The Legal Basis Of The Total State, Carl Schmitt, 1933

1. National Socialism does not think abstractly and soullessly. It is an existence of everything that is normative and functional. It secures and cultivates every genuine form of popular justice wherever it finds it, in the countryside, in tribes, or in social classes. It created the peasant inheritance law; it saved the peasantry; it purged the German civil service of foreign elements and thereby restored it as a social class. It has the courage to treat unequal things unequally and to enforce necessary distinctions. For this reason, where it makes sense, it will recognize a class jurisdiction, as it reintroduced it for the army by the Act of May 12, 1933 (RGBl. I p. 264) on the basis of the old military penal code. A special type of professional discipline with professional jurisdiction would also be conceivable for certain organizations of the party, such as the SA and SS. With the emergence of genuine professional groups, the area of professional jurisdiction will expand of its own accord. In a different way, but with the same sense of concrete organic growth, National Socialism can do justice to the specific differences between villages, rural towns, industrial communities, large cities, and district offices in the area of local self-government without being hampered by the false notions of equality of a liberal-democratic scheme.

a) However, recognition of the diversity of organic life would immediately lead to an unfortunate pluralistic fragmentation of the German people along religious, ethnic, class, and interest lines if a strong state did not elevate and secure the whole of political unity above all diversity. Every political unity requires a unifying, internal logic for its institutions and norms. It needs a unified concern that shapes all areas of public life. In this sense, too, there is no normal state that is not totalitarian. As diverse as the perspectives on the regulations and institutions of the various spheres of life are, a unified, consistent main principle must be recognized and upheld. Any uncertainty or conflict becomes a starting point for formations that are initially neutral toward the state but later become hostile to it, and a point of entry for pluralistic fragmentation and disintegration. A strong state is a prerequisite for the vigorous independent existence of its diverse members. The strength of the National Socialist state lies in the fact that it is dominated and permeated from top to bottom and in every atom of its existence by the idea of leadership. This principle, through which the movement has grown great, must be implemented at all times, both in state administration and in the various areas of self-government, taking into account, of course, the modifications required by the particular nature of the matter. However, it would not be permissible to exempt any important area of public life from the rule of the Führer principle.

The outwardly rigid military and bureaucratic state of 19th-century Germany made the serious political mistake of allowing a different principle of organization to emerge in local self-government than in the state “executive,” which at that time meant the state itself. The fact that local government was elected would not in itself have been sufficient to justify an internal state dichotomy, given the fundamental differences between the municipality and the state; but precisely because they were elected, the elected municipal representatives were regarded as the true bearers

and representatives of the municipality, thereby recognizing a formal principle for the municipality that was contrary to the monarchical state. Local self-government thus became a point of entry for the liberal-democratic parliamentary principle into a monarchical-authoritarian bureaucratic state. As early as 1810, the controversial figure von Stein came to the conclusion that he had not kept a sharp enough eye on the “difference between administration and governance”. Under the typical pretext that these were “apolitical” matters of self-government, the liberal bourgeoisie created a sphere of public law that was removed from the state and yet “free of the state,” in which different political ideals and different principles of form and organization applied than in the state. Under German legal camouflages such as “cooperative association,” “freedom of self-government,” “own affairs,” etc., a goal- and purpose-conscious legal doctrine then shook the Führer principle of the Prussian state. The doctrine of the essential equality of all human associations, especially those of the community and the state, very effectively supported the conquest of the Prussian state by a principle of organization that was alien to its nature.

