

## Changes in the Structure of Political Compromise

By Otto Kirchheimer

Modern political theory has established a close relationship between political compromise and government in a developed industrial society.<sup>1</sup> In this context, compromise means that the foremost political decisions are reached by agreement among individuals as well as among social groups. The following remarks will not evaluate this definition but will try to analyze the conditions and nature of compromises as far as they influenced the European political system under liberalism, mass democracy and Fascism. To the latter stages correspond three different types of agreement which have characterized European constitutional history: to liberalism corresponded the complex of working agreements among parliamentary representatives and between them and the government; to mass democracy, the agreements between voluntary associations; and to Fascism, the pacts by which the heads of the compulsory estates distribute power and booty.

### *1. Compromise Under the Representative System and Under Mass Democracy*

In his reflections on the French revolution, Burke, with characteristic vehemence and pointedness, depicts the shift in the location of power to the plutocratic oligarchies, a development which, according to him, had been initiated by the revolutionary policy of confiscation. The "volatilization of property," of which this representative of the English landed aristocracy accuses the revolutionary legislators, is responsible for the creation of a commonwealth founded on "gaming," in comparison with which, in Burke's opinion, the "known scandals of history amount to comparatively little."<sup>2</sup>

The all-embracing medium of money profoundly conditioned the political institutions of the era. Today we are accustomed to regard money more in its role as one technical means of domination among many. But this purely technical role of money is a phe-

<sup>1</sup>See, for example, H. Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed. Berlin 1929, and more recently E. P. Herring, *The Politics of Democracy*, New York 1940.

<sup>2</sup>E. Burke, *Collected Works*, 5th ed., Boston 1877, 3, pp. 485 ff.

nomenon which did not appear until the monopolistic period. In any case the nineteenth century saw the incontestable application of the sociological thesis that the personal security derived from the possession of money was the most concrete form and expression of confidence in the public order.<sup>1</sup>

Possession of money was just as important for the political weight of an individual within the nation as the degree of creditworthiness is for the nation's position in the international concert. Legal equality of citizens and equality of states before international law were the juristic premise for the working of the free exchange process.<sup>2</sup>

An integral part of the representative system was the conception of an agent who was no longer bound by the estates but who at the same time had not yet become a spokesman tied to definite group interests. The French constitution of 1791, Sect. III, Art. 7, by denying the admissibility of binding instructions given by the electorate to the representatives, marks the final transition from the *mandat impératif* of the estates to the representative system of the nineteenth century.<sup>3</sup> Theories of public law have taken the opportunity to stress the element of freedom contained in the condemnation of the *mandat impératif*, this condemnation being the very basis of the representative system.<sup>4</sup>

In its relatively pure form, the representative system did not prevail in Europe for a particularly long period. Even at the beginning it was alloyed by elements of absolutism and by elements of the still older estate system. Its period of fruition occurred in the second and third quarter of the nineteenth century when it combined with the doctrine of public opinion. Its territorial extension was confined to those states "where there is no honest poverty, where education is diffused and political intelligence common,"<sup>5</sup> that is to say, to the sphere of developing capitalist economy. With the decline

<sup>1</sup>Georg Simmel, *Philosophie des Geldes*, 5th ed., Munich 1930, p. 165.

<sup>2</sup>Bagehot, *Collected Works*, ed. Barrington, vol. VI, p. 14. "Lombard Street, 1873": "It is sometimes said that any foreign country can borrow in Lombard Street at a price, some countries can borrow much cheaper than others; but all, it is said, can have some money if they choose to pay enough for it. Perhaps this is an exaggeration but confined as, of course, it was meant to be to the civilized nations, it is not much of an exaggeration." As regards the conceptions of civilized and commercial, which are used synonymously, see Kunz, "Zum Begriff der *Nation Civilisée*" in: *Zeitschrift für Öffentliches Recht*, vol. 7, 1928, p. 86.

<sup>3</sup>See the excellent exposition of this point in K. Loewenstein, *Volk und Parlament nach der Staatstheorie der französischen Nationalversammlung*, Munich 1922, pp. 191 ff., especially p. 200.

<sup>4</sup>For the best account of this see G. Leibholz, *Das Wesen der Repräsentation*, Berlin 1929.

<sup>5</sup>Bagehot, *op. cit.*, I, 345.

of the central position of money as a universal measuring rod and with the effacement of the correlative independence of representation by the monopolizing society, the remnants of the representative system were becoming rapidly submerged. This process characterized the period of mass democracy.

The political system of mass democracy had, as one of its decisive characteristics, the antagonism between public control of government and private control of central banks. The latter had most important public functions. When the central bank legislation of the nineteenth century took shape, there was no doubt as to the political significance of the administration of this type of joint-stock company, "on whose wisdom it depends whether a country shall be solvent or insolvent."<sup>1</sup>

Robert Peel, when he introduced the Bank Charter Act of 1844, described the sphere of influence which the domination of the credit apparatus brings with it, and his words show a tendency to reification typical of the period: "There is no contract, public or private, no engagement internal or individual which is unaffected by it [the bill]. The enterprises of commerce, the profits of trade, the arrangement made in all the domestic arrangements of society, the wages of labor, pecuniary transactions of the highest amount and of the lowest, the payment of the national debt, the provision for the national expenditure, the command which the coin of the smallest denomination has over the necessities of life are all affected by the decision to which we may come."<sup>2</sup> This administration of the central bank, by far the most important office in Great Britain of those "outside the gift of the Crown,"<sup>3</sup> is carried on by officials elected from among the ranks of the banking community. If Brook Adams appears to have been too pointed in his opinion that the Bank Act of 1844, by yielding the control of the currency to bankers, marked a definite transfer of sovereignty to Lombard Street,<sup>4</sup> it is only because in the nineteenth century there was no serious conflict between Whitehall and Lombard Street. Since throughout the nineteenth century the restricted parliamentary franchise did not permit of any disharmony between the interests of the financial community and those of parliamentary government, the relation between the central bank and the government was equally unproblematic, whether the central bank had statutory independence or whether it was to some extent subject to govern-

<sup>1</sup>Bagehot, *op. cit.*, VI, 32.

<sup>2</sup>Hansard, vol. 74, p. 720.

<sup>3</sup>*The Economist*, March 29, 1941, p. 399.

<sup>4</sup>Brooks, Adams, *The Law of Civilisation and Decay*, New York 1895, p. 283.

mental regulation. This state of affairs was only rarely interrupted; symptomatically, interruption occurred in 1870 when the defeatist interests of the upper middle class, anxious for the rapid termination of the Franco-Prussian war, found themselves faced by the credit requirements of a government presided over by Gambetta and having a policy of resistance à l'outrance. But even in this period the respect for the reputation of the *Banque de France*, which was supposed to represent public credit, was very high, as may be seen from the humble restraint of the Paris *Commune's* delegate to the bank.<sup>1</sup> Even the change in the governorship, effected by Gambetta when he returned to power in 1882, had no real significance.<sup>2</sup>

In the post-war period of mass democracy, it becomes generally recognized that the complete independence of the central bank as a transmission belt for the financial community can be profitably used to hold the government and parliament in check. One of the earliest resolutions of the Council of the League of Nations insists on the independence of central banks from governmental interference.<sup>3</sup> The more the respective countries were dependent on outside loans, the more stringent were the requirements for the non-interference of governments in the central banks, which in their turn were subjected to a system of mixed control exercised by private national and international financial interests. Thus the degree of independence of a small country was basically conditional upon whether it had to deal with a unified creditor pool—as Austria had to do with its creditors, pooled under the auspices of the League of Nations—or whether political competition between prospective creditor nations left the governments with a greater amount of liberty of movement in their foreign policy—as in the case of the Balkan nations. The desires and demands of the home banking community were reinforced by the backing of international banking organizations which, in the persons of financial commissioners and representatives, resided in the respective capitals themselves, and this was one of the decisive factors favoring or obstructing changes in the political balance in those countries.<sup>4</sup> In Germany the Bank Law of 1924 took most of the powers which the government formerly had exercised and transferred them to the Board of

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<sup>1</sup>Charles Beslay, *Mes Souvenirs*, Paris 1873, Chapter "Ma délégation à la Banque."

