

## The Third Reich

---

The twelve years of the National Socialist Third Reich have received more scholarly attention than any other period of similar duration for the obvious reasons of the brutality of the regime, its novelty, its instigation of the Second World War and above all the Holocaust. Those same features have made the interpretation of the regime especially problematic and contentious. The facts that an explicit constitution was never written and that an authorised ideology was never sanctioned have hampered the efforts of later commentators, as they did the efforts of theorists supportive of the regime at the time, to make sense of what the regime actually was. This lack of explicit central direction was recognised by a National Socialist official, who noted that often people waited in vain for instructions on how to act:

Unfortunately, the same will be true in the future; but in fact it is the duty of everybody to try to work towards the Führer along the lines he would wish. Anyone who makes mistakes will notice it soon enough. But anyone who really works towards the Führer along his lines and towards his goal will certainly both now and in the future one day have the finest reward in the form of the sudden legal confirmation of his work.<sup>1</sup>

In terms of the broader issues of political theory, the nature of the state, law, administration and the international order, this prescription captured the uncertainty which theorists were faced with but erred in suggesting that they would ever find final confirmation of their views.

While some older theorists who were hostile or unsympathetic to the regime, such as Smend, Anschütz and Thoma, wrote little or avoided the central political issues, younger ambitious men rushed to fill the gap, often taking the posts of those who had been driven into exile or retirement. They vied to demonstrate their commitment to the regime, and many engaged in personal conspiracies in order to discredit their competitors. This was accompanied by an inflationary use of what was taken to be appropriate vocabulary that induced the National Socialist jurist Gottfried Neesze to complain of 'speechifying

and enthusiasm about blood and earth, race, honour, community, *Volk*' behind which lay the old concepts of constitutional theory.<sup>2</sup> Neesze's point, of course, was that this new vocabulary had to be taken more seriously and the break with the past had to be captured in the concepts of constitutional theory. In Neesze's mind, failure to do so could amount to 'sabotage', a charge he did not hesitate to level at Otto Koellreutter despite the fact that Koellreutter was one of the few established jurists to commit himself openly to the National Socialist party before the seizure of power.<sup>3</sup>

The sense of a break with the past and of a renewal of German spirit and energy was widespread. The break with the past meant in the first place a break with Weimar. For historians especially, that could mean the supposed reassertion of a link with the Prussian and imperial tradition that had been severed in 1918. Younger historians, however, were more inclined to see the *kleindeutsch* solution of Bismarck as insufficiently ambitious.<sup>4</sup> For many historians and legal theorists, the revolutionary transition represented by the advent of the Third Reich signified a break with the entire liberal era. From this perspective, the German Reich that collapsed in 1918, together with the theories it spawned, was recast as liberal in spirit and principle, or at best as a beleaguered 'soldiers' state' that was crippled by its concessions to the civilians.<sup>5</sup> The idea of national renewal and the end of a liberal era came together in the supposition that Germany was embarking on a new, distinctively German political path. Here, the old liberal models were no guide. Even the once-favoured *Allgemeine Staatslehre* was consigned to the past. Carl Schmitt dismissed this 'category' as a 'typical concern of the liberal nineteenth century'.<sup>6</sup> The very word *allgemein* (general) suggested a form of state of universal validity. That was incompatible with the idea that the National Socialist state was distinctive and distinctively German. There was not even any attempt to formulate a comparative theory or model of fascist states.<sup>7</sup>

The reality of the Third Reich was itself a paradox of the perceived omnipresence of the state and what the historian Michael Geyer has described as an 'extreme dilution of domination into an endless series of partial statelike organisations'.<sup>8</sup> It was, according to Geyer,

a state consisting of public actors – some of them were legally 'private' like industries, some belonged to the executive like the military, and some were altogether hybrid mixtures like the German Labour Front – which gained their autonomy from their ability to coerce and to gain independent access to resources.<sup>9</sup>

Here, it was not the convergence of these competing actors that allowed the system to function but the distance between them. It was this reality that also allowed political theorists to pick up different aspects of the system even if they were sometimes frustrated by the ambiguity of the 'hybrid mixtures' within the Third Reich.

It was rare for the confusion to be identified as bluntly as it was by the State Secretary of the Interior, Wilhelm Stuckart: 'inflation of administrative authorities, war between administrative authorities, duplication of work and idleness of administrative authorities . . . reduction of legal security through the increased possibility of mutually conflicting administrative decisions', all of which threatened the most valuable asset 'that a state possesses, namely the trust of the people'.<sup>10</sup> Nevertheless, Stuckart effectively acknowledged that the disintegration of any coherent order was far from confined to the National Socialist movement, that is, to the realm of the Party and its numerous affiliated organisations.

The pace of change, economic recovery and rearmament, anti-semitic persecution, the hollowing-out of the legal system by the security apparatus, increased if erratic state intervention in the economy, and above all expansion and war all forced theorists to attempt to grasp the nature of the regime in the light of the most recent developments. The union with Austria in 1938, in whose authoritarian constitution of 1934 some had seen the only alternative to National Socialism, the occupation of the Czech lands in 1939, and the occupation of most of Europe in the Second World War opened up new problems and perspectives that further challenged the viability of traditional concepts. Moreover, responsiveness to the dynamics and the complexity of the Third Reich had to be combined with assertions of the unity of the Third Reich – for it was unity that supposedly, if erroneously, distinguished it from the despised liberal order of the past.