The German military and civil service state showed stubborn resistance to the seemingly insurmountable advance of liberal ideas; it created an exemplary organizational penetration of state administration and local self-government, for which the Prussian district administrator is the famous example. The three-class suffrage system applicable to municipal elections also prevented the practical consequences of a consistent liberal democracy. But it cannot be denied that the state was intellectually unequal to its opponents, who were sometimes national-liberal, sometimes liberal, sometimes cooperative, and sometimes communal-liberal, and that, as shown above (under III, 2), it fought on the defensive here as well. As a result, it was ultimately defeated. It does not take long to prove that the situation must be different in our current constitutional and administrative law. In a totalitarian state, there can be no political protest demonstrations by a municipal parliament, such as, for example, the allegedly completely “apolitical” decision of the Berlin City Council in 1898 to lay a wreath on the graves of the revolutionaries of March 1848, which was portrayed as a “purely self-governing matter” and a “mere act of piety” (judgment of the Higher Administrative Court of July 9, 1898), or the Potsdam slag dispute between the state and the municipality, which was decided in favor of the municipality by the judgment of the State Court for the German Reich of July 9, 1928 (Cammers-Simons I, p. 276) [1].

1) In the Habsburg Monarchy, too, the forces dissolving the state, especially the nationalities fighting against the state as a whole, used local self-government as a gateway. It happened that the mayor of a provincial capital forbade the military to march through certain streets of the city. See Derw. Archiv XIX (1911), page 448, a passage which also contains a beautiful illustration of the meaning and nature of the "constitutional state".

b) The organizational implementation of the Führer principle requires, first of all, that all methods inherent in liberal-democratic thinking be eliminated. Elections from below, with all the results of previous elections, cease to exist. (The new election of the Reichstag on November 12, 1933, can, as shown above, only be regarded as part of a stab poll.) Nor can the old voting procedures, with the help of which a majority cobbled together in some way outvoted a minority and turned voting into a means of outvoting and suppressing dissent, be continued or repeated in a one-party state. The typical liberal divisions and dualisms between the legislative and executive branches, in the municipal organization of decision-making and administrative or executive bodies, have lost their meaning. The Reich government's legislative power is a first, groundbreaking example of this abolition of future divisions. Everywhere, the system of distribution and shifting of responsibility must be replaced by clear accountability on the part of the leader who professes to follow every command, and by election through selection.

A natural complement to the new concept of leadership for the National Socialist state is the establishment of a council of leaders. This council assists the leader with advice, suggestions, and expert opinions; it supports and promotes him, keeps him in close contact with his followers and the people, but it cannot relieve the leader of his responsibility. It is neither an organization of mistrust, control, and shifting of responsibility, nor is it intended to represent or express any internal dualism (representatives of the people against the government, representatives of the community against the community council) or even pluralism. Therefore, the council of leaders must not be elected from outside or from below, but must be selected by the leader according to certain selection principles that above all keep in mind the connection with the state and people-supporting party organization. This also allows for extensive consideration of special local and regional conditions, as well as professional and class-based circumstances and requirements. Leaders and leadership councils are simple and flexible in their concrete application to various areas of life. They found their first clear and exemplary form in the Prussian State Council, the great constructive work of Prussian Prime Minister Göring. In the Prussian law on the Provincial Council of June 17, 1933 (GS. p. 254), the idea has already been transferred from the sphere of government to that of administration. Today, it is generally accepted and recognized as a principle.

2. Given the fundamental importance of the Führer concept, it is all the more necessary to clearly distinguish the core concept of National Socialist constitutional law, the concept of leadership, in theoretical terms and to define its unique characteristics. In order to understand the concept in its full meaning and to ward off the danger of trivialization and tributes, it is first necessary to clearly contrast it with several other, seemingly related concepts. For such concepts, which are certainly necessary and indispensable in their field, but are also already imbued with a different spirit, are often used to assimilate the Führer concept to them and thereby paralyze its actual power. It is well known that it is a consequence of liberal democracy to see the ideal in political “leaderlessness.” However, most German lawyers have not yet become consciously aware that for a century now, a whole system of specific concepts has been working to eradicate the idea of leadership and that the leverage of such concepts is applied above all where they must have a politically destructive and downright devastating effect.