<sup>2</sup>A. Dauphin-Meunier, *La Banque de France*, Paris 1936, pp. 220-27.

<sup>3</sup>The resolution is quoted in Kisch-Elkan, *Central Banks*, London 1932, p. 17.

<sup>4</sup>Cf. the lucid exposition of the tie-up between international loans and retrogressive tendencies of governmental policies in post-war Austria and Hungary, in P. Szende, "Der Staatshaushalt und das Finanzsystem Oesterreichs und Ungarns" in: *Handbuch für Finanzwissenschaft*, Tübingen 1929, vol. 3, pp. 206-09, 220.

Directors of the *Reichsbank*—and to a much lesser degree to the internationalized “*Generalrat*” and the stockholders.<sup>1</sup> In this new fortified position the presidency of the *Reichsbank* very soon became the cohesive organism about which gathered the big financial and industrial interests. It acted as a channel of communication for them and as their accredited representative in their dealings with the government. In this function, for instance, *Reichsbank* president Schacht was instrumental in barring the cities from further access to the foreign loan market in order to prevent the extension of their successful competition with the privately-owned public utilities.<sup>2</sup>

This intervention was also felt in the case of the so-called “Hilferding Loans,” and it was of primary importance in the German crisis of 1929 which led to the downfall of the last parliamentary government. When MacDonald replaced the second Labor Cabinet with his National Government, it was likewise the administration of the Bank of England that was instrumental in provoking this change by asking for budget cuts known to be unacceptable to most of the labor leaders.<sup>3</sup> The strategic position of the Bank was enhanced by the very fact that had its demands been refused, the necessary loans would not have been forthcoming.

In many aspects, post-war France represents a special case. In Germany or England the strategic position of the central banks was only made use of as a last resort. In contrast to this restraint, the *Banque de France* and the parliamentary government represent the two opposite poles around which the whole social and political life of the nation revolved in the twenties. Several factors worked together to create this situation. The extraordinarily large public debt, which was carried over from the war and which was not wiped out by such a thorough inflation as in Germany, was an adverse condition to start with. It was aggravated by the inability to obtain sufficient tax revenue from the defective system of income taxes, which, in itself a symbol of middle class selfishness, was effectively supplemented by what was probably the lowest level of tax morality known in modern history. These conditions reduced the govern-

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<sup>1</sup>See H. Neisser, *Die alte und die neue Reichsbank*, in: *Strukturwandlungen der deutschen Volkswirtschaft*, vol. 2, Berlin 1929, p. 293, and *Deutschland unter dem Dawesplan*, Bericht des Generalagenten (December 22, 1928), Berlin 1929, p. 116.

<sup>2</sup>See, e.g., Otto Braun, *Von Weimar zu Hitler*, 2nd ed. New York 1940, p. 217, whose testimony is valuable on account of his position at the time as head of the Prussian Government.

<sup>3</sup>See, e.g., Philipp Snowden, *An Autobiography*, London 1934, vol. II, pp. 945-47, who quite naturally, given his role at the time, tries to play down the influence of the Bank of England and of the Federal Reserve Bank, without, however, being able to deny that they asked for cuts in the social services. See also L. Mc Weir, *The Tragedy of Ramsay MacDonald*, London 1938, pp. 349-57.

ment to a state of perpetual dependency upon the bankers, whether for bridging a temporary shortage of cash for some weeks or months, or in order to place new loans. Under these conditions the help of the *Banque de France* was indispensable either for rediscounting the treasury bonds taken over by private banking institutions, for conducting a generous nation-wide campaign in favor of new loans through its system of branches, or for procuring a foreign loan. The strategic advantage which the chronic difficulties of the government gave to the private regents of the bank, whose attitude was shared by the government-appointed governor, was invariably used whenever an undesirable government had to be outmaneuvered.

The story repeats itself over and over again in 1924, 1928, 1932, and 1936. The electorate shows tendencies to the left and puts into power some government combination shaped according to this image. But scarcely has the government begun to develop a timid program of social reform when the *crise de confiance*, with all the well-known features of the fall in the value of government bonds and the export of gold and foreign exchange, gets into full swing. The government finds it difficult to obtain even short-term credits, and with the depreciation of its long-term credit, the *deus ex machina*, the new long-term loan or, what is the desire of each successive minister of finance, the conversion of interest rates, is out of the question. With a little help from the governor and regents of the bank, who chastise the wrong set and are prepared to oblige the right set of politicians, the untrustworthy government disappears, *la rente* goes up, and all reforms are forgotten.<sup>1</sup> In the twenties this system worked fairly smoothly—apart from the fact that in 1928 the *Banque de France* forced on its own hero, Poincaré,<sup>2</sup> a much too low stabilization level for the franc, and that this later proved a distinct disadvantage. In the thirties, however, this process of “correcting” the popular will ran into difficulties. The *Banque de France* then tried to force its deflationary policy à

<sup>1</sup>The best insight into this process is given by the memoirs of Governor Moreau: “Le relèvement financier et monétaire de la France” in: *Revue des deux Mondes*, March 1, March 15, April 1, and April 15, 1937. See here especially his characterization of the Herriot ministry, pp. 55 ff.: when he wants to get rid of a cabinet, he decides “*de crever l’abcès*” (p. 58), in the opposite case he speaks of “*les intrigues de certains parlementaires*” (p. 30) against the government he wants to stay in office.

See also the already cited Dauphin-Meunier and Bopp, “Government and the Bank of France” in: *Public Policy*, II, 1941, pp. 3 ff.

For a general judgment by a politician who experienced some rather rough handling by these institutions see Caillaux in: *Sénat*, session ordinaire, July 23, 1936, p. 814: “It was always in the atmosphere of this institution to consider the notes of the Banque de France as independent of government credit and to believe that the Banque de France was not created to come to terms with the government.”

<sup>2</sup>Cf. Moreau, quoted *supra*, pp. 825-827.

*l'outrance* on successive political combinations. It succeeded only at the third attempt with the accession of Laval to the premiership. From this time on, the revision of the statute of the bank and the synchronization of its administration with the political leadership became the catchword of the formative period of the *Front Populaire*. But significantly enough, when the victorious *Front Populaire* abolished the overlordship of the *Banque de France* and tried, according to the popular slogan, to transform it into the *Banque de la France*, it did not have enough power to stop the flight of the franc. When the French republic was already drawing its last breath, the financial community reserved its *liberum veto* against the government decree-powers by prohibiting close scrutiny of the “*éternels mobilisés de l’armée Condé*,”<sup>1</sup> i.e., by refusing to put the principle of exchange control into effect. Paradoxically enough, the Enabling Act, given by Parliament to the Chautemps cabinet on June 30, 1937,<sup>2</sup> marks precisely the point at which the private manipulators of the financial apparatus retained their leadership while destroying the political fabric as a whole. This act enables the ministry to take all necessary measures but refuses it the most essential means for their execution. It orders the ministry “to assure the suppression of attempts to undermine public credit, to fight against speculation, to further economic recovery, price control, budget balancing, and, *without control of exchange*, to defend the gold holdings of the Bank of France.” France is an extreme case. In no other country was the conflict between political democracy and private command over the sources of credit allowed to develop so far as to lead to the complete breakdown of the whole social organism.