### *The state*

Otto Koellreutter made an early attempt to define the new state under the heading 'Der nationale Rechtsstaat' (The national *Rechtsstaat*). He specified that the realisation of this form of state did not entail a 'change of the form of the state', but what he meant by that was simply that a restoration of the monarchy was not possible. The new national *Rechtsstaat* is, he argued, different by virtue of the political idea that animates it. The elemental power of this new 'political substance' is

evident in the ease with which it has swept aside the autonomy of the states within the *Reich*. Despite this emphasis upon radical change, Koellreutter clearly wanted to retain some characteristics of traditional approach insofar as he wanted to retain the autonomy of the civil service. He wrote that there has to be a 'clear separation of the political leadership as the representative of political value and the professional civil service as the representative of the legal value . . .'<sup>11</sup>

It was Koellreutter's desire to retain the concept of the *Rechtsstaat* at all that induced Neesse's suspicions, though the number of those who wished to retain the concept in one guise or another was quite substantial.<sup>12</sup> Gustav Adolf Walz accepted that the concept was relevant to what he saw as the regime's commitment to justice and because general binding norms enunciated in legislation would still be required; but that did not warrant using the term *Rechtsstaat* as a general characterisation of the regime, for that would amount to confusing the means that the regime might employ with its essence.<sup>13</sup> Walz also considered the term 'authoritarian state'. That was favoured by Schmitt's pupil Herbert Krüger as well. For Krüger, 'the authoritarian state principle is the constitution of the National Socialist state'.<sup>14</sup> Walz, however, was not convinced. He argued that the concept of the authoritarian state had specific, recent political connotations, namely reliance on presidential power as enshrined in the Weimar constitution and a reformulation of the basic rights enshrined in the second part of the Weimar constitution.<sup>15</sup> The underlying political point was that the concept of the authoritarian state conjured up the viewpoint of those who had sought to establish an authoritarian alternative to both the democratic order of Weimar and to the National Socialists. Walz was little more sympathetic to the idea that the new regime should be characterised as a corporatist state. That was favoured by many who had long looked on the idea of a corporatist state, often as represented by fascist Italy, as an alternative to the Weimar Republic. Yet even Werner Sombart, who also favoured this idea, had to concede that it was at best only partially applicable to the new Germany. Of the various functions originally performed by the estates, the cultivation of a specific mentality among their members, the confirmation of non-egalitarian principles through the conferment of privileges, and educational, economic and political state functions, only fragments of the functional tasks of the estates could be revived, and even these only for segments of the population.<sup>16</sup>

Walz's preferred designation was the '*völkischer Führerstaat*',

which he claimed captured the distinctive national identity and sense of unity in the new state as well as the concentration of executive and legislative power in the leader, who was the leader of the *Reich*, the *Volk* and the party.<sup>17</sup> Ernst Forsthoff, another protégé of Schmitt, showed some reservations about relying so heavily on the idea of leadership. Leadership, he argued, is bound up with the personal qualities of the leader and the leader's ties to his followers. But such qualities and ties are transient in that they do not endure beyond the life of the leader. It is acceptable, he continued, that a movement held together by leadership can dissolve with the death of the leader; but this is not acceptable for the state, which is 'the form of the political existence of a people'.<sup>18</sup> Walz also complained that there was something 'unmetaphysical' in the personal qualities of the leader. The desired metaphysical principle remained somewhat elusive, though it is clear that what Walz meant by this was some ideology of a quasi-religious nature that provided an unquestionable sanction for the authority of the 'total state', that is, the state that swept away the liberal *Rechtsstaat* with its reliance on law and the distinction between state and society. In seeking to explain what he meant by 'total state', Forsthoff had to combine the general antipathy to formal bureaucracies – though he insisted that some element of bureaucratically guaranteed calculability is necessary – and the idea of a form of authority that entailed personal responsibility and personal power of command. He found this in the figure of the *Reichsstatthalter*, that is, the position of Reich Governor created by the new regime to coordinate the states of the Reich. Several years later, Arnold Köttgen argued that these political commissars had been a transitional phenomenon whose role and whose distinctiveness from the civil service had subsequently faded.<sup>19</sup> Köttgen was arguably right about the Reich Governors, though Forsthoff had picked up Hitler's inclination to use special authorities or commissars to circumvent the crises to which the regime was prone as well as to promote his racist and anti-semitic visions. The fact that Köttgen and Forsthoff were each partially right is bound up with the difficulty that each had in responding to an ever-changing reality whose ultimate destination could not be defined.

Schmitt made one of the most enduring attempts to capture this dynamic under the title *Staat, Bewegung, Volk* (State, Movement, People).<sup>20</sup> He claimed that each term could be used to express the 'political unity' of the new order but also to capture a specific side of it: 'the state in the narrower sense as the political-static part, the movement as the political-dynamic element and the *Volk* as the unpolitical

side, thriving under the protection and shadow of the political decisions . . .<sup>21</sup> Having set up a tripartite framework, Schmitt then argued that unity is established insofar as the movement 'presses through and leads' the state and the *Volk*.<sup>22</sup> While clearly legitimating the leading role claimed by the Nazi movement as a whole, Schmitt also claimed that the interaction of these elements under the guiding role of the movement provides an alternative to the dualistic conceptions typical of the liberal democratic order which counterposes state and *Volk*, government and *Volk*, citizen and civil servant, or state and party.<sup>23</sup> Schmitt still thought it necessary to warn against allowing these political decisions in the new order to become subject to the courts, for the equality of the contending parties inherent in due legal process might allow the 'open or concealed enemy of the new state' to put itself on the same level as the state or the movement.<sup>24</sup>

Reinhard Höhn had been encouraged by Schmitt but soon became a bitter rival. He constantly harried those whom he suspected, rightly or wrongly, of less-than-wholehearted commitment to the new order. Yet he agreed with Schmitt on the dangers of subjecting the state and movement to due legal process and turned this into a broader attack upon the 'juristic state personality, the "foundation and corner stone" of previous constitutional law. . . .'<sup>25</sup> In a survey of the development of German constitutional thought, Georg Jellinek emerged as Höhn's main target. Jellinek, Höhn complained, had dissolved all human relations into relations between individual personalities. While other theorists had hesitated to reduce the state to the same level and had tended to deny the state's subjects 'subjective-public' rights against the state, Jellinek had construed the state as an 'abstract state personality' precisely in order to make such rights possible: 'In order to be able to give the individual subjective public rights, he had to place the state, as much as is possible, on the same level with the personality of the individual'.<sup>26</sup> For Höhn, breaking the hold of this concept of the state was the major challenge and achievement of the political thought of the new order: 'The foundation and corner stone of constitutional law is no longer the legal person of the state; rather the national community is the new starting point . . . The state as a legal person and the concept of the community are mutually exclusive'.<sup>27</sup>