Under the pretext of creating legal concepts, constitutional thinking, which is dominated by the fundamental principles of security, predictability, and reproducibility, transforms all representations, concepts, and institutions into normatively predetermined abstractions. It is said, for example, that every duty, if it is to be a legal duty and legally relevant, must always have a normatively measurable content and, consequently, be subject to judicial review. In this simple way, another type of duty, inaccessible to individualistic-liberal legal thinking, is excluded from legal life, and a very specific political worldview (which is by no means particularly legal or particularly will-creating in nature) is granted a monopoly on legal scholarship. The duties of loyalty that are essential to a constitutional state, such as the loyalty of subjects, civil servants, and fellow citizens, which are legal obligations in the full sense of the word, are thus reinterpreted as “merely moral” or “merely political” matters and deprived of their legal core. This line of thought celebrated its triumph in the Leipzig trial of the acting Prussian government of the Weimar system against the German Reich. The duty of loyalty of the states to the Reich, which is of course a legal obligation of a political nature, was destroyed in its essence with the help of such a liberal separation of law and politics and ridiculed as something “sentimental” by a typical representative of the Weimar system. The fact that National Socialists and Communists were placed on the same political footing was considered “law” as opposed to “politics”; distinguishing the Communist organization, i.e., a dangerous mortal enemy of the German state, from a national German movement was considered a violation of “equality before the law” and a “political” rather than a ‘legal’ or “juridical” assessment. Here, the anti-state core of the liberal antithesis of law and politics became palpable. However, in its ruling of October 25, 1932, the State Court of Justice for the German Reich insisted on remaining strictly “legal and neutral” in this regard as well, and refrained from making a decision. This explains the following passage, which is characteristic of the reasoning behind this famous ruling, word for word and sentence for sentence:

> "It may be admitted that in times of extreme political tension, particularly harsh public attacks by ministers of a country on the policy of the Reich may, under certain circumstances, constitute a breach of the duty of loyalty. The possibility of seeing such attacks as a breach of duty on the part of the country is not automatically ruled out by the fact that the minister is not acting in his official capacity but as a private individual or party member. However, an examination of Minister Severing's external conduct, even when viewed in the context of the overall situation at the time, shows that it did not exceed the limits of the required restraint to such an extent that it can be regarded as a breach of the state's duty toward the Reich."

Another example is the concept of supervision, which developed over half a century of liberal practice as a counter-concept to the concept of political leadership. It goes without saying that “supervision” still exists today in various applications of the word (supervision of civil servants, school supervision, municipal supervision, church supervision, etc.) and that its scope remains unchanged. One can also find elements of “supervision” in every type of leadership. However, it is necessary to clearly distinguish the specific areas of application of supervision and

to counteract the confusion that the concept of supervision threatens to cause with regard to the concept of genuine leadership.

Bismarck's federal constitution of April 18, 1871, was the constitution of a hegemonic federation; Prussia had hegemony, i.e., political leadership. That was undisputed and indisputable. However, it was not explicitly stated in the wording of the constitution, and since the concept of political leadership eludes the liberal positivist way of thinking, this crucial concept of German federal constitutional law met with little interest in constitutional law. Anyone who did justice to the truth and reality of this federal structure, which was entirely and completely based on hegemony, was accused of being “political” and “unscientific.” Thus, the central concept of this imperial constitution was distorted. In contrast, the concept of imperial supervision received much more detailed treatment and development. It is a logical consequence of this type of constitutional thinking that the systematic work on federal constitutional law in Bismarck's constitution, H. Triepel's “Die Reichsaufsicht” (1917), viewed this entire body of law sub specie Reich supervision. The fact that a significant scholar such as H. Triepel, who often demonstrated a keen sense of political reality in the face of the normative distortions of constitutional law, came to this conclusion shows the suggestive power of liberal constitutional thinking and the internal logic of such ways of thinking, which had shifted from leadership to supervision, for which even Reich legislation was ultimately only a case of “Reich supervision.”