Successive devaluation in different countries, the control of foreign commerce and exchange, and the abandonment of the cherished doctrine of budget equilibrium in favor of deficit spending have done away with the dependence of the government upon the whim of private bankers. To a certain extent the so-called “investors’ strike” in the privately-owned section of the economy—that is to say, the increasing difficulties in the profitable employment of capital—has contributed to this turn of events by establishing exceedingly low interest rates for government loans, especially in the United States. At any rate, the political importance of this change is evident. The government which has developed into the

<sup>1</sup>Vincent Auriol in: *Chambre*, session ordinaire, 1937, pp. 1964 f. He compares the manipulators of capital flight, always eager to stab their government in the back, with the French *émigré* nobility who, under the leadership of Prince Louis-Joseph Condé, tried at every turn of the French revolution to stage a comeback.

<sup>2</sup>See *Journal Officiel*, July 1, 1937, and especially the deliberation of the Senate on June 30, 1937, in: *Sénat*, session ordinaire, 1937, p. 718.

largest customer of industry, often buying more than 50 per cent of the national output, is today in a strategically much more advantageous position than any other competitor for power. The possibility which always hung in suspense over the heads of previous governments in the pre-crisis period, that the financial interests might exercise their veto to throw the currency system out of gear, now seems remote and perhaps even non-existent.<sup>1</sup>

But at the same time there is apparently a fairly wide-spread belief that the new system of government spending and the more or less complete abandonment of the doctrine "that natural forces may produce recovery" is intended to uphold the system of "production of wealth by private activity and enterprise."<sup>2</sup> In other words, the abandonment of the supremacy of money as an automatic regulator of social relationships is not supposed to cause a serious break in the scale of social evaluations prevalent in our society. But to what degree the desires which accompany the changes in the relationship between the government and the financial and industrial community may be fulfilled, modified, or entirely thwarted, depends upon the relationship between the various social forces and the form they assume under the changed conditions. The relationship that persisted between the financial community and the government up to the last crisis may illuminate the degree to which political power was exercised in the form of indirect power. The symbols of politics appealed and appeared to us with the entire emotional apparatus which we were accustomed to find on the front page of newspapers. Yet, for the realities of political power, their evaluation and appreciation, we had to turn to the financial page. We were certain that the deterioration we could see there would rapidly spread to the front page until a change in symbols would reestablish a balance between both.

In our day, the balance is definitely shifting in favor of government, marking a world-wide tendency that has been consummated in the authoritarian countries. Fascist authors have been quick to conclude that in these countries all indirect power has been replaced by direct power. If this transition from indirect to direct power has a more than merely technical meaning, it implies that the antagonism between state and society, and with it the compromise structure of the state, has permanently disappeared in civil affairs, and

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<sup>1</sup>See the remarks of Berle, *New Directions in the New World*, New York 1940, p. 121.

<sup>2</sup>See, e.g., the interesting discussion between governor Eccles, Federal Reserve Bank, the representative of the school of government spending as a means of upholding the existing private property relationships, which he in turn regards as the surest safeguard of democracy, and Senator Byrd of Virginia, representative of an old-fashioned "balance-the-budget" school, in the *New York Times*, December 20 and 27, 1938.

that there is no longer any contradiction between the social content and the political form of a society. In reality, however, the contradictions continued to prevail unabated, and what changed was only the form and structure of the compromise. The general tendency of this change leads away from the liberalistic form of compromise, which was essentially a delimitation of spheres between the individual and the government, to a compromise among conflicting power groups. This tendency may be illustrated by the shifting emphasis in the ideology of compromise.

In the liberalistic period, it was Herbert Spencer who gave an evolutionary superstructure to the doctrine of political compromise.<sup>1</sup> Political compromise was the vital condition of a society which marched toward ever higher forms. John Morley's<sup>2</sup> distinction between legitimate and illegitimate compromise furnished the specifically liberalistic element. The legitimacy of the compromise, he wrote, consists in the right of the outvoted individual or minority to uphold and advocate publicly the principles which the majority has rejected. The essence of the compromise thus lies in the guarantee of dissent which is regarded as the guarantee of a liberal system of government. This characteristically individualistic argument, however, recedes in John Stuart Mill's famous *Considerations on Representative Government*.<sup>3</sup> Here, the compromise becomes a group compromise. Mill declares that the very existence of representative government requires it to maintain a balance between capital and labor and their respective satellites. His idea of compromise betrays a desire to avoid the possibility of one social group gaining predominance over the others. In general, the justification of the idea of compromise varies with the social and political affiliations of its advocates. One of the last forms of the doctrine is to be found in the Austro-Marxian theory of the provisional equilibrium between the social classes.<sup>4</sup>

What was the reality which corresponded to the changing ideology of compromise? In a strictly technical sense the sphere of compromise expanded with the transition from competitive to monopoly capitalism. The growth of huge social units which accompanied the modern industrial process had a dual impact upon organizational developments. While destroying the older personalized form of association, it prepared the way for an intricate

<sup>1</sup>H. Spencer, *The Study of Sociology*, 1st ed., New York 1874, p. 396.

<sup>2</sup>J. Morley, *On Compromise*, 2nd ed., London 1877, p. 209.

<sup>3</sup>London 1876. See especially Chapter VI: "Of the Infirmities and Dangers to which Representative Government is Liable."

<sup>4</sup>Otto Bauer, *Die Österreichische Revolution*, Wien 1923, p. 196. Cf. Gurland's critique in *Marxismus und Diktatur*, Leipzig 1930, pp. 95 ff.

framework of working agreements among the monopolies which emerged victorious from the liberal era. The day-to-day compromise which the politically independent representative in liberalistic society concluded with the government and with his colleagues has given way to the compromise between large social and political organizations in the "pluralistic" state. What seems most interesting from a constitutional point of view is the transformation of the liberal rights of the individual—John Morley's guaranteed right of the individual to dissent as premise of the working of the compromise itself—into a set of guarantees for the existence of the accredited social groups, the partners in compromise. This process of absorption of individual rights by monopolistic groups, although noticeable throughout the whole world, was especially apparent under the Weimar Constitution, where the mixture of traditional liberties and *status quo* guarantees under the misleading title of fundamental rights offered an excellent legal starting point for such developments.<sup>1</sup> Property rights became a protective screen for the process of monopolization, freedom of religion was used to strengthen the existing religious corporations, and freedom of speech and association had to be supplemented by strong protecting organizations in order to obtain recognition. It was the social group, as far as it was recognized by other groups, that got protection, not the individual. A member of a group found the authorities willing to protect him as against his group only in extreme cases or if the degree of social legitimacy of the group was rather problematic. And if one of the traditional rights of the individual was challenged, it could prevail only in the form of a group guarantee.<sup>2</sup> The individual was thus forced into the group, and this fact, in turn, consolidated the status of the group. The functioning of political compromise became increasingly dependent upon the workability of pacts among the predominant associations of capital and labor as well as among the organizations within each of these categories.

## II. *Compromise Under National Socialism*

With the disappearance of the old compromise structure and its accompanying internal checks in Europe, a new type of government is emerging of which, at first glance, greater independence and

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<sup>1</sup>Schmitt, *Freiheitsrechte und institutionelle Garantien der Reichsverfassung*, Berlin 1931, and Huber, "Bedeutungswandel der Grundrechte" in: *Archiv für öffentliches Recht*, vol. 23, 1932, pp. 1-98.