Höhn's attack on the idea of the personality of the state was widely applauded. Neesze described it as Höhn's 'undisputable service'.<sup>28</sup> Yet the wider implications of Höhn's assault on the concept of the state were contested. Ernst Rudolf Huber, for example, described the replacement of the concept of the personality by that of the

community as the replacement of one abstract concept by another. Huber regarded the concept of community as important but argued that its indiscriminate use would merely undermine its true value.<sup>29</sup> In his *Verfassungsrecht des Grossdeutschen Reiches* (Constitutional Law of the Greater German Reich) of 1939, the most substantial work of its kind in the Third Reich, Huber mounted a cautious defence of the concept of the state. He had to defer to Hitler's repeated insistence that the state is an instrument and not a purpose in its own right, but he claimed that this did not require dispensing with the concept of the state or degrading it to the name of a 'dead apparatus'. Huber found an answer to his difficulty in distinguishing between the state in a narrower sense, as an administrative and military organisation, and the state in a wider sense as the totality of the national order, as a 'living organism'. He then suggested that the former might be designated as 'state organisation' and the latter as the *Reich*.<sup>30</sup>

While Huber deployed the concept of the *Reich* in order to salvage the concept of the state, two years later Schmitt produced a brief article with the title 'Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff' (The state as a concrete concept, bound to an historical epoch). He discussed the origins of the concepts of state and sovereignty in the sixteenth century but made clear that the era in which the state was the general organisational political form was coming to an end. Equally significant was his claim: 'The German *Volk* also had to go through the narrow pass of state sovereignty before it was possible for a new German *Reich* to win back for Germany leadership in Europe'.<sup>31</sup>

The initial attempts to grasp the nature of the new regime were followed by mounting attacks on old concepts mixed with defensive attempts to cling on to at least some of the old connotations of the state while adapting to the regime. The more ambitious, both personally and intellectually, staked everything on National Socialist victory.

### *The concept of politics: leadership contra administration*

Long-standing concern with political leadership combined with National Socialist veneration of the *Führer* to give it a central place in the attitude to the concept of politics in the Third Reich. In the case of Schmitt, this continued to be related to his understanding of the relationship of the political to the state. The assumption that the political is bound up with the state presumes, he argued, that the state

is the sole or normal form of political unity. This, however, he rejected as being no longer the case on the grounds that the *Volk* is now the normal form of political unity.<sup>32</sup> Yet Schmitt also continued to claim that the state has to be defined from the perspective of the political.<sup>33</sup> Attempts to determine an objective sphere of politics, distinct from economics, technology and religion or to separate out a non-political social sphere, had all failed. Even apparently trivial matters such as the music played during a military march could become highly political issues. Schmitt concluded that this 'proves how much today a *unified political leadership capable of taking decisions* is necessary for every people, in order to preserve the primacy of the political decisions (the primacy of politics) . . .'<sup>34</sup>

Schmitt sought to tie down this concept of political leadership by distinguishing it from other activities to which he thought it might be wrongly assimilated. Thus, political leadership has nothing to do with legally constrained activity. It is to be distinguished from any kind of 'supervision' and above all from ideas of 'trusteeship' and 'education'. He warned his readers that they must guard against the possibility 'that a specifically German and National Socialist concept [of political leadership] is muddled and watered down by assimilation to alien categories'.<sup>35</sup> Schmitt then stated what this specifically German and National Socialist concept was: 'the unconditional racial identity [*Artgleichheit*] between the leader and the followers [*Gefolgschaft*] . . .'<sup>36</sup> Schmitt left no doubt that he meant racial identity in the strict sense of the term. Referring to recent speeches in which the idea of race [*Rasse*] had been central, he added that this central role was 'no kind of theoretically conceived postulate'.<sup>37</sup>

Huber referred to Schmitt approvingly in his treatment of the nature of politics; but, despite having a similar focus upon leadership, the emphasis is significantly different. Thus Huber invoked Schmitt's well-known distinction between friend and enemy but asserted that this was only one criterion and that politics was of no value in itself without reference to a 'vital form, whose will, decision and act appear in the political'.<sup>38</sup> This is both close to Schmitt, insofar as it refers to a 'political unity', and somewhat distant from him, insofar as Huber sought to sidestep the centrality of Schmitt's distinction between friend and enemy. The real difference emerged, however, when Huber claimed that the historical continuity of political will required a 'bearer' of this will that endured through contingency and transformations of history and that this 'bearer of politics is the state . . .'<sup>39</sup> Huber's attempt to make the concept of the state central did not



diminish his enthusiasm for the 'leadership state' (*Führerstaat*). Indeed, Huber took the concept of sovereignty from the repertoire of attributes of the state in order to hand it over to the leader in its most unconstrained form, including 'originality, exclusivity and universality, irresistibility . . .'<sup>40</sup>

It was not only constitutional theorists who defended the primacy of politics and centrality of leadership. Helmut Schelsky and Arnold Gehlen did so from the perspectives of the history of political thought and philosophical anthropology. Schelsky sought to reclaim the seventeenth-century English philosopher Thomas Hobbes from what he saw was an individualistic and rationalistic misinterpretation. The error, he argued, lies in confusing Hobbes's approach to the explanation of the physical world, including the human body, with his approach to the distinctive qualities of human nature, that is, speech. Speech facilitates a certain distance from the environment by means of a more proficient calculation, of which animals are not capable, and it enables men to advise each other. It is, however, a third quality of speech that Schelsky emphasised. It means that 'we can command and understand commands'.<sup>41</sup> Here lies the source of society, peace and discipline. Speech not instinct is decisive. From this, Schelsky concluded: 'The primacy of politics can scarcely be more clearly developed already in the picture of man'.<sup>42</sup> The total state is rooted in human nature. Gehlen also appealed to the distinctiveness of human nature. For Gehlen, human nature is distinctive by virtue of human deficiencies when compared with other species. Lacking the certainty of instinct and the physiological adaptation to specific situations and forms of behaviour, man is exposed to risks and suffers from a lack of orientation in a way that other species are not. Yet this deficiency also provides an opportunity, for man has the capacity to form himself. Man is an object of discipline for himself. From this need for discipline, Gehlen developed an abstract justification for leadership which he then recoupled to the regime's racial agenda.<sup>43</sup>