The Weimar Constitution further reinforced and completed this tendency toward the concept of supervision. Not only because the Weimar Constitution is a particularly typical document of the bourgeois constitutional state and because its ideological foundation encompasses the liberal divisions between law and politics, law and power, spirit and power, etc., but above all because it completely eliminated Prussian hegemony and thereby completely eradicated the element of a strong leader from the federal organization, which was otherwise retained. By replacing the former Federal Council with a State Court empowered to rule on federal disputes, even between the Reich and the states, in judicial proceedings (Article 19), it indeed handed a new political weapon to the destruction of the political leadership concept and to all the Reich-disrupting forces interested in it — both party political pluralism and individual state particularism — namely that of proceedings before the State Court. In the judgments of the Weimar constitution, there were still some reservations about this method; in fatal practice, however, with the growing difficulty of the domestic political situation, the necessity of political leadership became increasingly apparent. But the prevailing normativism of constitutional law at the time and the lack of any genuine theory of the state contributed to the juridification of domestic politics. This state of affairs also culminated in a concept of supervision. The final word of the old dogma of supervision was coined (in Job Hedel's essay on the judgment of the State Court of Justice of October 25, 1932, Arch. des öffentl. Rechts, vol. 23, p. 211) as “Verfassungsaufsicht” (constitutional supervisory review). After Bismarck's constitution in federal state law had made the concept of “Reichsaufsicht” (Reich supervision) a suitable means of normativist relativization of political leadership, at the end of the Weimar system, the concept of “Verfassungsaufsicht” (constitutional supervisory review), which was entirely normativist, became possible. In the word

“Reichsaufsicht,” at least the supervising subject, the Reich, was still recognizable; in other terms, such as school supervision and municipal supervision, at least the object subject to supervision is contained. In the examination of “constitutional supervisory review”, on the other hand, neither a subject nor an object appears, but only the standard of supervision, i.e., the constitution. And this well-intentioned term, incidentally, was supposed to serve as the theoretical basis for the decisive political power of every federal system, the ultima ratio of the political unity of a federal empire, namely the Reich execution! With this, the ultimate degree of destruction of political leadership had been reached.

Three moments characterize the liberal constitutional development and formulation of the concept of supervision as the actual antithesis of the principle of political leadership. The first is a subtle normativist tendency: it limits the concept of supervision to the representation of a standard of supervision that is regulated in advance in terms of facts and is therefore measurable and verifiable. All relationships between the supervisor and the supervised are subject to this predetermined regulation, which therefore rejects any specific situation. Even the undefined and discretionary concepts of such a supervisory system are dominated by this tendency. They too are to find their limits in “excessive discretion” and “abuse of discretion,” and these limits are to be judicially reviewable. The “Führererbot,” which is interpreted into all these concepts of supervision, also has the political meaning of enforcing the principle of predictable measurability based on prior standardization and the regulability of all intellectual supervisory relationships.

The second characteristic of the development of a supervisory concept that is hostile to leadership lies in the tendency to treat the subject and object of supervision as equal. This follows logically from the normativism of the supervisory dogma mentioned above. For as soon as the standard of the interpretation is deemed to be negotiable and verifiable, it can be assumed that it has already been decided and determined in advance what the interpreter is allowed to do in terms of “interference” (this term, laden with political polemics, is characteristic of such a supposedly purely “legal” thinking); what the person subject to the interpretation must “expect” to be allowed; therefore, the person subject to the interpretation can always invoke the norm as the sole authoritative standard against the interpretation. It then becomes apparent that he is in reality not at all subject to the authority of the person issuing the opinion or even to a political leader, but always only to a supposedly objective, impersonal norm that can be verified by an outside third party. It further shows that the person expressing the opinion is also subject to the same norm and that, as a result, there can no longer be any question of leadership and submission, but only of an “objective” interpretation of the norm and a “fair” delimitation of contingencies on both sides. Then the word “interpretation” is also incorrect and must be replaced by “objective standardization” and “application of standards.”