<sup>2</sup>*N.L.R.B. vs. Chicago Apparatus Co.* (C. C. A. 7, Dec. 1940) 116 F. 2 d. 753. See also Charles Killingsworth, "Employer Freedom and the N.L.R.B." in: *Wisconsin Law Review*, March 1941, pp. 211-38.

power seem the outstanding characteristics. The new type is found in various more or less transitional forms. The automatic integration of the political structure by money in the nineteenth century and the systematic use of the credit apparatus to this end in the period of mass democracy has given way to forms of domination by institutionalized monopolies. These changes have occurred in their most pointed form in Germany.

The German economic system consists of various monopolies in which the competitive elements have only an "oasis" character.<sup>1</sup> The monopolies are of three kinds: the government's labor monopoly, the private monopolies in industry, and the Food Estate. The character of these monopolies must be defined in terms of their relationship to the public authorities and in terms of their inner structure. Whereas the monopoly for industrial and agricultural labor is a public monopoly under joint state and party control, allowing few opportunities for self-expression to individuals, the industrial monopolies and those in the Food Estate are administered by private interests which have been given a public character.<sup>2</sup> As such they form the backbone of a new system of guarantees which has taken over the role of the checks and balances inherent in the social structure under the older compromise system.

The first of these guarantees applies to the privileged groups in general. The abolition of institutional fluctuations produced by the democratic process of elections and the replacement of this process by a "strong government" has dispensed with the need to rely on the pressure potentialities of credit control. Greater security is calculated not only to outweigh the restrictions in the possible choice of investments, especially the inability to diminish risks by investing abroad, but also to counterbalance the diminished degree of personal freedom. There is an increased economic security for the propertied and professional classes as a whole to replace the smaller degree of individual liberty and arbitrariness which the individual finds in the totalitarian state. For various reasons the democratic government of the Weimar Republic distributed unsystematic favors and, although not having promised to do so, was forced to take over the bulk of losses in the realm of banking and heavy industry. The economic policies of the Fascist government,

<sup>1</sup>W. Neuling, "Wettbewerb, Monopol und Befehl in der heutigen Wirtschaft" in: *Zeitschrift f. d. ges. Staatswissenschaften*, vol. 99 (1939), p. 316, speaks of scanty "oases" of competition in the realm of the Food Estate.

<sup>2</sup>According to the estimates of the Institut für Konjunkturforschung, *Weekly Reports*, vol. 9, 1936, p. 198, at the end of 1936 all internally produced raw materials and semi-finished goods, and assuredly half of the industrial finished goods, were bound by agreements. This figure does not define the kind of agreement, whether direct monopolies or only regulatory procedures.

however, have not only reduced these risks almost to nil, but have enabled big industry to make investments which are required by conditions of modern technology, but to which, because of the risks involved, it was formerly unable or unwilling to commit itself.<sup>1</sup> A further guarantee lies in the active encouragement of the process of monopolization and cartelization and the transformation of a private power position that was only tolerated by law into a monopoly that remains private, yet is vested with public power.

This monopolization takes two forms: first, cartelization is extended through the establishment of a complete network of market regulating bodies in every sphere,<sup>1</sup> and second, the number of independent units in a given field is progressively reduced. Both processes are intimately interrelated. The cartel policy of National Socialism shows three stages of development. At the beginning, in 1933, we find a policy of active help granted to private market organizations in two ways, first, by considerably restricting the jurisdiction of the Cartel Tribunal, and second, by making cartelization compulsory and compelling outsiders to attach themselves to existing cartels. Even at this stage we can see a process which is significant for the new relationship between industry and the public authorities. Every increase in organizational power granted to the private industrial and trade associations is accompanied by an increase in the supervisory power of the corresponding government agencies. Whereas "state sovereignty" is used to "give the cartel power it could not obtain on a voluntary basis,"<sup>2</sup> the government builds up its own apparatus which acts as an organ to harmonize the group interests of business with the interests of other recognized social groups. The second stage occurs when the official organization of industrial self-administration, which has replaced the earlier *Reichsverband der deutschen Industrie* and its branches, emerges as an active agent in the process of cartelization. In theory, the system of industrial groups and chambers now formed is specifically excluded from any tasks pertaining to market regulation, although its jurisdiction embraces almost all other fields of industrial policy and organization. But in practice it is inevitable that the cartels, the supervision of which is one of the main tasks of this new organization, soon begin to dominate these official organizations. In the years 1936 and 1937, when attacks were being launched against the price level produced by this thoroughgoing cartelization, and when

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<sup>1</sup>See Gurland's article in this issue, pp. 227-34.

<sup>2</sup>C. Russell, "Die Praxis des Zwangskartellgesetzes" in: *Zeitschrift f. d. ges. Staatswissenschaften*, 1937, vol. 97, p. 500.

the office of the Price Commissioner was created, there was a kind of sham battle against this growing identity between the official groups and the private organizations which regulated the market. But in this battle no use was ever made of the coercive machinery of the government, and the Reich Ministry of Economic Affairs contented itself with issuing orders asking for reports and justifications of this identity of personnel and with promulgating general lines of direction.<sup>1</sup> Even this sham battle soon subsided, and in 1939 we reach the third stage in which the cartels, in their role as executive organs of the Reich Boards, are officially recognized as "all-embracing organs of market regulation."<sup>2</sup> As mandatories of the Reich Boards, which, in their turn, are independent legal personalities though subordinate to the Ministry of Economic Affairs, they now to an increasing degree regulate the distribution of both raw material and finished products.<sup>3</sup> Thus the process of cartelization has reached its logical conclusion in the final merger of private power and public organization.<sup>4</sup>

The process of concentration which accompanied thoroughgoing cartelization was accelerated for many reasons. The necessity for maximizing the speed of all deliveries pertaining to armaments required the use of labor-saving devices which, in their turn, depended on substantial investments—a need which became more and more evident with the increasing scarcity of labor. The shortage of raw materials worked against the small firms which had few import and bureaucratic connections of their own, and the expropriation of the Jews led in the same direction. In commerce, and

<sup>1</sup>An acknowledgment of the thoroughgoing identity of personnel in both organizations is given by Neuling, quoted *supra*, p. 304, n. 1. For the organization in industry in general see Kuehn, "Der vorläufige Aufbau der gewerblichen Wirtschaft" in: *Archiv d. öffentl. Rechts*, 1936, vol. 27, pp. 334-363, and the official commentary by the official of the Ministry of Economics, E. Barth, *Wesen und Aufgaben der Organisation der gewerblichen Wirtschaft*, 1939. As regards the relationship between cartel and official organizations see Kley, *Aufbau und Rechtscharakter der Neuorganisation der gewerblichen Wirtschaft und ihr Verhältnis zu den Kartellen*, Kölner Dissertation, 1938.

<sup>2</sup>"Kartell im Staatsdienst" in: *Deutscher Volkswirt*, Jan. 12, 1940, p. 447, and "Entlastung der Reichsstellen" in: *Deutscher Volkswirt*, July 12, 1940, p. 1452. For a rationalization of the impossibility of separating the functions of official groups and cartels, see Merkel, "Wirtschaftslenkung und Kartellrecht" in: *Kartell-Rundschau*, 1939, p. 397, and H. Drost, "Der Krieg und die Organisation der gewerblichen Wirtschaft" in: *Zeitschrift der Akademie für Deutsches Recht*, 1940, pp. 25-26.