While Schelsky and Gehlen deployed arguments about human nature in order to assert the primacy of politics construed in terms of leadership and discipline, Hans Peter Ipsen sought to identify the nature of politics by a comparative analysis of acts of state which, as such, were held to be beyond the remit of the judiciary, and hence political. Ipsen's goal was to strip away any limitation on the acts of those bodies that 'qualified', as he put it, as sovereign. Each such body, whether the state or the party, can determine for itself the specific cases in which it acts that count as sovereign and hence as completely

beyond judicial review. This does justice, he claimed, to the irrationality of the political.<sup>44</sup> An enumeration of such acts is neither possible nor desirable, for it violates the very concept of sovereign acts. He rejected even the legislative sanction of police powers beyond the realm of the judiciary in the Third Reich as insufficient recognition of the autonomy of the police.<sup>45</sup> Ipsen was aware that this proliferation of sovereign authorities was potentially problematic, hence his assurance that 'The "separation of leadership and administration" make the "dynamic element of leadership free" from the administrative element, without thereby setting up contradictory competencies'.<sup>46</sup> Despite this bland assurance, Ipsen conceded that some process of accommodation (*Ausgleich*) would be necessary, though that in turn was subordinated to political imperatives.<sup>47</sup> Ipsen came close, in fact, to giving expression to that 'extreme dilution of domination into an endless series of partial state-like organisations' which characterised the Third Reich, though he had to draw back from this conclusion in the interests of the façade of unity.

The distinction between leadership, or literally the leadership of men (*Menschenführung*), and administration (*Verwaltung*) was one of the central themes and dilemmas of political thought in the Third Reich. The assertion of the primacy of politics, understood as leadership in contrast to administration, was one of the main themes of political thought in the Third Reich. Again, Höhn adopted a consciously radical position on the distinction between the two. He specified that Hitler was leader (*Führer*) of the movement and the *Volk* and leader (*Leiter*) of the state, where the state is defined as an apparatus of authorities and civil servants. Within the state, there is no leadership but only command and obedience.<sup>48</sup> This distinction between leadership and administration was bound up with the idea that leadership is characterised by the voluntary submission of the followers of the leader and that the leader either represents or forms the *Volk*. The linkage with the movement was summarised in the frequent assertion that 'leadership is the sole task of the movement'.<sup>49</sup>

Although no-one denied the importance of the principle of leadership, Höhn's strict interpretation was not followed by all. Huber sought to mitigate it by protesting about the inflationary use of the term 'leader'. It is, he argued, particularly inappropriate in the economic context.<sup>50</sup> Johannes Heckel, however, took exception to Huber's extension of political leadership to the soldier, which, he claimed, 'burdens the army with tasks and responsibilities which do not correspond to its military profession . . .'.<sup>51</sup> Huber's extension of

the leadership principle to the army, despite his protest against its inflationary use elsewhere, followed from his opposition to the effective downgrading of the army and state implied by Höhn's restriction of the leadership principle to the National Socialist movement. Huber argued that all organisations, including the movement, require structures of command and obedience. At the same time, the army and administration are, he claimed, 'leadership orders which rest on voluntary sacrifice, responsibility and faithfulness'.<sup>52</sup>

Despite and because of the high level of politicisation and the sensitivity of discussion of the general concept of the state, there was what has been described as a 'turn towards administration' in the political thought of the Third Reich.<sup>53</sup> In part, this was a continuation of the response to the reduction in the role played by the legislative state that had already taken place in Weimar. It also seemed to offer some minimal refuge from the pressures from the National Socialist movement and the more radical political theorists. That meant showing that administration was not the mere administration of things but had some higher political dignity. This was what Forsthoff sought to achieve under the slogan 'provision for existence' (*Daseinsvorsorge*). He made clear that this is not to be equated with 'welfare' (*Fürsorge*).<sup>54</sup> He argued, rather, that modern, urbanised mankind is dependent for its very existence upon the provision of services, like the water and electricity supply, that can no longer be guaranteed at the level of the individual or family. What is at stake here is not how men live, but whether they will live at all. It is, he continued, these administrative tasks that define the prime activity of the modern state. Forsthoff duly acknowledged Höhn's distinction between leadership and administration but then promptly insisted that the administration he had in mind is no mere mechanistic process. It is, rather, 'a sovereign function of great political dynamism'.<sup>55</sup> Forsthoff also sought to connect his vision of administration as 'provision for existence' with the importance ascribed to the national community. He claimed that the enhanced dependence on this form of state administration is complemented by a vital 'unreflective trust', for without this 'feeling of being secure' there was a danger that the national community would 'dissolve in panic-ridden visions'.<sup>56</sup>

Forsthoff's attempt to balance the claims of political leadership and administration, in this case by enhancing the political profile of administration, was but one of numerous attempts to discern and legitimate some form of order amid the conflicting visions of the Third Reich. It was no more successful than any of the others in ending the

tension between the competing claims of leadership and administration. That tension became more problematic as National Socialist rule extended over German Austrians and then over non-German peoples. German administration over these peoples had an extent and quality that did not seem to fit the narrow scope generally ascribed to mere administration. Werner Best, who was to have extensive practical experience of occupation in the service of the SS, finally cut the Gordian knot by claiming that the word 'administration' (*Verwaltung*) has its origins in a more comprehensive concept of ruling (*Walten*). This concept of comprehensive rule had been broken up and administration reduced to a subordinate activity controlled by legislation and administrative courts. In the light of Germany's hegemonic position, however, all that had to be abandoned. Administration, according to Best, had to be understood once again as comprehensive ruling, and the distinction between '“political” rule' and '“executive” administration' had to be discarded.<sup>57</sup>

### *Volk, movement and law*

The primacy of the *Volk* was often presented as the unshakeable foundation of German political unity compared to the transience of the state. The endurance of the *Volk*, the more or less explicitly quasi-religious veneration of the *Volk*, the comparative transience of the state and the sense of threat to the unity of the *Volk*, were commonplace elements of one stream of thought in the Third Reich. Although the *Volk* was supposedly the enduring foundation of unity, it was also argued that the *Volk* had only been assigned its rightful place in the wake of the National Socialist revolution. Thus Höhn quoted Laband's assertion that the German *Reich* established in 1871 could not be understood as the creation of ever-increasing millions of German citizens as evidence of the earlier inability to grasp the true nature of the *Volk*.<sup>58</sup> Similarly, he complained that when Jellinek turned his gaze away from the juristically conceived state, all he saw was 'simple chaos'.<sup>59</sup> In contrast to these liberal conceptions, the *Volk* was presented as primary in the sense of directly incorporating the individual members of the community. Indeed, the individual, that is, the member of a society conceived as distinct from the state, equipped with basic rights, was to be replaced by the concept of the 'national comrade' (*Volksgenosse*) who had no need of such rights.<sup>60</sup> Whereas the liberal individual understood himself in contrast to the national

community, the national comrade was supposed to be incorporated within the community.