The third characteristic of this leading concept emerges with the same logical consistency from the two preceding characteristics. If a measurable standard prevails and both parties to the dispute are equally subject to that standard, it is inevitable that only an equally “objective,”

uninvolved third party, i.e., an independent judicial authority, can act as the organ of that objective standard and rule on both parties. A more general concept of opinion inevitably requires a judicial authority and the resolution of all differences between the subject of the opinion and the person concerned in a procedural manner. For all the very different types of opinion, there is therefore ultimately a judicial authority which has the final say in a more or less judicial procedure. The idea of protection and security, which is essential to the liberal concept of the constitutional state, then, when thought through to its conclusion, enables the administrative courts to decide disputes arising from the municipal right of interpretation in public authorities on the interpretation of the state's interpretation; the civil service courts of civil service law, the strict professional courts into mere protective words against the right to interpret official duties, which decide instead of the legislature on all important applications and effects of the interpretation of official duties; the state or constitutional court into an organ for the political control of the government restricted by the interpretation of the constitution. The result is always justice instead of political leadership. A trial judge is a political leader, and the methods of today's legal disputes are a model for the formation of a leader state. In decisive political cases, standardization and proceduralization merely bind the leader to the part of the disobedient that is not unlawful; the order of the parties is only the order of the enemies of the state and the people with the will of the state and the people; the decision by an independent judge is only the submission of the leader and his followers to a politically irresponsible non-leader.

3. Leadership is not commanding, differentiating, centralized bureaucratic governance, or any other arbitrary form of rule. There are some forms of rule and command, including good, just, and reasonable rule and authority, that are not leadership. The rule of the English over India or Egypt may be justified for many reasons, but it is anything but leadership of the Indians or Egyptians by the English. The exploitation of the former German colonies by the so-called mandatory powers under Article 22 of the Covenant of the League of Nations is disguised as “guardianship” and “education” under humanitarian pretexts, but it is likewise not leadership. Nor are most cases of dictatorship, however necessary and beneficial they may be, leadership in our sense of the word. Here, too, we must resist the blurring and weakening of a specifically German and National Socialist concept through assimilation into foreign categories.

There are various images and the like that are intended to illustrate the relationship between rulers and the ruled, those who govern and those who are governed, and it seems to me that it is also more accurate in legal terms to be aware of the technical meaning of these various terms than to use the familiar euphemisms of a “special power” that is not limited either to a predetermined norm or to “private life.” . The Roman Catholic Church has developed the image of the shepherd and the flock into a theological and dogmatic concept for its authority over the faithful. What is essential about this image is that the shepherd remains absolutely transcendent. This is not covered by the concept of “atonement.” A famous passage in Plato's “Politeios” deals with the various qualities required of a statesman, comparing him to a doctor, a shepherd, and a helmsman, in order to affirm the image of the helmsman. It has passed into all Latin-influenced languages of the Romance and Anglo-Saxon peoples through the “gubernator” and has become the word for

“government” as gouvernement, governo, government, or as the ‘Gubernium’ of the former Habsburg monarchy. The endangerment of this “gubernator” is a good example of how a pictorial analogy becomes a legal-technical term. Another characteristic image is that of the horse and rider, which the great French historian Hippolyte Taine used to describe Napoleon's rule over the French people. It applies magnificently to the empire of this Italian soldier who seized control of the French nation, because it provides a deeper explanation for the inner compulsion that drove this rule: to hastily normalize itself both externally and internally through ever new military successes and, at the same time, through ever new legitimations (plebiscites, papal coronation, marriage to a Habsburg) and institutionalizations (new nobility).