<sup>3</sup>That the persons who function as mandatories of the Reich Boards are often identical with the personnel of the cartels may be seen from the regulations for paper and wrapping material in: Posse-Landfried-Syrup-Backe-Alpers, "Die Reichsverteidigungsgesetzgebung," vol. 2, IV, Papier, pp. 83-88.

<sup>4</sup>An isolated but vigorous protest against this development may be found in F. Boehm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Stuttgart a. Berlin 1937, whose main arguments closely parallel those of the American antitrust movement.

especially in retail trade and handicraft, firms with the largest turnover increased their competitive advantages as they were able to obtain a greater supply of goods for distribution. They were also able better to withstand the reduction of the profit margin, necessitated by the rather rigid control of prices for consumers goods.

The economic pressure leading to concentration is accompanied by direct legal pressure. This has been used most vigorously against the owners of small shops and workshops. Pressure by powerful competitors who want to increase their sales in order to balance other unfavorable developments in cost factors has been aided and abetted by the government's desire to force marginal shop-owners into the factories. At first there was a process of indirect strangulation by governmentally approved exclusion from discounts, if the small shops did not reach a certain sales figure, and pressure was exercised in the same direction through a closer supervision of smaller plants by the social honor courts. This was soon followed by legislation aimed at a wholesale combing-out.<sup>1</sup> The slow disappearance of the small businessman is speeded up; shops are closed if they are deemed unnecessary for the national economy, the debts, as far as is thought advisable, are paid by official organizations, and the former shopkeepers and businessmen are sent off to the factory.

For industry as such, the direct legal measures furthering concentration are of a double nature. In the first place, the process of compulsory standardization of types carried on from 1938 deprives many producers of their independent status and thrusts them down to the level of specialized departments of larger units by restricting them to the production of parts of the finished product. This was especially the case in the automobile industry. The war has given new force to this development by causing the compulsory closure of the technologically more backward factories. Some of the owners of these have been entirely removed from the field and have become mere rentiers, others have been temporarily degraded to the level of wholesalers in their respective fields, receiving a special "colleague discount" which had to be given to them by the more fortunate members of the industry.<sup>2</sup> Whatever the manifold

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<sup>1</sup>Somewhat neglected so far, this role of the social honor courts, the supervision of small and medium-sized shops, is frankly acknowledged in *Soziale Praxis*, 1940, p. 1459. For the approval of those restrictions see the decision of the Cartel Tribunal of April 26, 1939, in *Kartell-Rundschau*, 1939, p. 420, which, already employing the terminology of the combing-out legislation, stipulates that a business which cannot, without endangering its existence, withstand a decrease of RM 50 in its annual profit cannot enjoy legal protection.

<sup>2</sup>See, e.g., the regulations for the soap industry given by Posse-Landfried, quoted *supra*, vol. 2, IV, Seife, Introductory Remarks.

individual variations in the various industries, it is clear that, in spite of a somewhat contradictory ideology, the mergers that have thus been brought about tend to become permanent and tend permanently to eliminate the units which were closed provisionally.<sup>1</sup>

The stronger the organizations, the greater the degree of liberty they have in administering the regulations that apply to their members. At the bottom, in handicraft, where the head of the organization lives more from his proved devotion to the National Socialist cause than because of the weight of his economically and financially weak organization, the administration's direct interference is comprehensive. The head of the organization simply acts as an executive organ of the state bureaucracy in combing out the weaker members.<sup>2</sup> In the sphere of large-scale business the transformation of positions of private power into public organs of economic "self-administration," though accompanied by the transfer of legal omnipotence to the supervisory ministries and special boards, has increased rather than decreased the power of those who dominate the organizations. Behind the legal screen of the leader-principle which requires that the group leaders be appointed by the public authorities, the absolutistic principles governing monopolized business groups continue unabated, especially since the complete demise of the stockholders as a supervisory organ. Even the legal prescriptions have to take this reality into account, and the group leader is required to submit to annual votes of confidence by his advisory boards. A negative vote would not legally be followed by his dismissal but, as the official commentator says, would only necessitate inquiries by higher bodies.<sup>3</sup> But, of course, the social function of this vote of confidence cannot be obscured by placing it in the context of the new constitutional phraseology. It expresses the state of affairs which prevails throughout the organizational set-up of German industry. The advisory board is constituted as an oligarchical body dominating through the same persons both private cartels and official trade organizations. Under the officially sanctioned leadership of one of the industrial lords, who is *primus inter pares* so far as the monopolists are concerned and who is leader so far as the plebeian rest is concerned, the professional bureaucratic personnel administers the law for the whole group. Consequently, this personnel has the task of adjusting the various interests within the group, either

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<sup>1</sup>As regards the ideology, see the wording of the decree on Gemeinschaftshilfe der Wirtschaft, February 19, 1940, *R.G.Bl.* I, p. 395, which starts with the supposition that the shut-down is only of a temporary character.

<sup>2</sup>Before the great combing-out of April 1, 1939, there were still 1,471,000 handicraft units employing less than 6 employees as compared with 1,734,000 in 1933.

<sup>3</sup>Barth, quoted *supra*, p. 67.

as the agency of last resort, or, as is increasingly the case, as a kind of preliminary sifting organ whose reports provide the raw material for the official decisions of the Reich Ministry of Economic Affairs. It represents, so to speak, the group interest as against the interest of the individual concern. Although this function served to strengthen the independence of the group bureaucracy as against individual concerns, this process did not go very far. The constitutional framework governing the organization of the group makes the group administration partial to the big interests within its jurisdiction no less than did its forerunner under the Weimar Republic. Every big concern has its own specialists who zealously and competently watch the work of the representative of the group. Significantly enough, the democratic element, a remnant of earlier estate ideas,<sup>1</sup> which would have required a vote of confidence from all members, not only from the advisory board, was already removed from the statute book by executive order in 1935,<sup>2</sup> and the relations between leadership and small and medium-sized producer have been adapted to the German reality. The status of the smaller producers has been changed from that of active participants into that of objects of propaganda. The war has not altered any part of this organizational structure. On the contrary, the building up of District Economic Boards has only established these characteristics the more firmly. At the same time, when the provincial and regional state bureaucracy was given supervisory power over the distribution of consumers goods for the whole population, the presidents of the regional organizations of trade and industry, of the Chambers of Industry and Commerce, saw themselves raised to the rank of Reich commissioners with the duty of seeing to it that the tasks of production were carried through.<sup>3</sup> And when the most recent legislation tried to reduce war profits, it likewise to a large extent placed the power to determine what is to be considered appropriate profit in the hands of the groups whose members were the very ones to make the profit.

To a large measure the governing ranks of the Chambers of Industry and of the Economic Groups are the ones that, either directly or by the weight of the advice which their experts set before the state bureaucracy, decide on the chances of making profits from any given means of production.<sup>4</sup> This method of determining the

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<sup>1</sup>T. Cole, "Corporative Organization of the Third Reich" in: *Review of Politics*, vol. 2, 1940, pp. 438-62.

<sup>2</sup>Barth, quoted *supra*, p. 68.

<sup>3</sup>Decrees on "Wirtschaftsverwaltung," August 27, 1939, Nov. 28, 1939, *R.G.Bl.* I, pp. 1495 and 2315, with regulations of Sept. 20, 1939, *R.G.Bl.* I, p. 1872.