The attempt to present the *Volk* as natural, substantive and inclusive proved difficult to reconcile with other elements of the Third Reich and with the account of pre-National Socialist Germany as a record of fragmentation culminating in defeat and the Weimar Republic. Unity, that is, the supposed reality of the national community, had to be construed as both the product of Hitler and the National Socialist movement, on the one hand, and as something pre-existing on the other hand. This effectively left considerable scope for significantly different emphases and mutual recrimination. Amid the enthusiasm of the early days of the regime, Wilhelm Sauer could proclaim that the Nordic racial type is no virtue per se, that race in general is not a value in itself but only a precondition and that the *Volk* is a mere natural organism.<sup>61</sup> The need for some form of political supplement to this natural substratum was summarised in Sauer's slogan: 'the race [*Volk*] is nature; the state is form; the nation [*Nation*] is content, value, culture . . .'<sup>62</sup> As Germany instigated the Second World War, Huber also insisted that although race (*Rasse*) was the natural foundation of the *Volk*, an 'historical idea' or 'historical mission' was required in order to form the 'political *Volk*'. In doing so, he felt obliged to rebut Höhn's accusation that in distinguishing between the natural and the political *Volk* he was tearing apart race and history.<sup>63</sup> For Krüger, Hitler was the source and creator of the community. Köttgen agreed: 'The historical fact of a living national community [*Volksgemeinschaft*] rests on the life and work of this *Führer* . . .' Yet he promptly added that this leadership had risen up from the life of the *Volk* and the movement.<sup>64</sup> The circularity of the argument is plain, but it provided some defence against the charge of either underestimating Hitler's role or underestimating his roots in the *Volk* and the movement.

There was also some ambivalence about the role of the movement, especially the National Socialist Party, though Schmitt's characterisation of the regime as a 'movement state' (*Bewegungsstaat*) was widely adopted. The central difficulty concerned the relationship of the party to the state. On the one hand, the unity of party and state was invoked, both as a general principle and as a practice exemplified in Hitler's position as head of state and leader and in the union of party and state offices at a lower level. On the other hand, the distinction between political leadership and administration, as well as a desire to emphasise the difference between Germany and Italy, where the state was

ascribed a more dominant role, pointed to an emphasis upon the parallel existence of party and state. Thus, Ulrich Scheuner wrote of a 'characteristic duplication' of sovereign structures.<sup>65</sup> Approaching the relationship from the side of the party, Walter Sommer picked out the fact that it had its own assets, administration, law and courts as indicative of its autonomy. The Party, he proclaimed, has no need to intervene in the state, for such intervention would only distract it from its own tasks. Yet Sommer also noted that Hitler had warned that if the state administration failed to fulfil key tasks, they would be transferred to the Party.<sup>66</sup> Sommer was responding to what in reality was a fluid demarcation line that agencies of the Party could break through, especially if prompted by even vague suggestions from Hitler.

A similar ambivalence ran through attitudes towards the law. On the one hand, there was a desire to discard what was seen as the abstract, normative conception of law that was equated with the liberal order in favour of a more substantive conception rooted in the feelings of the unified community or the racial identity of the German *Volk*. In the racial legal theory of Helmut Nicolai, race defines the nature of law, the ability to judge particular cases and the fact of the commission of a crime. Having discarded the idea of free will in favour of a racial determinism, Nicolai saw the purpose of law as deterrence in cases of minor infringement and as the 'elimination' of 'unhealthy' racial elements in more serious cases.<sup>67</sup> Despite the anti-semitic rhetoric that recurs through his works in this period, anti-semitism did not play a structural role in Schmitt's attempt to redefine the nature of law. Schmitt asserted that there were only three approaches to law, the first two of which he discarded, namely normative and decisionistic approaches. Having earlier espoused decisionism against normativism himself, he now chose to emphasise the connection between the two. He picked out reliance upon general abstract rules, the characteristic of normativist approaches, that were nevertheless posited by men rather than existing independently of human will, as the characteristic of the individualistic positivism of the nineteenth century.<sup>68</sup> That what is offered as objective and generally valid is rooted in what is contingent and subjective, he now claimed, reveals the inability of the positivist conception to provide any reliable guidance. In place of these discredited options, Schmitt suggested that the alternative lies in terms of thinking in terms of 'concrete orders'. What Schmitt understood by this term is evident from his reference to institutions such as 'marriage, family, estate, state', and to the idea

that the terms employer, white-collar worker and blue-collar worker were being replaced by the terms 'leaders and followers within a factory', that is, that the liberal idea of a set of relationships, governed by abstract general norms, into which individuals entered at their discretion was to be replaced by the role they occupied within the National Socialist community and the law peculiar to that role.<sup>69</sup>

On the other hand, this supposedly more 'concrete' order dissolved into a fluid pattern as Schmitt pointed to the emergence of 'so-called general clauses', that is, to general concepts of 'good ethics, faith and belief', that could be attached to any law or judicial interpretation.<sup>70</sup> This, coupled with his explicit rejection of the *Rechtsstaat* understood as a form of constitutional restraint, pointed towards Best's vision, although Schmitt would personally clash with Best on several occasions since Best was not convinced that Schmitt had sufficiently accepted the importance of race in the new order.<sup>71</sup> According to Best,

preventive police tasks of the political police have not found a legal regulation. They cannot find them, for the preventive police tasks of the political police . . . cannot be written down and given normative form for all time. The tasks of the political police . . . are not freely selected but prescribed by the enemy.<sup>72</sup>