None of these images accurately captures what is meant by political leadership in the essentially German sense of the word. This concept of leadership stems entirely from the rigid, substance-driven thinking of the National Socialist movement. It is significant that every image fails and that every striking image is immediately more than just an image or something similar, but rather leadership in the matter itself. There is neither a need nor a possibility for a mediating image or a representative equivalent. It does not originate from Baroque allegories and representations, nor from a Cartesian idée générale. It is a concept of the immediate present and full of presence. For this reason, it also includes, as a political requirement, an unconditional similarity between leader and followers. The continuous, unmistakable contact between leader and followers, as well as their mutual loyalty, is based on this similarity. Only similarity can prevent the leader's power from becoming tyranny and arbitrariness; only it justifies the difference between any, however intelligent or advantageous, rule by a foreign will.

4. The unity of the German people is therefore the most essential prerequisite and foundation for the concept of the political leadership of the German people. When the idea of race was repeatedly emphasized at the National Socialist Lawyers' Conference in Leipzig in 1933 in the Führer's powerful closing speech, in the stirring speeches of the leader of the German Legal Front, Dr. Hans Frank, and in carefully prepared factual presentations, such as the lecture by H. Nicolai, this was not a theoretically conceived postulate. Without the principle of racial equality, the National Socialist state could not exist and a legal system would be inconceivable; it would immediately be at the mercy of its own liberal or Marxist elements, which would soon become either superior and critical or submissive and assimilated.

For lawyers who shape the new German law, it is particularly important to be aware of the systematic power of this concept of similarity, which permeates all legal considerations. The notion of the normative binding of judges to a law has become theoretically and practically untenable in essential areas of practical legal life. The law can no longer provide the predictability and certainty that are essential to the constitutional concept of the law. Certainty and predictability do not lie in standardization, but in situations that are assumed to be “normal.” From all sides and in countless circumstances, so-called general clauses and vague terms are finding their way into all areas of legal life, even into criminal law: “Good faith,” “good morals,” “important reason,” “unreasonable hardship,” “reasonableness,” “special emergency,” “disproportionate disadvantage,” “overriding

interests," "prohibition of abuse," "prohibition of arbitrariness," "claim to a legitimate interest" — these are just a few examples of this dissolution of legal normativism. Such general clauses have long since become inevitable and indispensable; they determine the overall picture of our administration of justice in both private and public law. A recently published (1933) work by the Jena law professor Hebenmann, Die Suche in die Generalklauseln (The Search for General Clauses), gives a vivid impression of the enormous spread of these clauses; it warns in serious terms of the danger of a complete dissolution of law into normatively indeterminate and unpredictable generalities. However, I do not believe that this solves the major problem of general clauses. The dissolution and vagueness of all concepts seems to me, especially in view of the existing literature in all legal disciplines, to be much more advanced than Hebenmann presents it. Even "actual" and "immediate concept" could be recognized as vague concepts, and not by some muddled thinker, but by an important German legal scholar, Philipp Hed in Tübingen. In legal theory and practice, we have already reached the point where the epistemological question arises in all its practical seriousness as to how far a word or concept used by the legislator can actually bind the occasional judgments in a truly predictable manner. We have found that every word and every concept immediately becomes critical, uncertain, vague, and fluctuating when different minds and interests assert themselves more subtly in a fluctuating situation. In particular, our entire administrative law is dominated by such vague terms that are not bound by norms but by situations (such as "public safety and order," "endangerment," "emergency," "proportionality," etc.), as well as terms such as "duty of discretion," "arbitrariness," and "prohibition of arbitrariness" are so unpredictable in cases of conflict that they themselves can become arbitrary.

Seen in this light, there are only "undefined" legal concepts today. No one would claim that it is possible today to return to the old belief in a factual and unambiguous standardization of all conceivable cases that has been established in advance and is always predictable. The situation and the illusion of a legal system that can capture all cases and all situations in advance in a factual and unambiguous manner cannot be revived, and indeed the idea of a clear codification or standardization is hardly feasible today. "A return to foreign positivism is out of the question," Ph. Hed rightly argues (Jur. Wodh. 1933, p. 1449). Thus, the application of justice is caught between Scylla and Charybdis. The way forward seems to lead into the unknown and to stray further and further from the solid ground of legal certainty and the rule of law, which is also the basis of judicial independence; a return to a formalistic belief in the rule of law, which is considered meaningless and has long been overcome by history, is equally out of the question.