<sup>4</sup>See, Gurland's article, pp. 256-58.

use to which a given means of production will be put has become the rule rather than the exception. Many owners have been totally or partially deprived of the possibility of making use of their machinery. The measures by which these expropriations have been carried through have a dual aspect. In most of the cases covered by the government's authority, quota restrictions and other measures have been actually carried through by the career group officials who have been vested with public authority, the profit of such operations accruing to certain members of the group. In the case of Jewish expropriation the question of indemnity for the damaged person does not arise.<sup>1</sup> In the other cases interference with private property invariably raises the question of indemnity. Under the Weimar Republic the courts that had jurisdiction over expropriation claims gave a very extensive interpretation to the concept of expropriation by public authorities. It was to be expected under Fascism that such an interpretation, as well as the insistence on full compensation, would be upheld by the courts in all cases where the physical property was left intact but where its profitable use was excluded in consequence of a governmental authorization or decree. The government therefore decided to throw the traditional procedures overboard. The differences arising from the transformation of the apparatus of production were to be treated as a pure intra-group concern and there was to be no appeal to an outside authority.

So we can see that the tendency already mentioned as characteristic of mass democracy, the absorption of individual rights in group rights, reaches its extreme form. This tendency was already visible in the cartel legislation of 1933, which prevented the Cartel Tribunal from interfering in disputes arising between members and the cartel. The principle of refusing to grant access to regular courts was also soon employed in numerous decrees, especially in those concerning the Food Estate (agriculture). These ruled that the parties have to content themselves with the decision of an intra-group arbitration court or, as far as questions of quotas are concerned, with committees of complaint provided for by their respective organizations.<sup>2</sup>

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<sup>1</sup>We can see the curious spectacle of the government running behind the private experts in Aryanization and trying belatedly to snatch a share of the loot, thus squeezing out the small businessman who had acquired Jewish property but did not have sufficient capital to run it, or, especially in the field of real estate, to preserve part of it for the warriors when they return from the victorious war. See the decree on the reexamination of Aryanization acts of June 10, 1940, *R.G.Bl.* I, p. 891, where, in case of inappropriate gains through Aryanization, compensation has to be paid to the Reich.

<sup>2</sup>Cf. L. Gebhard and H. Merkel, *Das Recht der landwirtschaftlichen Marktordnung*, 1937, who present an elaborate commentary on the organization of arbitration courts as far as agricultural market regulations are concerned (statute of February 26, 1935, *R.G.Bl.* I, 1293). They remark (III, p. 25) that appeals against the decisions of the

(footnote continued on next page)

The same state of affairs has prevailed in regard to the compensation granted in the case of compulsory shut-down of plants for the duration of the war. Here, too, the economic groups have sole jurisdiction in deciding whether and what indemnity should be given, and appeal is possible only to the Reich Economic Chamber, the coordinating body of these organizations. The remarkable feature of this legislation is, first, the abandonment of the principle, accepted throughout the liberal era and still acknowledged by the regular courts in Germany, that the individual should not suffer any loss through the acts of expropriation, that he should receive either a full or at least an "appropriate" indemnity.<sup>1</sup> If an indemnity is granted, it is granted by equity and not by law, and to say, as does the official language, that the "vital necessities of the whole region have to be considered before the interests of the individual" is only another way of justifying the redistribution of property.<sup>2</sup> But even more important than the degree of indemnification granted on account of the loss of professional and economic status is the fact that these rules deny access to the courts and, by so doing, close the iron ring which the new economic constitution of the monopolistic society places around the less favored members of a business or trade group. They are prevented from combining with other social groups or airing before a public forum their grievances against the monopolist dominating the group. The increasing factual subservience to the command of a monopoly-dominated group has now become a legalized subservience.

Industry and agriculture are not the only realms in which the dominant forces of the group have seized the right of decision in intra-group controversies—even where these controversies only thinly veil the life-struggle of marginal firms against monopolies. The same process is to be found elsewhere in the German political structure. One might almost determine the status of the different groups in Germany by the degree to which they have attained the *privilegium de non appellando*, to adopt a well-known concept from German constitutional history. That is to say, one might determine their status by the extent to which they have succeeded in depriving the

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committee of complaint to the arbitration court would have a chance of success only in very exceptional cases. See also W. Weber and F. Wieacker, *Eigentum und Enteignung*, Hamburg 1935, pp. 26-33, for a list of the expropriation features in the various decrees. As regards the elimination of ordinary courts in general, see the remark of Wieacker in *Deutsches Verwaltungsrecht*, 1937, p. 466.

<sup>1</sup>See, e.g., the decision of the Prussian Supreme Administrative Tribunal of March 29, 1935, vol. 100, p. 329.

<sup>2</sup>The practice of the arbitration courts of the Food Estate has been discussed in P. Giesecke, "Entschädigungspflicht bei marktordnenden Massnahmen" in: *Festgabe für Hedemann*, 1938, pp. 368-81.

individual member of the group of the possibility of appealing to external bodies against group decisions. This *privilegium de non-appellando* exists in its most concentrated form in the army. The army command is made absolute master over every individual in its service by virtue of denying any separation between the personal and the professional status of its members. Business does not need to strive for such a position; it is satisfied to control the social and economic functions of its members. As regards members of the state bureaucracy and of the party and its affiliated organizations, we have to differentiate between the direction of public affairs and the task of controlling the population. Insofar as this first function is concerned, no judicial interference is allowed. The ever expanding lists of activities which, by legislative order, are excluded from any judicial examination, make the discussion of whether the judiciary may itself decide which acts are to be included in the category of political acts and therefore to be exempted from examination, a mere theoretical squabble.<sup>1</sup> The judiciary has thus been degraded from the rank of an arbiter of inter-group conflicts to that of an "assistant"<sup>2</sup> of the administration. The judiciary competes with the various administrative services<sup>3</sup> as an organ to enforce discipline in the lower ranks of the bureaucracy, in the party, and among the population at large. The "taylorized" methods adopted especially in the administration of criminal law largely through granting the public prosecutor a dominant position over the procedure, and allowing a quick and "satisfying" disposal of a maximum of cases unhampered by procedural quirks,<sup>4</sup> have torn away

<sup>1</sup>For the status of the controversy see G. Ipsen, *Politik und Justiz*, Hamburg 1937, and S. Grundmann, "Die richterliche Nachprüfung von politischen Führungsakten" in: *Zeitschrift f. d. ges. Staatswissenschaften*, vol. 10, 1940, pp. 512-44.

<sup>2</sup>Cf. Under Secretary of the Treasury Reinhardt in: *Deutsche Steuerzeitung*, 1935, p. 485; see also G. Schmoelders, "Die Weiterbildung des Wirtschaftsrechts" in: *Zeitschrift f. d. ges. Staatswissenschaften*, vol. 101, 1941, p. 78. The organisation of a Supreme Administrative Court for the whole Reich carries the new status of the judiciary to its logical conclusion when it prescribes that the judges can be removed from the Court at the end of the fiscal year. See *Frankfurter Zeitung*, April 22, 1941. As regards the small part played by the labor courts in determining the relationship between employers and employees, see Cole, "National Socialism and German Labor Courts" in: *Journal of Politics*, vol. III, 1941, p. 196.

<sup>3</sup>As regards the civil liability of the party for offenses committed by party functionaries, see the party point of view in A. Lingg, *Die Verwaltung der NSDAP*, Munich 1940, pp. 257 ff. The right of the courts to pass on this question is upheld by S. Grundmann, quoted *supra*, pp. 541 ff., and the decision of the *Reichsgericht* of February 17, 1939, in: *Deutsches Recht*, 1939, p. 1785. The lower courts, however, more exposed to party pressure, do not seem to follow the Supreme Court. The criminal liability of party members for embezzlement is at times enforced in the courts—provided that one of the numerous amnesties does not intervene. But the secrecy of the procedure and the absolute prohibition of reports on such trials deprive them of any function of control. See E. Roper and C. Leiser, *Skeleton of Justice*, New York 1941.