### *A National Socialist theory of international law*

Throughout the course of the Third Reich, attitudes towards the international order were prescribed by the international enemy, in the sense that German theorists held that Germany had been subordinated to an alien and imperialist model of international law. In part, they hoped that the principles of this enemy, which were embodied in the Versailles Treaty and the Geneva-based League of Nations, could be turned against this enemy. Just as they praised the ability of the National Socialist movement to exploit what they saw as the weaknesses of the Weimar Republic's liberal democracy in order to overthrow it, so too they hoped to exploit the principled equality of states in international law in order to enhance Germany's position, and occasionally openly blurted this out.<sup>73</sup> The close connection between internal enmity, the hostility towards Weimar, and external enmity, towards Versailles and the League of Nations, was evident in the title of a collection of essays by Schmitt, published in 1940: *Positionen und Begriffe im Kampf mit Weimar–Genf–Versailles 1923–1939* (Positions and Concepts in the Struggle with

Weimar–Geneva–Versailles). Schmitt's illustration of the connections evident in this struggle was, according to Hermann Jahrreiss, 'a great gain which we must not lose sight of again'.<sup>74</sup> At the same time, other supporters of the regime sought to exploit what they saw as the strengths of the political ideas of the Third Reich in order to formulate a new, distinctively National Socialist approach to the international order. In part, this was a logical consequence of Schmitt's warning at the end of the Weimar Republic that a people is first defeated when it subordinates itself to a foreign conception of international law.<sup>75</sup> If Germany were to escape this subordination, then it had to formulate a distinctive, indigenous conception of international law. The tension between these two approaches was linked to other choices. Thus, attempts to exploit such principles as the equality of states tended to appeal to those inclined to adopt a statist perspective more generally. Attempts to emphasise a distinctive National Socialist approach tended to appeal to those inclined to adopt a *völkisch* perspective. As in other areas of political thought in the Third Reich, indeed even more so, uncertainty about the final goals of the regime, compounded in this case by tactical considerations, left scope for divergent interpretations and mutual recriminations.

Especially in the earlier years, relatively orthodox assertions were still possible. Friedrich Wilhelm von Rauchhaupt bluntly stated: 'The subject and object of international relations are fundamentally the states recognised in international law'.<sup>76</sup> The fact that Rauchhaupt asserted that states without arms and honour do not qualify as subjects of international law amounted to little more than a reformulation of this basic principle, though the emphasis on arms and honour clearly reflected the continuing resentment of the impositions of the Versailles Treaty.<sup>77</sup> Gustav Walz defended the same principle as the foundation of international law. He explicitly rejected 'monistic' arguments that gave primacy to either domestic law or international law in favour of a 'pluralistic' conception of international order. This emphasis upon pluralism was, he claimed, wholly consistent with National Socialist principles. It entailed a rejection of any form of imperialism as well as the assumption that individuals or the 'totality of individuals', that is, mankind, counted as subjects in international law. The only subjects of international law, he claimed, are 'national [*völkisch*] communities organised into states'.<sup>78</sup>

Hans Keller was not convinced that the full significance of the National Socialist emphasis upon the *Volk* had been truly grasped.



Walz had come close but failed at the last hurdle because he allowed the state to speak in the name of the *Volk*.<sup>79</sup> Just as Höhn had attacked the concept of the state in general in the name of *völkisch* principles, so too Keller attacked its use in international law. The idea of the territorially defined state divorced from the *Volk* is, he argued, an un-Germanic concept derived from the Italian renaissance and Roman law and refined by French absolutism and the idea of the nation state as developed in nineteenth-century France.<sup>80</sup> From this perspective, insofar as international law exists, it does so on the basis of the conception of law held by the various nations. As such, it extends so far as these peoples share the same conception of law. According to Nicolai, an exponent of an overtly racial approach to law, such conceptions are rooted in the racial characteristics of peoples. From this, he concluded that there can be no universally valid international law, but only a law shared by those of similar racial stock. In the case of Germany, that meant an international community coextensive with Nordic peoples.<sup>81</sup> Best's deductions from the *völkisch* principle did not even allow for this. The overriding priority of the *Volk* is compatible with a degree of 'regularity' but no more. Law is rooted in the *Volk*, and there is nothing beneath the *Volk* and nothing above the *Volk* in which law can be rooted.<sup>82</sup>

The starkness of Best's position took no account of the lingering conviction, which Heinrich Triepel still expressed, that the persistence of power could only be ensured by some form of law.<sup>83</sup> Nor did it take account of the need to challenge alternative conceptions of international law that might appeal to neutral powers in the event of war. It was this that continued to concern Schmitt. Schmitt was still haunted by Germany's defeat by the sea powers, that is, the British and the Americans, in the First World War. Indeed, he sought to deploy his assumptions about the role of myth in politics to create a myth of sea power through which he could discredit those aspects of international law that he saw as a threat to Germany. The sea powers, he claimed, are inherently imperialistic and reject tradition rooted in the experience of continental European land power whereby war is treated as a duel between two states, neither of whom need be presumed to be unjust by third parties who can remain neutral. It is typical that sea power discriminates in the event of war, defining one of the parties as unjust, as an enemy of mankind, who can, therefore, be pursued with all ferocity.<sup>84</sup> Behind all this lay Schmitt's fear that America would intervene in a European war as it had done in the First World War.

Schmitt's search for a new form of international law, his search for

an alternative concept of political unity to that of the state and his continuing hostility to the sea powers came together in his *Völkerrechtliche Grossraumordnung* (The Order of Large Spaces in International Law), first published in 1939. There, Schmitt noted that in the autumn of 1937 he had not been able to specify what he wanted to put in the place of the old concepts of international law. Now, however, he had found an answer, without having to 'yield to the concepts of the western democracies', namely the *Reich*.<sup>85</sup> Each *Grossraum*, or large region, would consist of a leading power, the *Reich*, as well as several nations. The *Reiche*, Schmitt explained, 'are the leading powers, whose political idea radiates through a specific *Grossraum* and who specifically exclude the intervention of alien powers into this *Grossraum*'.<sup>86</sup> With this principle of non-intervention by powers alien to the *Grossraum*, Schmitt sought to turn the ideas of the western democracies against them, for this principle is, he claimed, that of the American Monroe doctrine.

