of 4 November 1848.

34 French law of 3 April 1878, Article 1, §2: *Elle (la loi) fixe le temps de sa durée. A l'expiration de ce temps, l'état de siège cesse de plein droit à moins qu'une loi nouvelle n'en prolonge les effets* [The law determines the length of its duration. When this period of time expires, the state of siege ends legally, unless a new law extends its effects].

Index