<sup>4</sup>See O. Kirchheimer, "Criminal Law in National Socialist Germany" in vol. 8 (1940), pp. 444-63, of this periodical.

the sanctity of the judiciary<sup>1</sup> and have deprived the government of the moral and propagandistic value inherent in the services of the judiciary. It becomes less important as a problem whether the regular judiciary or a service bureaucracy is chosen to carry out these functions, and the field is left open for minor rivalries. However, even here the observed tendency to acquire as far as possible the *privilegium de non appellando* is always noticeable throughout the administrative services of party and state bureaucracy.

Within the constitutional framework of the Weimar Republic, it became the function of the bureaucracy continually to keep under scrutiny the relationship between big business and labor, but also to preserve the *status quo* of agriculture and small-scale business. The cohesive element which united the bureaucracy was the preservation of its social status against encroachments from the outside and, whenever feasible, the desire to extend its activities. The ideological emphasis on its impartial service to the nation as a whole hid the fact that, as far as the object of its policies was concerned, the unity was more apparent than real. The controversies between the social groups reappeared in somewhat mitigated form, free of propagandistic tinge, in the relationship between the various divisions of the public services. When we try to assess the impact of the changes in the political power structure on the bureaucracy and on its relationship to the National Socialist party, we realize that the unity of the bureaucracy was shaken still more. In part it lost its identity through its steady permeation by, and association with, the party machine, and in part its general negative attitude to outside control lost its *raison d'être* in the new and much less controlled set-up.<sup>2</sup> Thus we are confronted with the strange picture of an intense centralization within each administrative unit going hand in hand with certain tendencies to departmentalization. Each of the highest sub-leaders jealously guards against a loss of status by being subjected to anybody's command but the *Führer's*. As in older systems, what counts is the individual's proximity to the supposed fountain of the

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<sup>1</sup>Reich Minister Frank speaks of "taylorism" in criminal procedure in his somewhat melancholy reflections on the fate of German criminal law under present conditions in "Die Aufgaben der Strafrechtserneuerung" in: *Zeitschrift der Akademie für Deutsches Recht*, 1941, p. 25. See also G. Dahm, "Richtermacht und Gerichtsverfassung im Strafrecht" in: *Zeitschrift f. d. ges. Staatsw.*, 1941, vol. 101, pp. 287-308.

<sup>2</sup>The remaining control organ over the bureaucracy, the Rechnungshof (Court of Accounts Control), never very effective in the observations which it issues on expenditure incurred years before, has under the Third Reich become a repository for high officials from the Weimar period who prove their right to the salary they have drawn in their former positions by checking accounts "as soldiers in *Zivil* imbued by the spirit of the leader." (H. Mueller, "Die Stellung des Rechnungshofs im 3. Reich" in: *Finanzarchiv*, vol. 7, 1940, pp. 193, 205.)

charisma itself, not the fact of belonging to the rational council of government. In consequence, "the position of Ministers of the Reich has undergone a fundamental change. They do not form a collegium, an organizational unit."<sup>1</sup> The number of administrative organizations under the direct command of the *Führer* and exempt from any other supervision is steadily increasing. And the interpenetration of party and bureaucracy leads to jurisdictional regulations compared with which the most difficult intricacies of federal problematics are relatively easy to follow. Thus, for example, we have such a figure as the *Reichsführer SS* who, as head of the police, is administratively incorporated in the Reich Ministry of the Interior without, however, being subject in his decisions to the approval of the Reich Minister.<sup>2</sup>

The official constitutional theory likes to regard the relationship between state and party as one between a technical apparatus and a political movement, the former following the directions of the latter, which is supposed to be the immediate expression of national life and will. The official ideology, therefore, sees the party as an indissoluble unit. In reality the structure of the National Socialist party and its place in the political power structure of modern Germany can only be understood in terms of its dual function. First, the National Socialist party arose as a mass party and as such is the heir to the other mass parties which existed during the era of mass democracy. Second, the party and the state bureaucracy together constitute an organ of mass domination. It is a competitor of, and later an heir to, the left-wing mass parties. It not only tries to cater to the economic desires of its followers but also incorporates in its structure some vision of a new political order. The fact that its following is a heterogeneous one makes necessary a constant shift in the ideology, a greater emphasis on the purely political elements of the new order as against the economic basis, and heavier emphasis on propaganda—lest its following dissolve into its separate social components. When the trade unions and left-wing political parties were destroyed, the new mass organizations of the National Socialist party took over at least some of the social functions of the

<sup>1</sup>U. Scheuner, "Deutsche Staatsführung im Krieg" in: *Deutsche Rechtswissenschaft*, vol. 5, 1940, p. 26. For earlier formulations in the same direction see R. Höhn, *Wandlungen im staatsrechtlichen Denken*, Berlin 1934, p. 39.

<sup>2</sup>The same exempt position within the foreign and labor ministries is held by the Reich leader of the Germans abroad and by the Work Service leader of the Reich. As regards the structure of the Youth Organization, see H. Dietze, "Die verfassungsrechtliche Stellung der Hitler-Jugend" in: *Zeitschrift f. d. ges. Staatsw.*, vol. 100, 1940, pp. 113-56, who comes (p. 154) to the conclusion that the youth movement is an institution which does not belong exclusively to the party or to the government, cannot be measured by conceptions of party law or constitutional law, and thus is subject only to those of the Reich law.

defunct groups. The numerous individuals who, both before 1933 and to a certain extent afterwards, transferred their loyalty to the National Socialist organization, helped to establish this continuity.<sup>1</sup> In the conditions of party pluralism under the Weimar Republic, in order to balance the heterogeneity of its membership, the National Socialist party had not only to adopt a special vehemence in the competition for political power but also to establish the principle of an unquestionable faith in its leadership. Having achieved predominance in the state, but being without a clearly defined social program, the party followed the line of least resistance. It confirmed the titles of business and the army but at the same time hastened to build up a competitive apparatus of its own, gradually reinforcing it with the services of the technically efficient state bureaucracy.

This process changed the structure of the party itself and brought the party's ever present bureaucratic element sharply to the fore. The party proved no support for the independent middle classes in their struggle for survival but, instead, actually hastened their final decline more than any other single factor in modern German history. On the other hand, the capture of the state machinery by the party, the vast extension of this machinery, and its duplication in many cases by a corresponding party bureaucracy, though depriving many of the middle class elements of their position in the process of production, gave them in compensation economic security and social standing.<sup>2</sup> The fact that, although many of the new functionaries have come from the independent middle classes, this same middle class was crushed as never before with the active help of the new bureaucracy shows how far and fast this new social group has already traveled in its alienation from its earlier basis. Besides demonstrating that the new group was becoming separated from its earlier social interests, this also testifies to its adaptation to the various (often far-flung) new tasks with which it has been entrusted, jointly with, or in addition to, the state bureaucracy. Whereas the party official rises to a position of equality with the government official and even in some cases succeeds in entering the ranks of the

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<sup>1</sup>The inherited elements in the National Socialist party are naturally effaced if the party is contrasted with the somewhat literary and artificial political styles of nineteenth century representation instead of with the mass parties of mass democracy. Cf. Ipsen, "Vom Begriff der Partei" in: *Zeitschrift f. d. ges. Staatsw.*, Vol. 100, 1940, p. 406.