There is only one way forward: the national socialist state has firmly committed itself to this path, and State Secretary Streifler has given it a clear slogan in the slogan "Not legal reform, but legal form." If independent administration of justice is to continue to exist and it is nevertheless impossible to ensure that judges are bound by predetermined norms in a meaningful and automatic way, then everything depends on the nature and type of our judges and civil servants. This has never had such decisive significance as it does today. Even in the former liberal-democratic system, there was no lack of ethical and moral demands placed on the "higher personality" of the judge. But this remained empty rhetoric because people only spoke of

“personality” in general terms, and the word, in the service of liberal individualism, only had the meaning of “the people” and not the specific meaning of “the individual.” (in order not to have to distinguish between things that are similar and dissimilar). The actual substance of “personality” must be defined with certainty, and it lies in the obligation and similarity of every person entrusted with the presentation, interpretation, and application of clear law. Out of the inherent necessities of legal work, the idea of similarity will permeate and dominate all public law. It applies to the professional civil service, to the legal profession, which is involved in the maintenance and shaping of the law, and to all cases in which members of the national community are active in administration, the maintenance of the law, and legal education. Above all, it will ensure fruitful cooperation in the formation of the new “leadership councils” that are to be established.

We know not only emotionally, but also on the basis of strict scientific insight, that everything that is said is the expression of a specific thought. It is an epistemological truth that only those who are able to correctly interpret words, correctly hear utterances, correctly spell words, and correctly evaluate impressions of people and things are able to live in a refined, artful manner. Down to the deepest, most unconscious stirrings of the mind, but also down to the finest fibers of the brain, human beings are rooted in the reality of their ethnic and racial identity. The human being is influenced by this dual and contradictory nature in the deepest, unconscious movements of the mind, but also in the smallest brain cells. Not everyone who wants to be objective, and who believes with subjective good conscience that they have tried hard enough to be objective, is objective. A stranger may behave as if he is trying hard and may make astute efforts, may read books and write books, but he thinks and understands differently because he is of a different nature, and in every decisive train of thought he remains within the essential conditions of his own nature. That is the objective effectiveness of “objectivity.”

As long as one could believe that judges and even administrative officials were merely functions of normative legality, mere “law-enforcing machines,” a mere “concretization of abstract norms,” one could ignore the truth of the contingency of all human thought, as well as the situational contingency of every human norm and every factual description. Montesquieu's famous statement that the judge is “only the mouth that pronounces the words of the law,” “la bouche, qui prononce les paroles de la loi,” was still mostly understood mechanistically in the 18th century. For our present sensibility, this statement already leads into the sphere of living human existence, which is filled with organic, biological, and ethnic differences. We have become more sensitive today; we see, if I may say so, the diversity even of the mouths that speak the same words and sentences. We hear how they “pronounce” the same words very differently. We know that the same word sounds different when spoken by different peoples, but also has a different meaning and significance, and that in matters of legal interpretation and the assessment of facts, small differences can have astonishing consequences. Nevertheless, we must and want to uphold both the legally secure position of German civil servants and, in particular, the independence of judges. We are therefore compelled to ask about the bonds without which all safeguards and freedoms, all judicial independence, and above all that “creativity” would be nothing but anarchy and a particularly serious source of political danger. We are looking for a bond that is more reliable, more

vibrant, and deeper than the deceptive bond to the perishable letters of a thousand legal paragraphs. Where else could it lie but in ourselves and our own nature? Here too, given the inseparable connection between the rule of law, the civil service, and judicial independence, all questions and answers lead to the requirement of a kind of sameness without which a totalitarian state cannot survive for a single day.