Schmitt's vision raised a number of awkward questions. Huber, who was generally supportive, worried that it might look too much like a "superstate".<sup>87</sup> Best, ever suspicious that Schmitt had not taken the *völkisch* principle to heart, was concerned that Schmitt had conceded too much to those nations subject to German hegemony – for, if the *Grossraumordnung* was a system of international law, it was possible that they might claim the right to negotiate treaties with the hegemonic power or even the right to renounce their 'international legal ties with the leading nation'.<sup>88</sup> Höhn raised a host of objections, including the idea that the principle of non-intervention was itself associated with the 'individualistic state', that is, the liberal state.<sup>89</sup> Such responses were reflections of more general differences of emphasis as well as continuing animosities. They were also bound up with persistent uncertainty about the final destination and shape of a Europe dominated by National Socialist Germany and the difficulty that supporters of that hegemony had in conceiving of some structure and order without at least fragments of the liberal discourse which they competed to disparage.

Political thought in the Third Reich was driven forward by this competition to reject the concepts of the past, which were recognised as part of the German past, if only to be disparaged as foreign implants. Yet the peculiar lack of system, the proliferation of competing agencies, the emergence of policies driven forward by those 'working towards the *Führer*' still left room for dispute and for greater or lesser adaptation to the racial visions for which the Third Reich, and with it part of German political thought, would be condemned.

## Notes

1. Jeremy Noakes and Geoffrey Pridham (eds), *Nazism*, vol. 2 (Exeter: Exeter University Press, 1984), p. 207. For the wider significance of this, see Ian Kershaw, 'Working towards the Führer', *Contemporary European History* 2 (1993), pp. 103–18.
2. Gottfried Neesze, 'Verfassungsrechtliches Schrifttum', *Zeitschrift für die gesamte Staatswissenschaft* 96 (1936), p. 388.
3. *Ibid.*, p. 395.
4. Karen Schönwälder, *Historiker und Politik* (Frankfurt am Main: Campus, 1992), pp. 23, 80–1.
5. The conflict between the soldier and the state was the theme of Carl Schmitt, *Staatsgefüge und Zusammenbruch des Zweiten Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1934). It was still possible to argue that this was simplistic history. See Fritz Hartung, 'Staatsgefüge und Zusammenbruch des Zweiten Reiches', *Historische Zeitschrift* 151 (1935), pp. 528–44.
6. Carl Schmitt, *Staat, Bewegung, Volk* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 14.
7. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3 (Munich: C. H. Beck, 1999), p. 319.
8. Michael Geyer, 'The state in National Socialist Germany', in Charles Bright and Susan Harding (eds), *Statemaking and Social Movements* (Ann Arbor: University of Michigan Press, 1984), p. 196.
9. *Ibid.*, p. 206.
10. Wilhelm Stuckart, 'Zentralgewalt, Dezentralisation, Verwaltungseinheit', in Wilhelm Stuckart et al., *Festgabe für Heinrich Himmler* (Darmstadt: Wittich, 1941), p. 24.
11. Otto Koellreutter, 'Der nationale Rechtsstaat', *Deutsche Juristen-Zeitung*, 38 (1933), p. 522.
12. See Christian Hilger, *Rechtsstaatsbegriffe im Dritten Reich* (Tübingen: Mohr, 2003).
13. G. Walz, 'Autoritärer Staat, nationaler Rechtsstaat oder völkischer Rechtsstaat?', *Deutsche Juristen-Zeitung*, 38 (1933), pp. 1,338–9.
14. Herbert Krüger, 'Das neue Staatsrecht des dritten Reiches', *Fischers Zeitschrift* 70 (1934), p. 291.
15. Walz, 'Autoritärer Staat, nationaler Rechtsstaat oder völkischer Rechtsstaat?', p. 1,338.
16. Werner Sombart, 'Das Wesen der ständischen Gliederung mit besonderer Berücksichtigung Deutschlands', *Deutsche Juristen-Zeitung* 39 (1934), pp. 502–11.
17. Walz, 'Autoritärer Staat, nationaler Rechtsstaat oder völkischer Rechtsstaat?', p. 1,340.
18. Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 31.

19. Arnold Köttgen, 'Die Stellung des Beamtentums im völkischen Führerstaat', *Jahrbuch des öffentlichen Rechts der Gegenwart* 25 (1938), pp. 59–60.
20. Schmitt, *Staat, Bewegung, Volk*.
21. *Ibid.*, p. 12.
22. *Ibid.*
23. *Ibid.*, pp. 16–17, 21.
24. *Ibid.*, p. 21.
25. Reinhard Höhn, 'Staat und Rechtsgemeinschaft', *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935), p. 656.
26. *Ibid.*, p. 662.
27. Quoted in Michael Stolleis, 'Community and national community (Volksgemeinschaft): reflections on legal terminology under National Socialism', in Michael Stolleis, *The Law under the Swastika* (Chicago: University of Chicago Press, 1998), p. 75.
28. Neesze, 'Verfassungsrechtliches Schrifttum', p. 396.
29. Ernst Rudolf Huber, 'Einheit und Gliederung des völkischen Rechts', *Zeitschrift für die gesamte Staatswissenschaft* 98 (1938), p. 331. For other critics, see Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, pp. 328–30.
30. Ernst Rudolf Huber, *Verfassungsrecht des Grossdeutschen Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1939), pp. 163–7.
31. Carl Schmitt, 'Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff' [1941], in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Berlin: Duncker & Humblot, 1958), p. 379.
32. Carl Schmitt, 'Politik' [1936], in Carl Schmitt, *Staat, Grossraum, Nomos* (Berlin: Duncker & Humblot, 1995), p. 133.
33. Schmitt, *Staat, Bewegung, Volk*, p. 15.
34. Schmitt, 'Politik', p. 135.
35. Schmitt, *Staat, Bewegung, Volk*, pp. 36–41.
36. *Ibid.*, p. 42. On the translation of *Artgleichheit*, see Peter Caldwell, 'National Socialism and constitutional law', *Cardozo Law Review* 16 (1995), p. 408.
37. Schmitt, *Staat, Bewegung, Volk*, p. 42.
38. Ernst Rudolf Huber, 'Die deutsche Staatswissenschaft', *Zeitschrift für die gesamte Staatswissenschaft* 95 (1934–35), p. 29.
39. *Ibid.*, p. 30.
40. *Ibid.*, p. 41.
41. Helmut Schelsky, 'Die Totalität des Staates bei Hobbes', *Archiv für Rechts- und Sozialphilosophie* 31 (1937–8), p. 185.
42. *Ibid.*
43. See Gerwin Klinger, 'Die Modernisierung des NS-Staates aus dem Geist der Anthropologie', in Wolfgang Bialas and Manfred Gangl (eds),