<sup>2</sup>There are no figures available for the period since 1935, but even up to then, with the process of aggrandizement going on, the proportion of officials in the total membership of the National Socialist party increased from 6.7 per cent in 1933 to 13 in 1935. Cf. Gerth, "The Nazi Party, Its Leadership and Composition" in: *The American Journal of Sociology*, 1940, vol. 45, p. 527. Some of this increase, however, may only be apparent, as, e.g., in the case where the party acknowledges the right of a wife to transfer her low party membership number to her husband though he himself refrained from openly joining the party while he was an official. See Lingg, quoted *supra*, pp. 172-73.

business group, the lower party member only holds honorary and onerous office and becomes almost indistinguishable from the ordinary non-party citizen as a zealously watched object rather than a subject of political power.

The new legislation concerning administrative leadership in the "Landkreise,"<sup>1</sup> which has been given much attention in Germany,<sup>2</sup> must be understood as a rearguard action which, for propagandistic aims, attempts to revive the theoretical conception of the unified party as an independent entity in its relationship to the state bureaucracy. It starts from the principle that leadership over persons (*Menschenführung*) is exclusively the task of the party. The competent party official is responsible to his party superior for the conduct and attitude of the population. The township president or the mayor, however, is responsible for the orderly execution of all administrative tasks in the framework of legal jurisdiction. Both organs are forbidden to meddle in each other's business. The psychological usefulness of such a regulation is undeniable. It protects the party official against requests from the rank and file of the membership by emphasizing a separation which for all practical purposes does not exist, and after laying down these principles the statute itself has thus to define the different degrees of cooperation between both hierarchies. Though the relation between party and bureaucracy may give rise to ostentatious jurisdictional disputes, it is not in these that we find the deeper-lying conflicts, but within the structure of the party itself. So long as the party has not exclusively become a huge apparatus for mass domination, so long as the desires, fears and wishes of the atomized masses still filter through the numerous channels of party organizations, like the Labor Front and the National Socialist Welfare Agency, which exercise *Betreuungsfunktionen*, duties of a "guardian of the masses," there are still some deteriorated remnants of the earlier form, the mass party. Even in their bureaucratic form, those elements of the party which are entrusted with the care of the masses represent, in some degree, the unrepresented sections of the community who have no independent voice in the balance of power.

By carefully restricting itself exclusively to the military sphere, the army, from the very beginning, was able to uphold the independence it had reestablished under the Weimar Democracy. Busi-

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<sup>1</sup>In spite of its misleading title, which only refers to the "Landkreise" (rural districts), the statute of December 28, 1939, *R.G.Bl.* I, 1940, p. 45, is designed to provide general control over the relationship between the middle ranks of the bureaucracy and the corresponding party officials.

<sup>2</sup>O. Redelberger, "Partei und Staat im Landkreis" in *Reichsverwaltungsblatt*, vol. 61, 1940, p. 47.

ness, trade, and the independent ranks of agriculture became a closed monopoly. Government and party not only accepted its inner power distribution as they found it, but actively helped to drive it still more pointedly in the direction of an oligarchic combine. The relationship of these groups to the army and the party hierarchy is in flux; especially the respective weight of the party bureaucracy and the army is subject to sudden shifts, due to the impact of the war changes, the transitional or permanent character of which is not yet discernible. But one permanent pattern stands out. While sections of the new party and state bureaucracy act as transmission belts for those groups sufficiently vocal in their own right, other parts of the state and party bureaucracy which exercise the *Betreuungsfunktion* represent the unrepresented.<sup>1</sup> The compromise between the more articulate groups and these "guardians of the masses" more often than not resemble the arbitration award of Marshal Balbo who, while permitting a salary reduction asked for by the employers, awarded to the workers of Ferrara the *epitheton ornans* "valiant."<sup>2</sup> One of the chief if not *the* chief compromise they concluded in the name of the unrepresented, the "Leipzig Agreement of 1935," was as farcical as the Balbo award. By this agreement the "Self-Administration of German Economy" became formally affiliated with the Labor Front. No practical consequences, however, were ever drawn from this "liaison."<sup>3</sup> But there is compromise, nevertheless, as in every other society which has a high degree of social stratification.

In the compromise structure of National Socialism as it arose after the disappearance of all independent representation of the masses, the old question is brought to the fore: how can the interest of the various partners to the compromise, the monopolies, army, industry, and agriculture as well as the diversified layers of party bureaucracy, be brought to a common denominator? It is apparent that the *Führer*, or, as we should more appropriately say, the group of persons identified with the *Führer*, has established an authority which acts as an ultimate arbiter in all cases where the respective monopoly groups are not able to reach a decision by themselves. The leadership is able to decide inter-group differences with relative ease, and these decisions are carried through with a minimum of resistance only because the unfolding program of expansion has given the various groups the possibility of extending their activities

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<sup>1</sup>As regards the modified compromise, see the comment of E. Morstein Marx, "Bureaucracy and Dictatorship" in: *Review of Politics*, vol. 3, 1941, p. 101.

<sup>2</sup>This story is related in Rosenstock-Franck, "*Les étapes de l'économie fasciste italienne*," Paris 1939, p. 233.

<sup>3</sup>Its wording in: W. Mueller, "*Das soziale Leben im neuen Deutschland*," Berlin 1938, pp. 136-37.

(though on a different plane) and of satisfying their desires without too much need of getting in each other's way.<sup>1</sup> The ultimate decision of the *Führer* group is therefore the more easily accepted the more it takes the form and function of a permanent guarantee of the imperialist order.<sup>2</sup> It is this interdependence between the unquestionable authority of the ruling group and the program of expansion which offers the characteristic phenomenon of the compromise structure of the Fascist order, directs its further course, and decides upon its ultimate fate.

To summarize our remarks, we can describe the changes in political compromise as follows. During the liberal period of modern society, political compromise operated among parliamentarians and between them and the government. Every representative acted on his own, promoting certain financial, business and agricultural interests and changing allegiance from one to another of them according to his own interests and judgment. Thus, through individual agreements the functioning of parliament was constantly kept in harmony with the prevailing economic structure. With the beginnings of "mass democracy" (about 1910-11), the task of keeping political compromise in harmony with the economic structure devolved to a considerable extent upon the central banks. At the same time, the agreements tended to evolve from individual ones into voluntary compacts between the main groups of capital and labor and their subdivisions.

Fascism characterizes the stage at which the individual has completely lost his independence and the ruling groups have become recognized by the state as the sole legal parties to political compromise. Since money, a rather adequate expression of social power during the liberal period, ceased to mediate between economic and political life, another coordinator of public life was sorely needed. There remained only the institution of leadership to arbitrate between the groups. Its power rests on its ability to compensate every

<sup>1</sup>See for the whole problem the semi-official commentary in G. Neesse, *Führergewalt*, Tübingen 1940.

<sup>2</sup>Characteristic of the intimate connection between the establishment of the authority placed in the German leadership and the execution of its imperialist program is a sharp refutation of the conservative writer Triepel who attempted to uphold the view that a state may be called sovereign even if it has no external independence, provided that it controls its own subjects. See H. Triepel, *Die Hegemonie*, Stuttgart 1938, p. 143, rejected by E. Huber in his review in: *Zeitschrift f. d. ges. Staatsw.*, vol. 100, 1940, p. 179. In fact, the form of domination which the large-space (*Grossraum*) imperialism of Germany creates is not very amenable to the fiction of a sovereign restricted to the domestic realm. "The developing large-space order might, contrary to earlier imperialism, constitute a system of direct and open domination"—says E. Huber, "Position und Begriffe" in: *Zeitschrift f. d. ges. Staatsw.*, vol. 100, 1940, p. 143.

group sacrifice with advantages which, however, can ultimately be got only in the international field, that is to say, through imperialist policy.