- Intellektuelle im Nationalsozialismus* (Frankfurt am Main: Peter Lang, 2000), pp. 299–324.
44. Hans Peter Ipsen, *Politik und Justiz* (Hamburg: Hanseatische Verlagsanstalt, 1937), p. 82.
  45. *Ibid.*, pp. 283–4.
  46. *Ibid.*, p. 276.
  47. *Ibid.*, pp. 303–10.
  48. See Ebergard Laux, 'Führung und Verwaltung in der Rechtslehre des Nationalsozialismus', in Dieter Rebentisch and Karl Teppe (eds), *Verwaltung contra Menschenführung im Staat Hitlers* (Göttingen: Vandenhoeck & Ruprecht, 1986), p. 52.
  49. *Ibid.*, p. 60.
  50. Huber, 'Einheit und Gliederung des völkischen Rechts', p. 333.
  51. Johannes Heckel, *Wehrverfassung und Wehrrecht des Grossdeutschen Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1939), p. 37.
  52. Huber, *Verfassungsrecht des Grossdeutschen Reiches*, p. 199.
  53. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, pp. 351–80.
  54. Ernst Forsthoff, *Die Verwaltung als Leistungsträger* (Stuttgart: Kohlhammer, 1938), p. 47.
  55. *Ibid.*, p. 13.
  56. *Ibid.*, pp. 17–18.
  57. Werner Best, 'Grundfragen einer deutschen Grossraum-Verwaltung', in Stuckart et al., *Festgabe für Heinrich Himmler*, pp. 36–7.
  58. Reinhard Höhn, 'Volk, Staat, Reich', *Volk im Werden* 4 (1936), p. 372. For Laband's argument, see above, Chapter 1.
  59. Höhn, 'Staat und Rechtsgemeinschaft', p. 662.
  60. Thus Huber, *Verfassungsrecht des Grossdeutschen Reiches*, p. 361.
  61. Wilhelm Sauer, 'Schöpferisches Volkstum als nationales und weltpolitisches Prinzip', *Archiv für Rechts- und Sozialphilosophie* 27 (1933), pp. 19, 17, 6.
  62. *Ibid.*, p. 6.
  63. Huber, *Verfassungsrecht des Grossdeutschen Reiches*, pp. 153–4.
  64. Arnold Köttgen, 'Vom deutschen Staatsleben', *Jahrbuch des öffentlichen Rechts der Genewart*, 24 (1937), p. 63.
  65. Quoted in Horst Dreier, 'Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 60 (2001), p. 42.
  66. Walter Sommer, 'Die NSDAP als Verwaltungsträger', in Hans Frank (ed.), *Deutsches Verwaltungsrecht* (Munich: Eher, 1937), p. 169.
  67. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, pp. 83–4.
  68. Carl Schmitt, *Über die drei Arten des Rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), p. 32.
  69. *Ibid.*, pp. 63–4.
  70. *Ibid.*, pp. 58–9.

71. On Schmitt's rejection of the concept of the *Rechtsstaat*, see 'Was bedeutet der Streit um den "Rechtsstaat"?', *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935), pp. 189–201.
72. Werner Best, 'Die politische Polizei des Dritten Reiches', in Frank (ed.), *Deutsches Verwaltungsrecht*, p. 424.
73. See the comments of Ernst Wolgast quoted in Eduard Bristler, *Nationalsozialistische Völkerrecht* (Zurich: Europa, 1938), pp. 66–7.
74. Hermann Jahrreis, 'Wandel der Weltordnung', *Zeitschrift für Öffentliches Recht* 21 (1942), p. 519.
75. See also: 'But we will not subject ourselves spiritually to the coercive fictions of a dead positivism'. Carl Schmitt, *Nationalsozialismus und Völkerrecht* (Berlin: Duncker & Dünnhaupt, 1934), p. 29.
76. Fr. von Rauchhaupt, *Völkerrecht* (Munich: Voglrieder, 1936), p. 33.
77. *Ibid.*, p. 124.
78. Gustav Adolf Walz, 'Das Verhältnis von Völkerrecht und staatlicher Recht nach nationalsozialistischer Rechtsauffassung', *Zeitschrift für Völkerrecht*, 18 (1934), pp. 146–7.
79. Hans Keller, *Das Recht der Völker* (Berlin: Franz Vahlen, 1938), pp. 124–5.
80. *Ibid.*, pp. 105–15.
81. As Lawrence Preuss noted, such theorists had no explanation for the failure of Scandinavians to share this view: 'National Socialist conceptions of international law', *American Political Science Review* 29 (1935), p. 606.
82. Werner Best, 'Rechtsbegriff und "Völkerrecht"', *Deutsches Recht* 9 (1939), pp. 1,347–8.
83. Carl Heinrich Triepel, *Die Hegemonie* (Stuttgart: Kohlhammer, 1943), p. 202.
84. Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin: Duncker & Humblot, 1938).
85. Carl Schmitt, *Völkerrechtliche Grossraumordnung*, 4th edn (Berlin: Deutscher Rechtsverlag, 1941), p. 49.
86. *Ibid.*, p. 36.
87. Ernst Rudolf Huber, 'Positionen und Begriffe', *Zeitschrift für die gesamte Staatswissenschaft* 101 (1941), p. 43.
88. Werner Best, 'Nochmals: Völkische Grossraumordnung statt "Völkerrechtliche" Grossraumordnung', *Deutsches Recht* 11 (1941), p. 1,534.
89. Reinhard Höhn, 'Grossraumordnung und völkisches Rechtsdenken', *Reich – Volksordnung – Lebensraum* 1 (1941), pp. 279–81.